



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr D Whaley

v

Bernard Matthews Foods Limited

Heard at: Bury St Edmunds Employment Tribunal (via CVP)

On: 16 January 2023

Before: Employment Judge King

Appearances

For the Claimant: In person

For the Respondent: Ms Crawshay-Williams, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for wrongful dismissal is dismissed as the Tribunal does not have jurisdiction to hear the same.
2. The Claimant's claim for sex discrimination under the Equality Act 2010 is struck out as having no reasonable prospects of success.

REASONS

Background

1. The claimant attended in person and the respondent was represented by Counsel. The matter was listed for three hours to determine the issues but through no fault of his own the claimant was an hour late to the hearing as the prison service had failed to make the necessary arrangements for the hearing to start on time. I was able to hear submissions on both matters but judgment had to be reserved due to insufficient time.
2. I did not hear any evidence in this case and I raised with the parties my concerns regarding having a mini trial of this matter. The case was decided purely on the submissions of the parties and the documentary evidence, together with the facts that are not disputed in this case.

3. The parties had prepared an agreed preliminary hearing bundle which ran to 77 pages. This included the documentary evidence referred to and the pleadings.
4. At the outset of the hearing today, we confirmed the claims as those of wrongful dismissal and direct sex discrimination. The claimant had originally brought a claim for unfair dismissal as well but at the preliminary hearing on 21st September 2022 and by judgment dated the same day the unfair dismissal claim was struck out as the Tribunal had no jurisdiction to hear the complaint as the claimant had less than two years service. Again, at that hearing the claimant had to leave early through no fault of his own.
5. The preliminary hearing on 21st September 2022 was able to determine that it was just and equitable to extend time in respect of the sex discrimination claim but that the matter would be listed for today to determine the respondent's application for a strike out/deposit order in respect of that claim under Rule 37(1)(a) that the claim had little or no reasonable prospect of success.
6. Following the hearing, by letter dated 8th December 2022 the respondent also made an application in respect of the wrongful dismissal claim. The respondent made this application on several grounds firstly as with the sex discrimination claim that it had little or no reasonable prospects of success or secondly that it should be struck out as it had been lodged out of time.
7. The claimant defended the applications. The claimant incorrectly stated that the last preliminary hearing had determined the time point. He is correct in respect of the sex discrimination claim but not the wrongful dismissal claim. This was not dealt with at the last hearing and involves a different test "the not reasonable practicable" test rather than the "just and equitable" test today.
8. The respondent's application had reached the claimant in time for him to prepare for the hearing and he provided some commentary on it both before the hearing and during his submissions. The claimant had also prepared the further information in relation to the sex discrimination claim in accordance with the order made at the September preliminary hearing although this was late it was considered.

The Law

9. The relevant law that we need to refer to in this case is as follows:
10. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 deals with strike out:

Striking out

37.—(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).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above

11. Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 deals with deposit orders:

Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

12. Article 3 and 7 (including the extension of time under Article 8B) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 deals with the wrongful dismissal claim jurisdiction and time limits as follows:

Extension of jurisdiction

3. Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment.

.....

Time within which proceedings may be brought

7. Subject to article 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b)where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

(ba)where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).

(c)where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

Extension of time limit to facilitate conciliation before institution of proceedings

8B.—(1) This article applies where this Order provides for it to apply for the purposes of a provision of this Order (“a relevant provision”).

(2) In this article—

(a)Day A is the day on which the worker concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b)Day B is the day on which the worker concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by a relevant provision would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Order to extend the time limit set by a relevant provision, the power is exercisable in relation to that time limit as extended by this regulation.

13. Section 136 of the Equality Act 2010, in relation to the burden of proof as follows:

136. Burden of proof

(1) *This section applies to any proceedings relating to a contravention of this Act.*

(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

(4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

(5) *This section does not apply to proceedings for an offence under this Act.*

(6) *A reference to the court includes a reference to—*

(a) an employment tribunal;

(b).....

14. Counsel for the respondent referred me to the case of Ahir v British Airways plc [2017] EWCA Civ 1392.

15. In addition, I raised the following cases with the parties, Anyanwu & Another v South Bank Student Union [2001] 2 All ER 353, Mechkarav v Citibank NA [2016] ICR 1121, Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, Garcia v British Airways plc [2022] and Balls v Downham Market High School and College UKEAT/0343/10.

