



EMPLOYMENT TRIBUNALS

Claimant: Mr D Masih

Respondent: Mitie Limited

Heard at: Employment Tribunal, Birmingham **On:** 21 December 2022

Before: Employment Judge Webb

Representation

Claimant: Representing himself

Respondent: Mr C Ilangaratne

JUDGMENT having been sent to the parties on 22 December 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. Mr Masih was employed by the Respondent from January 2013 to December 2021. His claim is about how he was treated during his employment and his dismissal. He says that he was treated badly by his employer and dismissed because of his race or his whistle blowing activities.
2. The Respondent denies this to be the case and says that Mr Masih was in fact dismissed because of his conduct.

The Hearing

3. The Claimant represented himself and gave evidence. The Respondent was represented by Mr C Ilangaratne.
4. In making my decision I also considered the documents from the 419 page bundle of documents which the parties introduced had prepared for the hearing. The Claimant also provided a witness statement dated 5 December 2022.
5. I noted in the bundle, and it was confirmed to me by Mr Masih that he suffers from a stammer and did not want the way in which he presented

himself to be held against him. I have taken into account that he has a stammer, but in any event his evidence was clear and he was able to answer questions put to him clearly and tell me why I should not strike out his claims.

Claims and Issues

6. The Claimant has bought a claim against the Respondent for unfair dismissal, race discrimination and whistleblowing detriment
7. The issues to be decided in this preliminary hearing were identified in the Order of Employment Judge Camp dated 02 October 2022 and confirmed at the start of the hearing as follows:
 - a. Were all the whistleblowing detriment complaints made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:
 - i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or failure complained of?
 - ii. If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
 - iii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
 - iv. 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?
 - b. Were all the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
 - ii. If not, was there conduct extending over a period?
 - iii. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - iv. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 1. Why were the complaints not made to the Tribunal in time?
 2. In any event, is it just and equitable in all the circumstances to extend time?
8. The order of Judge Camp was clear that the Respondent should set out in a written application those parts of the claim that the Respondent wished to strike out, along with the reasons.
9. In the written application dated 08 November 2022 the Respondent only referred to those events that related to the grievance in August 2020 as being out of time.

10. In his submission Mr Ilangaratne expanded this application to include all the events prior to 20 December 2021.
11. Although this had not been specifically dealt with in the application, I considered that it was appropriate for me to deal with those events also. If I did not it would still be open for the Respondent to make a further application for those parts to be struck out and that would require a further hearing. The evidence I was provided by Mr Masih in his documents and the oral evidence also dealt with these claims and there was no prejudice to him in them being considered by me at the hearing.

Findings of Fact

12. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.
13. The Claimant was dismissed on 21st December 2021 and the claim was submitted on 19 March 2022. Any claims submitted about matters that happened before 20 December 2021 may be out of time.
14. The first act Mr Masih complains about took place in 2016 and relates to the appointment of a white man as a manager rather than himself.
15. The next event about which he complains took place in June 2020 when the claimant says the respondent failed to pay for his apprenticeship course that resulted in him being removed from the course.
16. The next events are those that date from August 2020 to November 2020 and relate to the Respondent ignoring his assessments of another employee and a failure to uphold a grievance and whistleblowing concerns.
17. The final events about which he complains related the disciplinary process in December 2021 and his dismissal on 21 December 2021 and the negative outcome in his appeal against dismissal in January 2022, and the fact his grievance submitted in December was not considered.
18. Mr Masih asked me to find that each of these events are linked because they are all about his employment. Mr Ilangaratne in his submissions said that they were in fact matters that arose in the course of employment and are not linked. I find that each of these events are different factually and that there are clear time gaps between them.
19. Mr Masih's explanation for his failure to submit claim earlier was that he did not wish to lose his job by bringing a claim to the Tribunal and wanted to resolve the matter internally with his employer.
20. I find that Mr Masih did wish to resolve matter internally with his employer. However, I find that in each case, it was clear that the internal processes were competed but did not meet with Mr Masih's expectation of being resolved in his favour.

21. Mr Maish when asked by Mr Ilangaratne about why, at the end of each of the internal process, he did not submit a claim then, his response was to repeat that he did not wish to lose his job.
22. There is no evidence that he was told by his employer in writing or orally that this would be the result. In evidence he was clear that in respect of the event in 2016 he was definitely not told that.
23. Mr Masih pointed to the negotiations that took place between him and the respondent and asked me to imply that this was evidence that employer would dismiss him. However, the negotiations in my view do not support that interpretation. I find Mr Masih's fear of being dismissed should he have brought a claim earlier to be a subjective one.
24. Mr Masih's evidence is that he has been conducting these Tribunal proceedings as a lay person, researching things on the ACAS website, among others. I accept that he is not a lawyer. However, his answers to questions about when he knew about time limits for bringing claims were unclear and evasive. I find that he is capable of identifying relevant Tribunal rules and procedures and could have done so from 2016 onwards.
25. I find that he was aware of all the facts about the events he complains about from 2016 onwards.

Law

26. The Tribunal's jurisdiction to deal with whistleblowing detriment claims is limited by section 48(3) of the Employment Rights Act 1996:

“(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

- (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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.”*

27. In assessing if it was reasonably practicable to present claim within a time limit, I should give it a liberal construction in favour of the employee, Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53.
28. What is reasonably practicable is a question of fact for me to decide, and it is for the Claimant to show why the claim was not presented earlier.
29. Reasonably practicable, does not mean reasonable, nor does it mean physically possible, but means something like “reasonably feasible”, Palmer v Southend-on-Sea Borough Council 1984 ICR 372.

