



EMPLOYMENT TRIBUNALS

Claimant
Mr B Aquilina

Respondent
v Manor Restaurants (UK) Limited

OPEN PRELIMINARY HEARING

Heard at: London South by CVP

On: 28 September 2022

Before: Employment Judge Truscott KC

Appearances:

For the Claimant: No appearance or representation
For the Respondent: Mr S Tibbetts of Counsel

JUDGMENT on PRELIMINARY HEARING

1. The claim for unpaid wages was presented outside the primary time limit contained in section 23(2) of the Employment Rights Act 1996 and it was reasonably practicable for the claim to be presented within the primary time limit, the claim for unpaid wages is struck out.
2. The claims of sex and sexual orientation discrimination were presented outside the primary time limit contained in section 123(1)(a) of the Equality Act 2010 and it is not just and equitable to extend the period within which the claims fall to be lodged. The claims of discrimination are struck out.

REASONS

Preliminary

1. This preliminary hearing was fixed to address the issue of time limits for the discrimination claim being lodged. The claimant did not attend the hearing.
2. There was a bundle of documents to which reference will be made where necessary.

Findings

1. The claimant alleges unpaid wages for the period from September/October 2019.

2. On 25 June 2020 the claimant was suspended from work [40]. During the course of the investigation which followed, upon being informed of the allegations against him, the claimant raised a number of grievances about his colleagues. The respondent invited the claimant to a grievance hearing on 13 July 2020. The respondent was unable to conclude its investigation into the grievance and a letter was sent to the claimant on 22 July 2020 confirming his grievance would be closed.

3. The claimant was invited to a disciplinary hearing on 20 August 2020 by a letter dated 17 August 2020, however the claimant did not attend this meeting as he was signed off sick after 3 August 2020.

4. On 23 November 2020, the claimant submitted a grievance spanning 22 pages detailing a number of complaints since the beginning of his employment. However, as the claimant was signed off sick, the respondent considered it was inappropriate to investigate these without the claimant being well enough to attend a grievance investigation meeting. An external HR Consultant was appointed to consider the claimant's grievances and the grievance hearings took place on 8, 11, and 12 January 2021. The claimant was invited to a meeting on 10 February 2021 to discuss the grievance outcome. The claimant was provided with a copy of the grievance outcome in writing which confirmed that his complaints were not being upheld or inconclusive. The claimant did not appeal the grievance outcome.

5. On 15 February 2021 the claimant informed the respondent that he was feeling a lot better, and felt ready to return to work. The respondent informed him that he would remain on suspension, in order for the disciplinary process to be completed, and an external HR consultant would be appointed.

6. By a letter dated 3 March 2021, the claimant was invited to a disciplinary hearing on 8 March 2021. The disciplinary meeting was conducted by an external HR consultant, and the claimant was offered his right to be accompanied but chose to attend the meeting alone.

7. On 10 March 2021, the claimant was sent a letter with the outcome of his disciplinary process. He was summarily dismissed for gross misconduct. The effective date of termination was 10 March 2021.

8. The ACAS Certificate is dated 25 May 2021 and the claim is dated 4 June 2021

Law

Reasonably practicable

9. Section 23(2) of the Employment Rights Act 1996 provides:
“an Employment Tribunal shall not consider a complaint...unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination.”

10. A Tribunal may only extend time for presenting a claim where it is satisfied of the following:

“It was “not reasonably practicable” for the complaint to be presented in time. The claim was nevertheless presented “within such further period as the Tribunal considers reasonable” (Section 23(4) ERA 1996.)

Just and equitable extension

11. Section 123(1)(b) of the 2010 Equality Act permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable. Section 140B of the Equality Act 2010 serves to extend the time limit under section 123 to facilitate conciliation before institution of proceedings.

12. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR 279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

13. The Tribunal also notes the guidance offered by the Court of Appeal in the case of **Apelogun-Gabriels v. London Borough of Lambeth & Anr** [2002] ICR 713 at 719 D that the pursuit by a claimant of an internal grievance or appeal procedure will not normally constitute sufficient ground for delaying the presentation of a claim: and observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

14. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment ... cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what LJ Auld said “there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised.”

15. The Tribunal’s discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

- the length and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;

the extent to which the party sued had co-operated with any requests for information;

the promptness with which the claimant acted once he knew of the possibility of taking action; and

the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

16. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

17. Incorrect legal advice may be a valid reason for delay in bringing a claim but will depend on the facts of the case: **Hawkins v Ball & Barclays** [1996] IRLR 258 and **Chohan v Derby Law Centre** [2004] IRLR 685. In answering the question as to whether to extend time, the Tribunal needs to decide why the time limit was not met and why, after the expiry of the primary time limit, the claim was not brought sooner than it was; see **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2014] UKEAT/0305/13 unreported per Langstaff J. However, in determining whether or not to grant an extension of time, all the factors in the case should be considered; see **Rathakrishnan v Pizza Express (Restaurants) Ltd** (2016) IRLR 278.

18. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as “the just and equitable power” has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

19. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the “just and equitable” discretion should be exercised in the particular case.

DISCUSSION and DECISION

20. It is the respondent’s position that the issue in relation to the claimant’s wages from September and October 2019 was resolved and no further payments fall due to the claimant. The claimant provided no reason why the very late claim should be considered.

21. The claimant was last at work on 25 June 2020. Any acts of discrimination must have taken place on or before that date or are not sufficiently specified in the period thereafter. No explanation was provided as to why the discrimination claims were presented out of time and in these circumstances the Tribunal considered what action was appropriate.

Balance of prejudice

22. In relation to prejudice generally, the respondent will have the prejudice of having to defend a claim which is not specified in any detail and which is well out of time.

23. On the basis of the guidance set out earlier and weighing all the relevant factors, the Tribunal considers that it is not proportionate to resolve those issues when they are out of time, accordingly it is not just and equitable to extend the time for lodging the claim and the claim of discrimination is struck out.

Employment Judge Truscott KC

Date 3 October 2022