



EMPLOYMENT TRIBUNALS

Claimant: Mr E King

Respondents: London Fire Commissioner

Heard at: East London Hearing Centre (in public)

On: 10 July 2023

Before: Employment Judge S Moor

Representation

Claimant: In person

Respondent: Mr B Amunwa (Counsel)

JUDGMENT

1. The claimant's application to amend the race discrimination claim is refused.
2. The unfair dismissal claim is struck out because the Claimant has no reasonable prospect of showing they were brought in time or that time should be extended.
3. The race discrimination claims are struck out because the Claimant has no reasonable prospect of showing they were brought in time or that time should be extended.

REASONS

1. The claimant was employed as a firefighter by the Respondent from May 2018 to 10 October 2021. He presented unfair dismissal and race discrimination complaints to the Tribunal on 11 January 2023 after an ACAS EC certificate dated 9 January 2023.

2. This hearing was held to decide the following issues:
 - 2.1. whether to strike out the claim
 - 2.2. whether to order a deposit to be paid as a condition of continuing with any allegation in the claim

on the grounds that it has no reasonable prospects of success or little prospects of success because it has been presented out of time.

Issues

3. The issues provided by the Respondent adequately set out the issues in the unfair dismissal claim.
4. I next clarified the issues with the parties in the race discrimination claim.
5. The unfavourable treatment alleged is that:
 - 5.1. The Claimant's manager did not like that the Claimant fit in quickly. He told him 'you are meant to be a buck (a term for someone new) and are not meant to be hanging around with the guys';
 - 5.2. The team made remarks that black men driving black BMWs are always going to be stopped [by the police];
 - 5.3. The team complimented the Claimant in the gym about his fitness but linked their remarks to his race/genetics;
 - 5.4. Managers negatively stereotyped the Claimant asking him too many times where he had grown up, what his background was and saying 'you are one of those gangsta boys';
 - 5.5. His manager asked if he had not been fired yet and told him he was going to get him moved.
 - 5.6. The decision to uphold his dismissal appeal
 - 5.7. The Claimant was treated differently from others by:
 - 5.7.1. not being allowed to use his phone;
 - 5.7.2. having to provide an enhanced DBS check;
 - 5.7.3. not being believed about his holiday dates and having to provide flight details;
 - 5.7.4. being required to provide a covid test with his name and address on it which was going to cost around £185.

6. Was that different, detrimental treatment because of race?
 - 6.1. The Claimant will say he was the only black firefighter at Bethnal Green fire station in a team of around 45.
 - 6.2. The Claimant will say he was negatively stereotyped as untrustworthy/likely to be a criminal due to his race.

Amendment Application

7. I judged the issues set out not in bold were sufficiently referred to in the claim form to be part of the original claim or further information in relation to it. The Claimant acknowledged that the matters in bold were new and required amendment. The parties agreed I should consider this application to amend as well as the strike out/deposit application.

8. The Claimant had no particular reason for failing to set out in full his discrimination claim in his claim form, except that he was representing himself.

9. The Respondent argued that the matters sought to be amended were new, substantial, factual allegations and now very stale: they would have been out of time (for the reasons they set out in their main application) even on presentation of the claim but are even more so now and they relate to the whole of employment going back to 2018. It was highly likely to be the case that such a passage of time would affect the cogency of any evidence the Respondent could give and the new allegations were unlikely to be possible to prove or deny through documentation. This put the Respondent to greater hardship in defending the claim than the Claimant in prosecuting it.

10. In considering whether to allow an application to amend I must consider:

10.1. The type of amendment: is it a new factual claim, how extensive or is it merely a relabelling. Will new witness evidence need to be called?

10.2. The reason for the delay: the longer the delay the more cogent is the reason expected to be. Not having a reason for the delay is not determinative of the application but it is an important factor.

10.3. The balance of prejudice or hardship in either granting or denying the amendment. I look at how each side will be burdened by the decision.