30. The Tribunal jurisdiction to deal with discrimination detriment claims is also limited. Section 123(1) of the Equality Act 2010 says:

“(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.”

31. The discretion I have to extend under the just and equitable test is wider than that where it was not reasonably practicable to present a claim in time. But it is for the Claimant to show that it would be just and equitable to extend time.

32. In considering whether it is just and equitable to extend time I must consider the prejudice the parties would suffer as a result of the decision reached and to have regard to all the circumstances of the case.

33. In particular the I should have regard to the length of the delay and the reason for it, how evidence may be affected by that delay, the speed at which the claim was submitted once the facts on which the claim are based were known to the claimant and the steps taken to obtain advice once those facts were known.

Conclusions

34. I have considered the facts as I have set out above and the submissions of the parties in reaching my conclusions on the issues before me.

35. *Was the whistleblowing detriment claim made to the Tribunal within three months (plus early conciliation extension) of the act or failure complained of?*

36. The claims were all submitted on the same date. I conclude the claim for whistleblowing detriment relating to 2016 was not presented within the relevant time limit. I also conclude that the claim for whistleblowing detriment relating to events of 2020 were not presented within the relevant time limit. The claims relating to whistleblowing detriment for events in December 2021 all occurred prior to the 21 December and I conclude these to have been presented out of time.

37. *If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?*

38. I conclude that the length of time between the events of 2016 and 2020 and the different facts of those events means that they can not be described as a series of events when combined with those events of late 2021.

39. However, I conclude that the disciplinary process that began in December 2021 and ended with the final act of the Claimant dismissal on 21

December 2021 are factually related and can be described as a series of act. I conclude the claims in relation to the events in December 2021 were submitted in time because these were a series of related events that ended with the dismissal on 21 December 2021.

40. *If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?*
41. The Claimant knew about the facts that underlie those claims at the time and the Claimant has been able to submit this claim, having undertaken appropriate research; the Claimant did not suggest he could not have done the same in relation to the claim relating to events 2016 and 2020.
42. That there was an internal process does not of itself mean it was not reasonably practicable to submit the claim Bodha v Hampshire Area Health Authority 1982 ICR 200. In any event I have found that the internal process in each case had concluded in a way the claimant found unsatisfactory. The explanation for the claims not being submitted following the conclusion of the processes, that the Claimant had a subjective fear of being dismissed in my view would not mean it was not reasonably practicable, as that view was subjective and not based on statements by his employer.
43. I conclude it was reasonably practicable for the Claimant to have submitted his claim about the events in 2016 and 2020 within the tribunal time limit.
44. As it was reasonably practicable for those claims to be submitted within the relevant time limit, I conclude the Tribunal does not have jurisdiction to deal with them.
45. *Was the claim relating to discrimination made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*
46. In line with my conclusions set out at paragraph 36 above, the claims relating to events in 2016 and 2020 were not presented within the relevant time limits. I find that the claims relating to whistleblowing detriment for events in December 2021 all occurred prior and were presented out of time.
47. *If not, was there conduct extending over a period? If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*
48. I conclude for the reason set out in paragraphs 38 and 39 above that the claim about the events of 2016 and 2020 can not be considered to be conduct extending over a period when combined with the events of late 2021. However, the events of December 2021 can be considered conduct over a period that concluded with the Claimants dismissal on 21 December 2021. I conclude claims in relation to those events in December 2021 were submitted in time.

49. *If not, were the claims made within a further period that the Tribunal thinks is just and equitable?*
50. I have found that one of the reasons Mr Masih did not submit a claim was that he wished to resolve the matter internally. In his written submission Mr Masih referred me to the case of Wells Cathedral School Ltd v Souter [2021] 7 WLUK 766 as support of the legal proposition that internal resolution should be encouraged and is a reason for extending time in these types of cases. However, I have found that in Mr Masih's case the events of 2016 and 2020 were resolved by internal processes but not in a way that was satisfactory to him. The facts relating to those were known to him at the time. I place little weight on this as a factor that would enable me to extend time.
51. I have found Mr Masih's other reason was his subjective fear of losing his job if he were to make a claim. I place little weight on this factor also because that fear is subjective.
52. The delay in submitting the claim about events in 2016 was significant, and I accept Mr Ilangaratne's argument that it would now prejudice the Respondent because of difficulties in respect of obtaining evidence and I place significant weight on that in relation to the 2016 events. However, in relation to the events in 2020 that factor is less weighty, but there was still a delay from the time Mr Masih was aware of the facts, so I do place some weight on this as a factor against extending time.
53. I have considered that there would be prejudice against Mr Masih if I do not extend claims as it would prevent a Tribunal from fully examining his allegations and that is a factor on which I have placed weight.
54. In his submissions Mr Ilangaratne asked that I consider the merits of claim when assessing if it is just and equitable to extend time. However, neither party was able to point me to evidence that strongly pointed to a particular conclusion on the merits. I am clear that I am not being asked to make a decision on the merits claims before me and in those circumstances, I conclude this to be a neutral factor.
55. Having considered these factors above I conclude that the weight of the factors against extending time is greater than those for extending time. I conclude it would not be just and equitable to extend time for the claims relating to matters in 2016 and 2020.

Employment Judge Webb

Date: 23 December 2022