Reference number
2300282-2023

EMPLOYMENT TRIBUNALS

London South Employment Tribunal
12th July 2023 (video)

Claimant: Gurchaten Burra

Respondent: Fleetmix Limited

Open Preliminary Hearing

Before: Judge M Aspinall (sitting alone as an Employment Judge)
Appearances: Mr Burra, in person
Mr D Morgan, Solicitor for the Respondent

JUDGMENT

1. The claim for racial discrimination is struck out as it is presented out of time. No good reason has been advanced by the Claimant for this delay and I have decided not to exercise discretion under section 123 of the Equality Act 2010.

2. The application to amend the claim to include one for a redundancy payment is refused.

3. The claims brought in respect of unfair dismissal, breach of contract, failure to provide written terms and conditions, and in relation to holiday pay and the Working Time Regulation/annual leave are not affected by these decisions and will proceed to a full hearing.

Background and issues

4. This preliminary hearing was to consider two key issues:
   4.1. Whether the claim for racial discrimination, presented approximately 500 days after the alleged discriminatory events, should proceed; and
   4.2. Whether the claimant should be permitted to amend his claim to include one for a redundancy payment.

Decisions

Racial Discrimination Claim:

4. The claimant presented his claim for racial discrimination well over the normal 3-month time limit under section 123 of the Equality Act 2010. The relevant case law includes 'British Coal Corp v Keeble' [1997] IRLR 336 and 'Robertson v Bexley Community Centre' [2003] IRLR 434. These cases underline that tribunals should only extend time in cases where it was not reasonably practicable for the claimant to present his complaint within

the normal time limit or where it is just and equitable to extend time.

5. The Respondent says that the incident cited at paragraph 6 of the ET1 served by Claimant in January 2023 provides an unspecified date in the first week when he started working as a labourer – which was on 6 April 2021. At the outside, they say that the claimant went off on sickness absence in early June 2021 so that would have been the very latest date on which any such incident could have occurred.

6. The Respondent says that since the claimant raised other grievances with them – for example around not being able to return to his job as a driver without fear of reprisals. They say, therefore that the Claimant's belated assertion that he did not raise the issue of racial discrimination because he feared reprisals should be taken against that background.

7. They note that the Claimant had sought legal advice – there were copies of correspondence between the Claimant and his solicitors in his own bundle provided to the Respondent and the Tribunal. That advice was sought a considerable time before he brought his claims and ought to have galvanised him into action sooner and with more haste.

8. In fact, he brought this claim years, not days or weeks or even months, after the time limit expired.

9. The Claimant, in response to the application to strike out the claim for race discrimination, relied on his written submission which he had sent to the Tribunal just before 4pm on the day prior to the hearing. Having read that document, it appears that the Claimant accepts that he is out of time to bring that claim ("…I agree that this surpasses the time frame under Section 123 (1) (b) Equality Act 2010…") and brings the claim now because a witness had come forward who had also heard a member of the Respondent's staff using derogatory and racist language when referring to the claimant.

10. He has also averred in that document, that others – the Managing Director – used similar racist language towards him. He provides no timelines but indicates that this behaviour persisted throughout the time he was actively employed by the Respondent.

11. I am not satisfied that the Claimant reasonably had fears that any attempt by him to raise issues of racial discrimination – he had brought other grievances to their attention. It appears, in fact, that the fears of reprisals referred to by the Respondent are the fears that the Claimant has about reprisals against his putative witness and not for himself.

12. I am, also, not satisfied that the appearance of a witness, at this late stage, is sufficient to find that time ought to be extended. Mr Burra has not presented any compelling evidence demonstrating that it was not reasonably practicable for him to present his complaint within the time limit, or that it would be just and equitable to extend time.

13. The time limit for bringing a claim for race discrimination is 3-months from the incident complained of – or 3-months since the last in a course of conduct where such harassment or discrimination extended over a period. In this case, as the Claimant went onto long-term sickness absence in June 2021 and did not return to his employment after that date, the time limit for making a claim of this kind had, on any view, long passed.

14. Therefore, this part of his claim is struck out.

Redundancy Payment Claim:

15. The claimant sought to add a claim for redundancy payment under section 135 of the Employment Rights Act 1996. This more than 6 months following his dismissal and over 3 months after the company started making redundancies. The legal time limit for such a claim is 6 months after the effective date of termination (section 156 Employment Rights Act 1996). In 'Selkent Bus Co Ltd v Moore' [1996] IRLR 661, it was held that a tribunal can only extend this time limit if it was not 'reasonably practicable' for the claimant to present the complaint within the 6-month period, and that the claim was presented 'as soon as reasonably practicable' after that.

