



EMPLOYMENT TRIBUNALS

Claimant: Mr H S Gill

Respondent: Warrington Borough Transport Limited

Heard at: Manchester Employment Tribunal (in person)

On: 16 May 2023

Before: Employment Judge Dunlop

Representation

Claimant: In person

Respondent: Mr J Lomax (Solicitor)

JUDGMENT having been sent to the parties on 25 May 2023 and a request for reconsideration having been made within the time limit prescribed for a request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Employment Judge has treated the request for reconsideration as incorporating a request for written reasons and the following reasons are provided:

REASONS

Introduction

1. The claimant's remaining claim is of race discrimination. He was employed by the respondent for approximately 9 days as a trainee bus driver before being dismissed on the basis that he had failed driving assessments. He states that there was no issue with his performance. As (in his view) there was no good reason to dismiss him, and as he was the only non-white trainee in his cohort, he believes that the reason for dismissal may be related to race.

Time limits

2. We have established today, and it is now agreed, that the complaint as it related to dismissal was presented one day out of time. There is also a complaint about the driving assessment itself. Taken alone, that would be a few days out of time, but it is clearly linked to the complaint about dismissal

and, for the purposes of today, I have proceeded on the basis that the claim as a whole was presented one day late.

3. I considered this matter as a preliminary issue under Rule 53(1)(b) Employment Tribunal Rules of Procedure 2013. I heard evidence from Mr Gill, who was cross examined by Mr Lomax. I also had regard to a small bundle of documents, including documents which Mr Gill wanted me to consider.

Findings of Fact

4. Mr Gill commenced mandatory Early Conciliation on the last possible day. Having not resolved the matter through Early Conciliation, he then decided to bring a claim. I accept his evidence, which was not challenged, that he was aware the deadline for presenting his claim was 27 January 2022.
5. He intended to present it on that day. He was working an evening shift and began to fill in the form when he came home. The form was submitted after midnight, although Mr Gill is not sure of the exact time. This resulted in the presentation date of 28 January 2022. Mr Gill's evidence, again unchallenged, is that he missed the deadline by only a few hours, perhaps only a few minutes.
6. Mr Gill talked above having depression in the period leading up to the presentation of the claim, but there was no medical evidence presented. Perhaps more pertinently, there was no explanation from him as to how or why his depression stopped him from presenting his claim a day earlier than he did. Mr Gill had been able to complete other tasks, for example he had made several job applications and had started work with another employer on 16 December 2022.

The legal test

7. In circumstances where a discrimination claim is presented out of time, Section 123 Equality Act 2010 gives me a wide discretion to extend time to allow the complaint to be brought within such further period as I consider to be "just and equitable". That is, as Mr Lomax acknowledged, a broad test which leaves a wide discretion to the Tribunal. Nonetheless, there are a number of legal authorities which deal with the factors I should consider. I have paid particular regard in this case to **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 (CA)** and **Adedeji v University Hospitals Biurmingham NHS Foundation Trust [2021] ICR D5, CA**.
8. In some circumstances it can be permissible to take into account the merits of the claim in deciding whether it would be just and equitable to extend time. (see **Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132**) but only where the Tribunal has material from which it can legitimately form a view on the merits of the case.

Discussion and conclusion

9. I have considered the following points:

- 9.1 Firstly, the length of the delay. This is minimal. There is no practical difference (whether for the Tribunal's purposes or the respondent's) between a claim presented on 27 January and one presented on 28 January. There is no forensic prejudice to the respondent – that is, prejudice caused by witnesses being unavailable or documents being unrecoverable and so on.
- 9.2 The reason for the delay. Whilst the delay is very short, there is no good reason for it that I can discern. Mr Gill chose to act on the last possible day, both in starting Early Conciliation and in presenting his claim. In the second instance, he got caught out. His reasons for choosing to act on the last day were vague. As noted above, although there was some reference to depression I was not satisfied, on the evidence, that this provided an explanation. Further, this was not a case where the claimant was unaware of the deadline, was seeking advice, or had technological difficulties. The fact that he presented the claim immediately after the deadline shows that he was well-able to do it, he simply chose to leave it until the last minute.
- 9.3 I have also considered the prejudice to the parties. The prejudice to the claimant lies in the fact that he would be prevented from bringing a claim and having it heard.
- 9.4 The prejudice to the respondent is that if the application to extend time is allowed it would be faced with defending a claim. In that respect, I consider I am entitled to take account of the respondent's point that, although there is no forensic prejudice as such, the employment was very short-lived and the claim was submitted a total of over 5 months from when it ended.
10. Taking into account all of these factors my conclusion is that, albeit by a narrow margin, it is not just and equitable to extend time for the presentation of this claim.
11. Given the starting point of a very short length of delay, but with no good reason behind it, I may have been inclined to exercise my discretion in this case if it had seemed like a particularly meritorious case; the sort of case which it is important for the Tribunal to hear. Unfortunately for Mr Gill, I do not consider that it is such a case. Therefore, weighing the apparent merits of the case into the balance does not change the conclusion I have outlined above. I will say more about the merits of the claim in the next part of the Judgment.
12. My decision is therefore that the claim was not presented within such time as I consider just and equitable. The Tribunal therefore has no jurisdiction to hear the claim and it will be dismissed.

Strike Out/Deposit Application

13. The respondent had also made an application to strike out the claim on its merits. This application does not fall to be determined, due to the finding I have made above as to jurisdiction. However, given that the parties made submissions on this application, I considered it may be helpful to the parties to know, in summary, what the decision would have been.

14. I would not have struck out the claim. As alluded to by Mr Lomax, the test for strike out is very high. He has not satisfied me that this case quite meets that test.
15. I would, however, have made the case subject to a Deposit Order (subject to considering Mr Gill's financial means). I consider that it meets the test of having "little reasonable prospect of success". Mr Gill can point to nothing beyond a difference in treatment and a difference in race. This is not enough to establish a claim of discrimination treatment (see Langstaff J's summary in **Chandhok v Tirkey [2015] OCR 527**).
16. Further, the respondent has pointed to a plausible reason for the treatment – the claimant's poor performance in the assessment. Mr Gill says that that reason is invalid and has questioned the authenticity of documents produced by the respondent. Those allegations would have to be tested at trial, but experience suggests that it would be very rare for a Tribunal to find that a large employer has forged documentation such as this. Finally, the claimant has undermined his own case by suggesting alternative, non-race-related reasons why the respondent may have wanted to dismiss him, including the fact that (he says) there was a preference to employ individuals living in its own local authority area, which Mr Gill did not.
17. I did not hear any evidence of means and make no comment as to the amount of any Deposit Order that I might have made had the case proceeded beyond today.

Employment Judge Dunlop

Date: 11 July 2023

WRITTEN REASONS SENT TO THE PARTIES ON
Date: 20 July 2023

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FOR EMPLOYMENT TRIBUNALS