Findings of Fact

16. The claim was presented by an ET1 dated 13th May 2022. This was following an Acas Early Conciliation period between 20th April 2022 and 5th May 2022. It was handwritten and posted. The claimant was at the time a serving prisoner. The claimant accepted his claims were being submitted out of time in the claim form.

17. The claimant was employed by the respondent commencing on 27th September 2021 and his employment ended on 10th December 2021. The claimant was weekly paid so any notice should have been paid by 17th December 2021.

18. The claimant wrote a detailed letter to the respondent on 30th January 2022 (within the time limits) setting out that he thought he had been discriminated against for being a prisoner and threatened to bring proceedings against the respondent in the county court. There was no reference to sex discrimination.

19. It is in dispute as to whether his attendance at work was withdrawn by the prison meaning he could not attend or he was dismissed by the respondent. As a serving prisoner he was released to be able to work at the respondent and transport provided. For the purposes of this hearing

only I am taking the claimant's case at its highest that he was dismissed by the respondent to assess the strength of the claims.

20. By letter dated 21 June 2022, the claimant was given a strike out warning in respect of the unfair dismissal claim, as under section 108 Employment Rights Act 1996, the claimant was not entitled to bring a claim without two years' service and there was no apparent exceptions applicable. The claimant had until 28th June 2022 to give those reasons. The claimant's wrongful dismissal claims and sex discrimination claims were accepted and the respondent filed a response defending those claims.
21. At the outset of the hearing the issues were discussed. At the preliminary hearing on 21st September 2022 the Tribunal issued a judgment that it did not have jurisdiction to hear the claimant's claim for unfair dismissal as he had sufficient service. The reasonably practicable test was not thus considered. The Tribunal did however consider whilst the claim for sex discrimination was presented out of time, it was just and equitable to extend time. Further information on that claim was sought and the matter was listed for the preliminary hearing today to determine the respondent's application in respect of the sex discrimination claim.
22. As set out above the respondent then made a further application in respect of the wrongful dismissal claim. The claimant presented his wrongful dismissal claim outside the time limit of three months which should have been by 16th March 2022. The claimant accepted in his claim form the claims were out of time. The claimant did not commence ACAS early conciliation until 20th April 2022 so no extension of time can be relied upon for the claim. It was presented almost 2 months out of time.
23. Turning to the sex discrimination claim the claimant names one comparator Leigh Attwood or relies on the hypothetical comparator. The claimant asserts that a female would not have been dismissed. Dismissal is the sole act of discrimination relied upon by the claimant as he says he did not break the rules of his licence and they had no reason to terminate his employment.
24. The claimant provided additional details as part of the bundle. These have not been tested in evidence as we are not to conduct a mini trial but I am for the purposes of considering the respondent's application taking the claimant's assertions at face value and as being true. The real nub of the claimant's issue was that female colleagues took exception to the nature of his previous conviction 20 years ago.
25. The claimant set out that he was more vulnerable because he was a prisoner and could not act like a normal employee, it is his conviction that he asserts caused him issues at work and resulted in him being treated differently. This is the reason for any disparity of treatment.
26. The claimant asserts that Sarah Baker sided with the women that complained because she was a woman and had he been a woman with complaints from male workers he would not have been dismissed. The

claimant states that had he not been a prisoner then she would not have been able to act in this way. Sarah Baker wrote a witness statement for the claimant to support the claimant's prison hearing and described him as polite and pleasant employee. He did have cause to complain to Sarah Baker as he was unhappy people were "googling him" and a third party raised a concern about befriending her and some of her female workers, exchanging numbers and that having googled him she did not feel he had been honest with her.

