



EMPLOYMENT TRIBUNALS

Claimant

Maxine Hanson

v

Respondent

Serco Limited

Heard at: Bury St Edmunds

On: 17 January 2023

Before: Employment Judge Freshwater

Appearances

For the Claimant: Mrs N Jain (Free Representation Unit)

For the Respondent: Miss W Miller (Counsel)

RESERVED JUDGMENT

1. The claims for unfair dismissal, automatically unfair dismissal and whistleblowing detriment are struck out.

RESERVED REASONS

Introduction

1. The claimant is Miss Maxine Hanson. The respondent is Serco Limited.
2. The claimant was employed by the respondent as a Prison Custody Officer from 9 July 2018 until 30 April 2021 when she was dismissed from her employment. She received pay in lieu of notice.
3. The claimant did not agree with the circumstances of her dismissal and made a claim to the Employment Tribunal.
4. The case was listed for case management directions on 19 August 2021.
5. At the case management hearing, the claimant withdrew her claims of age, race and sex discrimination and her claim for holiday pay. She confirmed that the only claims before the Tribunal were for:

- 5.1 Unfair dismissal pursuant to section 98 of the Employment Rights Act 1996;
 - 5.2 Automatically unfair dismissal pursuant to section 103A of the Employment Rights Act;
 - 5.3 Whistleblowing detriment pursuant to section 47B of the Employment Rights Act 1996 arising from the events leading up to her dismissal.
6. At the case management hearing, the respondent raised as an issue the assertion that the claim was out of time. The judge hearing the case directed that a preliminary hearing would take place to decide this issue.

Issues

7. This is a preliminary hearing to determine if the claimant's claim was made in time. If it is not, then the entirety of her claim will not be able to proceed because the tribunal has no jurisdiction.
8. The issues for determination at this hearing are whether the claim form was presented in time and if not whether time should be extended (on the basis that it was not reasonably practicable to present the claim form in time and it was presented within a reasonable period thereafter).

Procedure and hearing

9. This was a CVP hearing.
10. I was referred to an electronic bundle of 81 pages, the claimant's witness statement; an acknowledgement email from the tribunal to the claimant dated 17 June 2021; a letter from the tribunal confirming acceptance of claim form dated 2 November 2021; and an email from ACAS to the claimant informing her that respondent no longer wish to engage with ACAS early conciliation and issued the EC certificate dated 2 August 2021; and skeleton arguments from both parties.
11. I was referred to the following cases:
 - 10.1 *Miss J Pryce v Baxterstorey Limited (2022) EAT 61*
 - 10.2 *Thomas v Nationwide Building Society ET/1601342/14*
 - 10.3 *Dedman v British Building and Engineering Appliances Ltd [1974] 1 All ER 520*
 - 10.4 *London International College v Sen the EAT [1992] IRLR 292*
 - 10.5 *Thomas v Nationwide Building Society ET/1601342/14*
12. I heard oral submissions from both parties. The claimant gave oral evidence.

The law

Starting a claim

13. Section 18A(1) of the Employment Tribunals Act 1996 [ETA 1996] provides for the requirement to contact ACAS before instituting proceedings. It says that before a person presents an application to institute relevant proceedings relating to any matter, that person must provide to ACAS prescribed information, in the prescribed manner, about that matter.
14. Section 18A(8) of the ETA 1996 says that a person who is subject to the requirement in subsection (1) [to make contact with ACAS and provide them with information] may not present an application to institute relevant proceedings without a certificate under subsection (4).
15. Section 18(A)(7) says that a person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases, and such cases are prescribed by regulation.
16. Rule 8(1) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ["the 2013 Rules"] says "A claim shall be started by presenting a completed claim form (using a prescribed form) [the ET1 form] in accordance with any practice direction made under regulation 11 which supplements this rule".
17. Rule 85(2) of the 2013 Rules says, "A claim form may only be delivered in accordance with the practice direction made under regulation 11 which supplements rule 8".
18. The Practice Direction made by Judge Doyle, who was the previous President of the ET (England and Wales), says that a completed claim form could be presented to the tribunal in one of three ways: online, by post or by being presented in person.

Striking out

19. Rule 37 of Schedule 1 of the 2013 Rules states that:

(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;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

Reconsideration of rejection

20. Rule 13 of the 2013 Rules states that:

(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—

- (a) the decision to reject was wrong; or
- (b) the notified defect can be rectified.

(2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.

(3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.

(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.

Case law

21. In *Miss J Pryce v Baxterstorey Limited (2022) EAT 61* the claimant issued sex and race discrimination claims before she had obtained an early conciliation certificate from ACAS. By virtue of section 18A(8) of the ETA 1996 the Employment Tribunal [the ET] had no jurisdiction to consider the claims at that stage. A few days later she emailed the ET enclosing a copy of a certificate she had obtained in the meantime and inviting the tribunal to add the reference number to the form. The claims were then allowed to proceed but sometime later they were dismissed by the ET for lack of jurisdiction. The claimant appealed to the EAT. The EAT held that:

- (i) the claimant's email enclosing the certificate could not be considered as a re-presentation of the claim since rule 8 of the employment tribunal procedure rules require a claim to be presented by sending a completed ET1 to the tribunal and that requirement could not be waived;
- (ii) there was no jurisdiction to waive the requirement to re-present the claim since it would undermine the express statutory provision in section 18 A (8) of the ETA 1996.

