



EMPLOYMENT TRIBUNALS

Claimant: Ms R M Howell
Respondent: Secretary of State for Justice
Heard at: Midlands East Tribunal via Cloud Video Platform
On: 12 June 2023
Before: Employment Judge Brewer

Representation

Claimant: Mr J Jenkins, Paralegal
Respondent: Mr A Shellum, Counsel

JUDGMENT

1. The claimant's claim for unfair dismissal is struck out.
2. The claimant's claims for sex discrimination and race discrimination are dismissed.

REASONS

Introduction

1. On 8 April 2023 this case was listed for a preliminary hearing to determine the following three matters:
 - a. Jurisdiction (in respect of the claimant's unfair dismissal claim)
 - b. whether the claim was presented out of time (in respect of all claims)
 - c. whether the claimant has sufficient service (to bring an unfair dismissal claim).
2. The claimant was represented by Mr Jenkins and the respondent was represented by Mr Shellum. The claimant attended the hearing, but she did not provide any oral evidence.

3. I was presented with a bundle of documents prepared by the respondent and also a letter provided by the respondent dated 20 April 2023. On behalf of the claimant, I received several emails although their relevance was unclear.
4. I heard detailed submissions from Mr Jenkins and Mr Shellum and at the end of those submissions I decided that I needed time to consider all that I had heard and therefore agreed to send out detailed written reasons to the parties for my decision which I set out below.
5. At the outset of the hearing the parties agreed that the correct respondent is the Secretary of State for Justice.

Issues

6. The issues which arise from the matters I was asked to consider are essentially as follows. First, whether the tribunal has jurisdiction to hear a claim for unfair dismissal given that on the face of the claim form the claimant was not employed by the respondent. Second, if the tribunal does have jurisdiction to hear such a claim, did the claimant have the required two years continuous service to bring a claim of unfair dismissal. The third issue is an overarching question of whether the claim form was presented out of time and if so whether time should be extended.

Law

7. Unfair dismissal is a statutory claim derived from the Employment Rights Act 1996. The right to claim is set out in section 94 of the Act which states that,

“An employee has the right not to be unfairly dismissed by his employer.”
8. Save for a number of categories of automatic unfair dismissal, none of which apply here, an employee who wishes to bring a claim for unfair dismissal is required by section 108 of the Act to have been continuously employed by her employer for a period of not less than two years ending with the effective date of termination (see s.108(1)).
9. In relation to the out of time point, all of the claims set out in the claimant’s claim form require that the claim is brought within three months of the effective date of termination, in the case of a claim for unfair dismissal, or within three months of the date of the act complained of (or the last date in a series of acts) in relation to the discrimination claims being brought under the Equality Act 2010 (EqA). In both cases that three-month time limit is extended by the provisions relating to early conciliation found in section 140B EqA (discussed below).
10. That leaves the law relating to extending time if it is determined that the claims were indeed submitted out of time. For the reasons set out below, I will not here deal with extending time in relation to the claim for unfair dismissal.
11. In relation to the Tribunal’s power to extend time in discrimination claims, the law is summarised as follows.

12. The three-month time limit (plus any extension for early conciliation) for bringing a discrimination claim is not absolute: Employment Tribunals have discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so — section 123(1)(b) EqA.
13. In **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under what is now section 123(1)(b) EqA,

'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'
14. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable — **Pathan v South London Islamic Centre** EAT 0312/13.
15. The Court of Appeal in **Chief Constable of Lincolnshire Police v Caston** 2010 IRLR 327, CA held that to extend time there must be material on which the Tribunal could exercise the discretion.
16. In exercising their discretion to allow out-of-time claims to proceed, Tribunals may also have regard to the checklist contained in **S.33 of the Limitation Act 1980** (as modified by the EAT in **British Coal Corporation v Keeble and ors** 1997 IRLR 336, EAT). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular,
 - a. the length of, and reasons for, the delay,
 - b. the extent to which the cogency of the evidence is likely to be affected by the delay,
 - c. the extent to which the party sued has cooperated with any requests for information,
 - d. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.
17. The relevance of the factors set out in **British Coal Corporation v Keeble** was revisited in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** 2021 ICR D5, CA. In that case, the Court of Appeal upheld an Employment Judge's refusal to extend time for a race discrimination claim presented three days late. It noted that the judge had referred to the factors set out in S.33(3) of the Limitation Act 1980, following **Keeble**. As to the first factor, the length of and reasons for the delay, the judge had been entitled to take into account that, while the three-day delay was not substantial, the alleged discriminatory acts took place long before A's employment terminated, and that