11. First, I recognise that bringing a race discrimination claim is a very difficult step. It must be very difficult to look back and have to write down the racist atmosphere in which you worked when, at the time, you tried your best to get on with the job and rise above it. But this does not explain why, once the Claimant had taken the difficult step to present his claim, he did not set out simply and clearly (as he did so easily for me orally at this hearing) the discrimination he says he experienced. It did not require him

to be a lawyer to write down what had happened to him. There is no real reason why he has delayed. This is a weighty factor against granting the amendment.

12. Second, the new allegations are new factual complaints: they do not merely add to what is already in the claim. They will require new witness evidence, probably from several members of the team.

13. Third, the allegations are all out of the primary time limit of 3 months.

14. Finally, it is the Respondent that will be most prejudiced by this delay: the Claimant plainly remembers what happened because it happened to him. But time has passed and that delay may well have affected the Respondents' witnesses ability to remember – by very reason that the incidents were not personal to them.

15. While there are often good policy reasons for allowing matters of alleged discrimination to be aired even if brought out of time, here it seems to me the factors weigh against my granting an amendment and I refuse it.

16. I now move on to the strike out/deposit application. Mr Amunwa agreed that it was appropriate to hear evidence from the Claimant about the time point and I did so by asking him questions about the reasons for the timing of the presentation of his claim; what advice he had received and so on.

Findings of Fact

17. Having heard the evidence of the Claimant, and having read the documents referred to me, I make the following findings of fact.

18. The effective date of termination of employment was 22 October 2021, when the Claimant was dismissed for two allegations of misconduct. The appeal was upheld only for the second allegation on 16 May 2022. The Claimant admitted that second offence but with mitigation, which he argues should have led to action short of dismissal.

19. The Claimant was advised and represented during the internal hearings by his FBU trade union representative. After the dismissal the TU representative told the Claimant he had two options: *either* to internally appeal *or* to go to an employment tribunal. The Claimant thought he had a good chance internally and had been advised a tribunal would take 6-8 months. He therefore decided to continue with the internal appeal.

20. The TU representative also advised the claimant that the time limit for the tribunal was 3 or 3.5 months.

21. The TU representative suggested the claimant should contact the Information Commissioner's Office ('ICO') because the Respondent had misled the Disclosure and

Barring Service (DBS) when it had asked for an enhanced check by stating that the Claimant was a youth/child worker when it would surely have been clear to anyone within the Respondent that he was a firefighter.

22. When the internal appeal was not upheld, the Claimant's TU representative said it was now too late to go to a tribunal. He suggested the Claimant complain to the ICO, which he did. The Claimant decided not to go to the Tribunal at that stage thinking that once the ICO got back to him it would give him more confidence. It is clear to me and the Claimant confirmed this in his evidence that, by the end of the appeal, the Claimant knew that the Respondent had misled the DBS about his job title. He did not need that fact to be established through his complaint to the ICO. His complaint was essentially a separate complaint about a breach of data processing.

23. The ICO process took some time. Initially, the Respondent did not admit to the ICO that it had misled the DBS on its enhanced DBS request, but eventually it did admit to using the wrong job title. Unsurprisingly, on 20 October 2022 the ICO decided that the Respondent had broken the Data Protection regulations in relation to the Claimant. The Claimant wrote a letter before action to the Respondent on 7 November 2021 essentially seeking compensation for this and race discrimination and giving them 14 days to respond. The Respondent did not do so.

24. The Claimant started ACAS Early Conciliation on 9 January 2023 and presented his claim 2 days later. The Claimant said that he had spent the time from November 2022 in seeking advice as to how to best present his claim from friends and legal contacts and seeing if he could find a representative. They all told him he was too late to present a claim, but he decided to do so on his own.

25. The Claimant has access to the internet and uses email. He presents as an articulate, serious person well-able to research matters online.