27. The claimant accepts that he sent texts to another female worker LG and that LG was worried about the texts being disclosed to her husband. This suggests that the texts were more than a hello and it was outlined that they concerned potential to have a friendship outside of work although they have not been provided to me. The claimant asserts that they did not breach his licence terms.
28. Sarah Baker reported the contact between the claimant and LG to the prison as she believed that this was in breach of his licence terms. This was provided in the bundle and the respondent was under a duty to monitor the claimant and report any breach of their own rules or the RDR licence to the prison. This was a contractual obligation. It formed part of the memorandum of understanding that underwrote the whole work placement. This is what Sarah Baker did.
29. The claimant complains that at least 4 men have been dismissed and no women and that they were all prisoners. It is important to note that the prison in question (which has been deliberately not named) is for men. As such if 4 prisoners have all been dismissed it was 100% likely they would be male as no women served at this prison.
30. The claimant has provided a couple of examples of disparity of treatment of female workers but they are not prisoners. He has provided no evidence of a direct comparator for the dismissal with no material differences to him. Even the claimant accepts that being a prisoner and having that conviction was key.. There is no evidence to support any assertion of sex discrimination in terms of environmental factors, name calling, gestures, offensive environment. The claimant accepts that it is the knowledge of his historic convictions searchable online from media reports that caused his relationship with the female co-workers to deteriorate.

Conclusions

Wrongful dismissal – extension of time

31. Turning to the wrongful dismissal claim first. The claimant accepts that the claim is out of time. The question is thus was it reasonably practicable for the claimant to present that claim in time.
32. I have taken into consideration the fact that the claimant was a serving prisoner with limited freedom and that his claim form was handwritten.

However, it is clear that as at 30th January 2022 the claimant felt he had claims for having been dismissed and discriminated against for being a prisoner. He wrote a detailed letter referencing legal proceedings.

33. I am satisfied that the time point on the wrongful dismissal claim was not considered by Employment Judge Ord at the preliminary hearing as there is no reference to the time point being considered for this claim. The reasonably practicable test is a harder hurdle with less discretion for the judge contrasted with the just and equitable test for the sex discrimination claim. It is open to a Tribunal to grant an extension of time for discrimination claims as it is just and equitable but not for unfair dismissal or wrongful dismissal claims in the same claim form which whilst found in different legal provisions still have the same not reasonably practicable test.
34. I conclude that EJ Ord did not consider this point and this time issue has not been determined. The claimant must establish that it was not reasonably practicable for the claim to be presented within the primary time limits. He was a serving prisoner but was able to write that letter on 30th January 2022. As such I conclude that it was reasonably practicable for him to have presented his wrongful dismissal claim within time. If he was able to do this he was able to present his claim or commence ACAS early conciliation when he wrote that letter. The delays in doing so given he was aware he had claims at the end of January 2022 are not reasonable. As such the Tribunal does not have jurisdiction to hear the wrongful dismissal claim and this is struck out.
35. Given my conclusions on jurisdiction it is not necessary for me to go on to conclude the Rule 37 application for wrongful dismissal.

Sex discrimination claims

36. Taking guidance from the case law referred to above and considering s136 Equality Act 2010 there are no facts from which the Employment Tribunal could decide in the absence of another explanation, that the respondent had contravened the Equality Act 2010.
37. The claimant has not provided any named comparators who attended work in comparable circumstances and who were also not dismissed. There was no difference of treatment established, let alone bare facts of a difference status. There is no evidence from which an Employment Tribunal could conclude that the respondent has committed an act of discrimination. There is a reason unconnected to sex. The respondent had an obligation to raise its concerns with the prison and it is the prison that facilitate the work placement.
38. The central facts (aside from how the claimant came to not return) are not in dispute. In accordance with Ahir v BA [2017] where there are ostensibly innocent events to the act complained of what reason has the claimant to suppose that they are not what they seem. There is an innocent sequence of events from which it is not possible to infer any sex discrimination.

When the claimant wrote his January 2022 complaint he was clear that there was no a protected characteristic under the Equality Act but his prisoner status which caused him to be treated differently and knowledge of his conviction by others. These are not protected characteristics under the Equality Act 2010.