he could have complained of them in their own right as soon as they occurred or immediately following his resignation. As for A's assertion that he had mistakenly believed that he could benefit from an automatic extension of time under the early conciliation rules, the judge was entitled to take the view that this did not justify the grant of an extension, given that A had left it until very near the expiry of the primary deadline to take advice and then chose not to act on that advice because he thought that the solicitors had misunderstood the position.

18. The Court of Appeal's approach in **Adedeji** was followed by the EAT in **Secretary of State for Justice v Johnson** 2022 EAT 1 which also held that when considering the consequences of the Tribunal's decision can include whether allowing the claim to proceed would require the tribunal, for whatever reason, to make determinations about matters that had occurred long before the hearing.

Findings of fact

19. At all material times the claimant was employed by an agency called Belmont. The claimant says so in her claim form. She confirmed that she was contracted out to work for HMP Nottingham as a healthcare assistant. Mr Jenkins also agreed at the hearing that the claimant was employed by Belmont.
20. The claimant started working at HMP Nottingham on 10 May 2022.
21. The claimant was permanently suspended from working at HMP Nottingham on 22 July 2022. The reasons for her being so suspended are not material to my determinations.
22. It is clear from the claim form, much of which deals with the allegation of unfair constructive dismissal based on the respondent's alleged breach of trust and confidence, that the incident which the claimant complained about is her removal from working at HMP Nottingham which took place on 22 July 2022.
23. Therefore, the normal time limit for bringing a claim for discrimination under the EqA expired on 21 October 2022.
24. The claimant commenced early conciliation on 19 October 2022. For the purposes of section 140B EqA that is Day A.
25. The claimant received her early conciliation certificate on 18 November 2022 which, for the purposes of section 140B EqA is Day B.
26. By virtue of section 140B(2) to (4), because the normal time limit would have expired During the period of early conciliation, time is extended until one month after Day B which in this case was 18 December 2022.
27. The claim was presented on 20 December 2022, and it was therefore two days out of time. I note however that the claim form itself, signed by the claimant, was in fact completed on 28 November 2022. I also note that the claim was posted rather than completed and presented online.

28. On 2 February 2023 the case was listed for a substantive hearing 19, 20 and 21 February 2024.
29. There was intended to be a telephone case management hearing on the three April 2023 but that had to be postponed because the claimant had telephone difficulties. In granting the claimant's request for a postponement, Employment Judge Hutchinson ordered that the case be re listed for a 2-hour preliminary hearing by video to discuss the issues set out above.
30. Formal notice of today's hearing was sent to the parties on 8 April 2023 and although there are no orders in respect of witness evidence, documents or bundles, given that both parties are professionally represented it should have been obvious to the claimant that if she was relying on any particular matter either to argue that her claim was in time or that time should be extended, she would need to provide evidence of those matters. In the event the claimant provided no evidence relevant to the matters I had to determine and relied solely upon the submissions of Mr Jenkins.

Discussion and conclusion

Unfair dismissal

31. In relation to the claimant's claim for unfair dismissal, Mr Jenkins sought to argue that section 41 EqA, which in part states that a principal must not discriminate against a contract worker by not allowing the worker to do, or continue to do the work, allowed the contract worker to bring a claim for unfair dismissal. There is also reference in correspondence to section 39 EqA which states in part that an employer must not discriminate against an employee by dismissing the employee and that in some way which remains unclear to me, the claimant was covered by that provision.
32. Unfair dismissal is entirely a creature of statute, and that statute is the Employment Rights Act 1996. That Act makes it clear that only employees (or more correctly, former employees) can bring claims for unfair dismissal and not, for example, agency workers. The claimant has been entirely clear that she was not employed either by the prison or by the Secretary of State for Justice.
33. Mr Jenkins did seek to argue that because the claimant had worked as a contract worker in the prison service generally for a period of around five years she had therefore obtained her two years continuous service, but of course the two years continuous service is not continuous service as an employee and there was no evidence before me from which I could conclude other than, as indeed the claimant says in her own claim form, she was employed by the employment agency Belmont and not therefore by the respondent.
34. In the circumstances the claimant cannot bring a claim of unfair dismissal against the respondent and that claim must be dismissed.