26. The Claimant was plainly devastated to lose a career in the fire service. While I do not know the full facts and do not make any findings about them, from what I have heard it seems strange that a busy Metropolitan Police service would spend valuable time interfering with the Claimant's employment twice. The Met stopped him when he was driving in the street where he worked, which led to nothing, not a charge, not an arrest. Nevertheless the Met pressed the Respondent to look into the Claimant's criminal convictions. Nothing came up on the DBS check. The only conviction that came out of the enhanced DBS check (requested unlawfully by the Respondent using the wrong job title) was a minor one. I do not know whether that conviction was spent or not, or whether legally the Claimant was obliged to inform the Respondent about it, but because he had denied any recent convictions and provided a false covid test that proved to be the end of his career in the fire service. The Claimant considers he was racially profiled by the Met.

Legal Principles

Time Limits

27. Mr Amunwa helpfully summarised the legal principles and I agree with them.
28. I will refer to the primary time limit as 3 months plus any time extended by the Early Conciliation provisions.

Unfair Dismissal

29. In relation to unfair dismissal time can only be extended if it was not reasonably practicable to present the claim within the primary time limit. Where that is established then time can be extended but only to the point that it became reasonably practicable to present the claim.

30. As far back as Singh v Post Office [1973] ICR 437 (followed in the Bodha case cited by Mr Amanwa) it has been established that 'reasonably practicable' means: Was it reasonably capable of being done? Thus an internal appeal does not practically stop a claimant from presenting an ET1, as illustrated by the facts of both Singh and Bodha. Any properly trained trade union representative would know this.

31. Where a potential claimant is misadvised, depending on the circumstances, in particular the nature of the adviser, that may mean that it is not reasonably practicable to present a claim in time.

32. I should look not just at what the Claimant did but what it was reasonable to expect him to do practically.

Race Discrimination

33. The discretion to extend time for the presentation of a discrimination claim is broader under the Equality Act 2010. I can extend time if it is just and equitable to do so. I must exercise my discretion judicially by weighing all relevant factors. Factors include:

- 33.1. The length of the delay.
- 33.2. The reason for the delay: the longer the delay the more cogent the reason is expected to be.
- 33.3. The merits of the case may be relevant.
- 33.4. Whether the cogency of the evidence is likely to have been affected by the delay.
- 33.5. What advice or information the Claimant received or could have sought.

33.6. The balance of hardship.

Strike Out/Deposit

34. I may strike out a claim if it has no reasonable prospect of success. This is a very high threshold for the Respondent to meet. I should take the claim at its highest.

35. I may order a deposit as a condition of continuing with any claim or allegation within it if I consider it has little prospects of success. If a deposit is ordered then the Claimant risks paying the Respondent's legal costs if he chooses to continue because, if he loses for the same reason as the deposit was granted, he will be regarded as acting unreasonably.

Application of Facts and Law to Issues

Unfair Dismissal Claim

36. I have no hesitation in striking out the unfair dismissal claim.

37. First, the Claimant *has* persuaded me that it was not reasonably practicable to present his claim until shortly after 16 May 2021. This is because he was misadvised at the date of dismissal. His Trade Union representative advised him about two alternative options rather than advising him that time had started to run on the employment tribunal claim. As I have said, any trade union adviser should have known that this was not the case and that the claimant could do both but time started to run for the tribunal claim from the date of dismissal.

38. Nevertheless, the Claimant has *not* persuaded me that it was not reasonably practicable to present his claim shortly after his internal appeal was unsuccessful. By then he was no longer under the apprehension that he could appeal first. His complaint to the ICO did not practically stop him from presenting his claim to the Tribunal. It was still absolutely feasible to do so in parallel. By the end of the appeal he knew all the facts he needed to know for his unfair dismissal claim (in particular that the Respondent had misled the DBS). He knew the employment tribunal existed to hear unfair dismissal claims and knew the time limits were tight. The claim was reasonably capable of being presented very soon after 16 May 2021 and the Claimant did not do so.