22. In Thomas v Nationwide Building Society ET/1601342/14; the Employment Tribunal judge said that a similar defect had been rectified by undertaking the EC procedure and presenting the ACAS certificate to the tribunal later than the ET1.

Submissions

23. The claimant accepted that none of the exemptions to the requirement to obtain an ACAS certificate applied. The claimant argued that the submission of the ACAS certificate on the 3rd of August 2021 was adequate to remedy the defect and that this was sufficient as a form of re-submission of the claim, having previously submitted an invalid ET1 on the 16th of June 2021. In particular, the claimant relied on the case of Thomas v Nationwide Building society (see para 21 above).

24. The respondent argued that the ET1 was invalid and could not be rectified by the subsequent submission was the ACAS certificate. The respondent relied on the case of Pryce v Baxterstorey Limited (see para 20 above) noting the factual similarities with this case and stating that, in contrast to the case of Thomas, Pryce was a decision of the Employment Appeal Tribunal and therefore binding on this Tribunal.

Findings of fact

25. The claimant submitted her ET1 form to the tribunal on 16 June 2021. In that form, the claimant ticked the boxes in part 2 of the ET 1 form which said that she did not have an ACAS early conciliation number because her claim consisted only of a complaint of unfair dismissal which contained an application for interim relief.

26. In part 8.1 of the ET1 form, the claimant ticked boxes to state the types of claims that she was making. These were: unfair dismissal (including constructive dismissal); age, race and sex discrimination; and that she was owed holiday and other pay.

27. In part 8.2 of the ET1 form, the claimant expanded on her claim. She said that she was claiming interim relief as she felt that her employer had dismissed her due to a complaint that could be classed as whistleblowing.

28. On 27 July 2021, the tribunal sent a letter to the claimant explaining that an Employment Judge had rejected her claim because:

- (i) No early conciliation number had been provided; and
- (ii) Although the claimant had ticked a box to explain why she didn't have an early conciliation number, the explanation appeared to be incorrect because her application for interim relief was submitted out of time and was therefore invalid.

29. On 29 July 2021, the claimant emailed the tribunal office. She explained that although the ET1 had been registered as received on 16 June 2021, she was unaware that a previous ET1 requesting interim relief had not been registered after her dismissal on 30 April 2021. She stated in her email that there was an ET1 form from 11 May 2021 which she had not realised had not been registered until more than a month later. The claimant said that she had now started the ACAS early conciliation process.

30. On 30 July 2021, a member of administrative staff from the tribunal office emailed the claimant and told the claimant as follows:

“Please note that you will need to submit an application for reconsideration of the decision to reject your claim once you have completed the Early Conciliation process and received your Early Conciliation certificate from ACAS. You will need to send us a copy of the certificate with your application. The tribunal is unable to take any further action until you send us a copy of the certificate.”

31. The claimant obtained an ACAS early conciliation certificate on 2 August 2021. That certificate states that the early conciliation period ran from 29 June 2021 until 2 August 2021.

32. The claimant forwarded the ACAS certificate to the tribunal office by email on 3 August 2021.

33. On 16 August 2021, the tribunal office wrote to the claimant informing her that:

“I can confirm that your application for reconsideration dated 03/08/2021 was referred to Employment Judge R. Lewis on 09/08/2021. He has directed that your claims for unfair dismissal, racial discrimination, age discrimination, sex discrimination, whistle blowing and a claim for outstanding holiday pay can now be accepted. Your application for interim relief is out of time and therefore invalid – the Judge has read your email of 17th June which explains the reasons for the delay.”

34. On 2 November 2021, the tribunal informed the claimant by letter that her claim had been accepted.

35. It was agreed between the parties that the ACAS period in this case ran from 29 June 2021 until 2 August 2021. Further, it was agreed that the limitation date for a claim to be time was 2 September 2021.

Conclusions

36. The claimant has not provided a valid ET1 form. This is because the only way to rectify the error that was made by starting proceedings before there was an ACAS certificate in existence was to start them again after the certificate had been obtained using the standard claim form.

37. The submission of the early conciliation certificate by itself after the ET1 form is not sufficient to rectify the defect in the ET1.
38. The claimant has not presented a valid ET1 form at all and the tribunal does not have the jurisdiction to waive the requirement to represent the claim. Therefore, it cannot be said that a valid ET1 form has been presented as soon as reasonably practicable and I have not considered the merits of this point for the purposes of this judgment.
39. The entire claim must be struck out because the tribunal does not have jurisdiction.

Employment Judge Freshwater

Date: 8 March 2023

Sent to the parties on: 3 April 2023

For the Tribunal Office