16. Here, again, the Claimant opted to rely on his written application and submission related to bringing a claim for redundancy payments.

17. He accepted in his written submissions that there were time limit issues with his claim for a redundancy payment but that he believed that I ought to agree to his application. He said that he had not included the redundancy claim in his ET1 because new information, that Fleetmix Limited was closing, had only just come to light. He noted that all other employees had been made redundant on 3 March 2023.

18. He said that all the facts relied upon in demonstrating that this was a redundancy situation were contained in his ET1. On a fair reading of the ET1, I cannot find that made out. In other correspondence and documents, upon which he relied, he stated that the reason for closure was the compulsory purchase of the property.

19. The Respondent says that the Claimant was aware, at least on 28 February 2023, where the grounds of resistance (paragraph 43) referred to the likelihood that the company would be closing when Mr Henderson retired. They also noted that there had never been any plan for the site to be purchased – compulsorily or otherwise. In 2020, there was discussion with a potential developer, but these did not go beyond being exploratory and that they ended in 2020.

20. The addition a claim for redundancy is not a simple matter and is not a matter of relabelling. It is a claim which was, on any reading of the original claims, not pleaded or even obliquely referenced.

21. The ET1 and particulars of claim do not reference redundancy at all; for the simple reason, I find, that the question of redundancy had not arisen when he was dismissed, not arisen when he served his claim (in January 2023) and did not arise until more recently.

22. The claimant has provided no compelling evidence to show that it was not reasonably practicable to bring the redundancy claim within time or as soon as reasonably practicable thereafter. Furthermore, I am satisfied that the evidence demonstrates that the respondent did not contemplate redundancy at the time of Mr Burra's dismissal and that he was, in fact, dismissed based on ill-health/capability.

23. I take no view as to whether that reason for dismissal or the processes which were followed were fair or reasonable – those are matters to be determined by the tribunal at the final hearing into the claim of unfair dismissal.

24. I conclude that the respondent did not dismiss the claimant by reason of redundancy and that, in any event, the claim is brought out of time without good enough reason for me to consider extending the time limit. The application to amend to include a redundancy claim

is therefore refused.

McKenzie Friends

25. Mr Burra sought to have another person present at the hearing before me today – Miss Apter. He had, in correspondence in early May, indicated that he may want a McKenzie Friend to assist him. He said that Miss Apter was fulfilling that role. He told me that he had 'hired' her.

26. A "McKenzie Friend" is a term used in UK law to refer to an individual who aids a litigant in person in a court of law or a tribunal. This person does not need to be legally qualified. The concept originates from the case of McKenzie v McKenzie [1970] 3 All ER 1034.

27. In an employment tribunal, a McKenzie Friend can provide moral support, take notes, help with case papers, and give advice on the conduct of the case. However, they cannot address the tribunal, examine witnesses, or sign any official tribunal documents on behalf of the litigant.

28. The rules surrounding McKenzie friends in employment tribunals are less formal than in some higher courts, but they generally follow these principles:
    - 1.1. *Permission:* A litigant must ask the tribunal's permission for a McKenzie friend to assist. The tribunal should grant permission unless it is satisfied that, in that case, it is not in the interests of justice.
    - 1.2. *Duties:* A McKenzie friend may provide moral support, take notes, help with case papers, and quietly give advice on points of law, issues that the litigant may wish to raise with witnesses, procedure, and strategy.
    - 1.3. *Limitations:* A McKenzie friend has no right to act as the litigant's advocate or to address the tribunal directly – their role is instead to assist the litigant. They cannot examine witnesses or sign statements of case, applications or other litigation documents on behalf of the litigant.
    - 1.4. *Confidentiality:* McKenzie friends are expected to respect the confidentiality of the proceedings.
    - 1.5. *Right to refuse:* Tribunals retain the discretion to refuse to admit a McKenzie friend, particularly if they feel that their presence will hinder the tribunal process in some way.

29. In this case I was concerned that, not being physically in the same place as Mr Burra, Miss Apter would have difficulty in helping with case papers, and quietly giving advice on points of law, issues that Mr Burra may wish to raise with witnesses, procedure, and strategy.

30. In the event, Miss Apter did not join the hearing and my Clerk was unable to contact her on multiple occasions. Mr Burra asked my Clerk to try again in order that she might also be able to help Miss Apter to join the CVP hearing if she was having difficulty doing so.

Judge M Aspinall
Wednesday, 12th
July 2023