39. The unfair dismissal claim, therefore, has no reasonable prospects of succeeding because it has been brought out of time and, after a few days after the unsuccessful appeal it was reasonably practicable to present the claim. I cannot extend time beyond that point.

Race Discrimination Claim

40. I also strike out the race discrimination claim on the grounds that the Claimant has no reasonable prospects of persuading a Tribunal to extend time. I have weighed each factor carefully.

41. First, the merits. I do not agree with Mr Amunwa that the chances of success on the facts are obviously poor. Had the claim been presented in time, the question for the Tribunal would have been whether the Respondent would have so officiously pursued him if the Claimant had been white. I do not know the answer to this question, but against the background allegation of a manager taking against the only black firefighter on the watch a real question arose. Nor, however, can I say that the merits are so obviously in the Claimant's favour that they are factor weighing on the side of extending time. This is because he admitted to providing a false covid test although that is mitigated, on his case, by the fact he was faced with what was an exceptional request to provide expensive evidence and in the light of him having isolated for the appropriate length of time. The merits here is a neutral factor.

42. Second, the delay is lengthy. In relation to matters up to the dismissal the delay was not 15 months as Mr Amunwa suggested but about a year. The Claimant had until 21 January 2022 to begin ACAS Early Conciliation in his claim. He did not do so until 9 January 2023, almost a year later. In relation to the appeal the delay is 4-5 months. Both are long delays, relative to the 3 month primary time limit established by Parliament in the Equality Act 2010. The policy reason behind this very tight time limit is to encourage the speedy resolution of workplace complaints so that employees can move on in their careers and employers are not burdened by stale claims. The delay here is 4 times the primary time limit in respect of the dismissal and over twice the time limit in relation to the appeal.

43. Third, after 16 May 2022 or shortly thereafter, the Claimant has not provided a good reason for the delay. He did not act promptly as soon as he was aware of the time limits and his option to go to the Tribunal. As I have set out above, the professional mis-advice excuses the first few months but there is really no good reason for the delay shortly after the appeal outcome. The Claimant knew all he needed to know to get his claim going. He had been advised the tribunal time limits were short. He already thought he was out of time yet he delayed for a further 7 months. There was no reason for him to think, and he did not suggest to me, that he had to complete his ICO complaint first. It could reasonably have run in parallel with the employment tribunal claim because they were about different matters: one was a breach of the data regulations the other about discrimination. The outcome, in other words, of the ICO complaint was not going to change the basis of his discrimination claim. Even if I am wrong about that, there is no reason for the delay once he knew the ICO complaint outcome: November and December 2021 went by without the claimant presenting his claim by which time again he had been aware of the urgency. He had plenty of time before then to seek informal advice and there was no good reason for why he waited until then. The Claimant is intelligent enough to have sought out free advice or

information on the internet, which would also have pointed to him the need to act quickly to present his claim. He did not act with urgency or promptly.

44. Fourth, the delay in relation to the cogency of the evidence is a factor against extending time albeit less weighty. This is because, in the main, the claim relates to the disciplinary process, which will be well documented. Nevertheless where the Tribunal is inquiring into the minds of the decision makers, I agree with Mr Amunwa that their oral evidence and recollection of their thought processes will be an important part of the proceedings and might well be, to some extent, impaired by the delay.

45. Finally, I acknowledge the hardship to the Claimant in not being able to pursue what are important allegations. I have weighed this too in the balance.

46. Overall, it seems to me clear that the Claimant has no reasonable prospects in persuading a Tribunal to extend time even on the broader test of what is just and equitable: the most important factors here are the long delay and the lack of any good reason for at least 7 months of it.

47. I therefore strike out the race discrimination claims as having no reasonable prospect of success because they have been brought out of time and no Tribunal is likely to find that it is just and equitable to extend time.

Employment Judge S Moor
Date: 19 July 2023