39. This Employment Tribunal understands the claimant believes that this decision to dismiss him was unfair and that he has “suspicions” that it was related to his sex, but that is not enough to get a claim for sex discrimination out of the starting block. There needs to be something else, there needs to be something more. There are no comments or other matters which are relied upon which would establish a disparity in treatment relating to sex. I am not convinced that listing the matter for a final hearing would provide that. The claimant has had his case set out twice, once in the ET1 and once in his response to the order for further and better particulars and that I should take those documents in the highest in the way that the claimant pleads his case.
40. I therefore conclude that the dismissal on the grounds of sex has no reasonable prospects of success. The respondent had a duty to report its concerns and the claimant does not dispute he was messaging female workers or that they raised concerns about his historic convictions - the facts of these matters are not in dispute.
41. Having found that the dismissal and the matters surrounding it have no reasonable prospects of success as sex discrimination claims under the Equality Act 2010, this is not the end of the matter. I remind myself, that this is a two stage test. The first stage is to consider whether the grounds in Rule 37 (1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, are met and I do consider that the case has no reasonable prospects of success in respect of the sex claims.
42. I must, however, go on to decide whether to exercise my discretion to strike out this claim given the permissive nature of Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, what is often referred to as the second stage. I may strike out the claim but do not have to. I considered a number of factors before reaching a conclusion as to whether a strike out in this case would be appropriate.
43. I have considered that this is an early stage of the process and that full disclosure has not yet taken place. I have also considered that further and better particulars have been ordered, and in fact provided by the claimant so he has had two opportunities to make his case. I have taken into account the fact that the claimant identified at an early stage in his own complaint that he was treated differently because he was a prisoner and not because of his sex. I have also taken the claimant’s case at its highest.
44. I have considered that this is both a matter that appears before the Employment Tribunal today because another Judge of their own initiative

has listed it for a Preliminary Hearing following a preliminary hearing. Further that the respondent has made an application which set out detailed grounds as to why a strike out and indeed, as an alternative, a deposit order should be made. The claimant has had an opportunity to consider these grounds.

45. I have considered the overriding objective, the need to deal with cases proportionately and fairly and to save cost, time and expense. I have considered the competing interests of the parties. The claimant will of course be prejudiced by having his claim struck out but equally the respondent by allowing the case without clear merits to continue for a further period and be listed for a multi-day hearing.
46. I have also considered whether a deposit order would be more appropriate as an alternative, but the claimant is a serving prisoner and has not provided evidence of means but he has been serving for some time. There is no evidence that he can pay a deposit even if it was made at the lowest sum.
47. A deposit order would of course would require a lower test, set out in rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as in such a case it would only need to be established that the case had 'little' reasonable prospects of success. However, I have found a higher test that the discrimination case has no reasonable prospects of success.
48. I also take in mind the guidance of Anyanwu & Anr v South Bank Student Union, that only in the clearest cases should a claim for discrimination be struck out. In my view this is one such clear case.
49. Taking the claimant's claim at its highest on the papers, there are no core issues of fact that turn on oral evidence. I can understand why the claimant would feel aggrieved that he was treated differently because he was a prisoner and that this came at a time when he was hoping to work towards release and life after prison but sympathy and his prisoner status do not give the claimant a valid claim for sex discrimination.
50. I am conscious that this tribunal hearing should not conduct a mini trial of the evidence and I have not done so. I have decided this case on the papers and submissions from both parties. Taking the claimant's case at its highest, in particular the ET1 but also the further and better particulars document referred to in my findings of fact. The claimant has been clear it is his conviction and prisoner status that explain the treatment. It is an all male prison so he will not have any comparators from that prison who are female. The claim is brought as a direct discrimination claim
51. The Claimant may not agree with the decision that was taken. Even taking his case at its highest, he has a suspicion of sex discrimination and not evidence.

52. I find in this case it is appropriate to strike out the claims for discrimination having considered all of the above and that is the order of this Employment Tribunal. It is apparent that the claims have no reasonable prospects of success and this would not change at a full hearing and whilst such decisions are rare, it is appropriate in this case. The claimant may have legitimate concerns about being treated differently as a prisoner and by virtue of his previous convictions but this does not equate to a sex discrimination claim.
53. As set out above the claimant's claim for wrongful dismissal is struck out as the Tribunal does not have jurisdiction to hear this complaint as it was reasonably practicable for him to present the claim in time and it was presented out of time. The judgment of this Tribunal is therefore that the claims will proceed no further and end today.

Employment Judge King

Date:03.04.23.....

Sent to the parties on: 4.4.2023

GDJ
For the Tribunal Office