Discrimination claims

35. The material facts I had before me at this hearing were as I have set out above.
36. Mr Jenkins submitted that the claimant posted her claim form on 16 December 2022, and she was not unreasonable in presuming that it would arrive the next day, 17 December 2022. 16 December 2022 was a Friday. It is clear that the claim form did not arrive until Tuesday 20 December 2022.
37. As I have set out in my findings, the incident about which the claimant complains happened on 22 July 2022 and her claim form was completed by her on 28 November 2022 and it was her decision to wait until very close to the time limit to post her claim. There was no evidence before me of when she in fact posted the claim form and no evidence of any reason for any delay with the postal service. There was a submission by Mr Jenkins regarding postal strikes, but he submitted these ended before Friday 16 December 2022 so it is difficult to see their relevance. That is not to blame the claimant for delay, I merely point out that if a potential claimant leaves it rather late in the day to submit the claim, they inevitably run the risk of there being some delay in delivery whether indeed sent by post or even e-mail. Given that the claim form was completed well before it was sent to the Tribunal, and well before the deadline, it is unclear why the claimant delayed but delay she did. Had she acted promptly when she became aware of the claim she could bring, it is likely this issue would not have arisen.
38. Although the delay is not extensive, time limits are important, and any delay is serious particularly where there is no reason given for the delay.
39. In submissions Mr Jenkins asked me to take into account the fact that the respondent missed the time limit for submitting their response, but with respect to him that is an entirely different matter. The respondent made an application to the effect that they had not received the claim form and asked for an extension of time to submit their response when they became aware of it and an Employment Judge granted that extension of time. In my judgment it is not appropriate to weigh in the balance when considering the just and equitable argument that a respondent was given an extension of time to submit their response.
40. Mr Shellum submitted that given that the claimant's case rests very largely on verbal exchanges between her and colleagues at HMP Nottingham, delay does affect the cogency of the evidence. This is not an argument I would have accepted given that the case has always been listed for February 2024 and if I allow the claims to go forward the same amount of time will have passed between the claim being in time and heard and the claim being out of time and heard save for two days. However, having read the claim form and response I doubt, building in sufficient reading time for the Tribunal at the final hearing that three days will be sufficient and that being the case the more likely and realistic time that this case with that will be heard is around August or later in 2024. I am aware that cases of five days are already being listed as late as September

2024. I do have serious concerns that, in the circumstances of the case as I understand them, cogency of the evidence would be significantly affected if the claims are allowed to proceed and further delay ensues which I am satisfied will be the case.

41. I am conscious on the other hand that if I agree with the respondent, the claimant will not have any claim before the employment tribunal, but that of course is invariably the case and cannot be, as it were, a trump card. In these cases, it is always a question of balance and one side or the other is bound to be more or less disappointed.
42. Having said all of that it seems to me that the most significant point in this case takes us back to the **Robertson v Bexley Community Centre t/a Leisure Link** case in which, as I have set out above, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA,

'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'

43. In this case having listened very carefully to Mr Jenkins submissions, I am in the position of a judge who has been given no material by the claimant by which I can justify the exercise of the discretion to extend time. The sum total of the submissions made by Mr Jenkins, and I do not criticise him for this, I am sure that he did the best with the material he was given by the claimant, was that time should be extended because it would be just and equitable to do so without giving any reason why it would be just and equitable to do so and his argument was entirely circular in that regard
44. For those reasons I decline to extend time to allow the claimant's claims to proceed and those claims are therefore dismissed.

Employment Judge Brewer

Date: 12 June 2023

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