



EMPLOYMENT TRIBUNALS

Claimant: Mr Amrish Patel
First Respondent: Mitie Ltd
Second Respondent: Mr Paul Owen
Third Respondent: Mr Anthony Taylor

PRELIMINARY HEARING

Heard at: Watford (by CVP)
On: 11 July 2023
Before: Employment Judge Alliott (sitting alone)

Appearances

For the Claimant: In person
For the Respondents: Mr Simon McCrossan (counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's age discrimination claims were brought out of time and it would not be just and equitable to extend time and they are therefore struck out as there is no jurisdiction to hear them.
2. Mr Dean Mansfield is removed as a party to these proceedings.
3. The respondent's application to strike out the claim of constructive dismissal is dismissed.

REASONS

1. This public preliminary hearing was ordered by Employment Judge Moore on 19 April 2023:-

“To decide whether the claim of age discrimination at paragraph 3 of the claimant's further information dated 20 February 2023 has been brought in time

and/or whether it would be just and equitable to extend time pursuant to s.123 Equality Act 2010 so that the tribunal has jurisdiction to hear it.”

2. In the body of that case management summary Employment Judge Moore recorded as follows:-

“As regards the employer’s application to strike out the discrimination claims on the grounds that they were out of time, I agreed there should be an open preliminary hearing to hear such an application in respect of the claim of age discrimination set out in paragraph 3 of the claimant’s further information. That claim relates to seven unsuccessful internal job applications the claimant made between 13 March 2021 and 13 September 2021. The individuals involved in deciding those applications were entirely different to the individuals involved in the constructive dismissal claim (and other discrimination claims) and if that claim of age discrimination proceeds to the final hearing will considerably increase the amount of evidence and witnesses otherwise required. I therefore considered it would be proportionate for the question of whether that particular discrimination claim has been brought in time to be determined in advance of the final hearing at a separate open preliminary hearing.”

3. As part of the case management orders for this open preliminary hearing, the claimant was ordered as follows:-

“On or before 27 June 2023 the claimant must serve a witness statement on the respondent setting out his reasons why he did not bring a complaint of age discrimination in respect of his unsuccessful job applications between 13 March 2021 and 13 September 2021 any earlier, together with any facts and matters relied upon as to why it would be just and equitable to extend the normal three month time limit in respect of that claim. By the same date he must also serve on the respondent any documents he relies upon for this purpose.”

4. As already recorded the claimant made seven applications for alternative jobs between 13 March and 13 September 2021. The last rejection was on 13 September 2021. Accordingly, the primary three month limitation period for bringing a claim would have expired on 12 December 2021. The claimant’s claim form was presented on 21 March 2022 and is therefore three months and nine days late.

The law

5. I have taken into account the following extract from the IDS Employment Law Handbook on Discrimination at Work at paragraph 35.37 as follows-

“The Court of Appeal’s decision in Aziz v FDA [2010] EWCA Civ 304, CA also dealt with a procedural issue of “considerable practical importance”: On what basis should Employment Tribunals approach the question whether a claim is time barred at a preliminary hearing? The Court approved the approach laid down in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA that the test to be applied at the preliminary stage is to consider whether the claimant had established a prima facie case, or, to put it another way, “The claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs”.

6. As regards the just and equitable extension, I take into account the following from the IDS Employment Law Handbook Employment Tribunal Practice and Procedure at 5.103:-

“While Employment Tribunals have a wide discretion to allow an extension of time under the “just and equitable” test in section 123, it does not necessarily follow that exercise of the discretion is a foregone conclusion in a discrimination case. Indeed, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA, that when Employment Tribunals consider exercising the discretion under what is now section 123(1)(b) Equality Act, “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 complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.” The onus is therefore on the claimant to convince the Tribunal that it is just and equitable to extend the time limit.

7. Finally, section 123(3)(b) of the Equality Act 2010 provides as follows:-

“For the purposes of this section... failure to do something is to be treated as occurring when the person in question decided on it.”

8. Accordingly, time begins to run from the date of the decision not to offer the alternative job to the claimant.

The claimant’s explanations

9. In his witness statement the claimant gives the following reason why he did not bring a complaint sooner:-

“The reason why I did not bring a complaint specifically of age discrimination in respect of my unsuccessful job applications between 13 March 2021 and 13 September 2021 sooner, is that my resignation was not directly in response to this particular direct act of discrimination alone, it was in response to the outcome of my grievance findings given to me by Mitie on [2nd] December 2021. I considered this action to be the last cumulative “final straw”, I considered there to be a fundamental breach of “mutual trust and confidence” in my employment contract. This then led to my resignation.”

10. In my judgment this expressly appears to disassociate the age discrimination claims from the decision to resign. Further, it leads me to conclude that it is highly unlikely that the age discrimination claims would have seen the light of day but for the claimant’s subsequent resignation. There is no prima facie case that they are linked in any way to the constructive dismissal claim.

11. The claimant gave oral evidence. The claimant confirmed to me that at the time he was aware that he could present a claim to an employment tribunal for acts of discrimination and that he thought at the time of the rejection of his applications for jobs that he was being subjected to acts of age discrimination. The principal reason the claimant gave me for not taking action sooner was that he was still looking for further roles. However the

fact of the matter is that after 13 September 2021 until 12 December 2021 he made no further applications for roles.

12. The claimant is clearly an intelligent and articulate individual. He accepted that he was able to research his rights on Google and indeed did so. In early December he was sending “without prejudice” correspondence to the respondent as a result of his research into legal issues. He was fully aware of the implications of that particular phrase. Further the claimant contacted Acas in early January 2021 and it is clear that he consulted solicitors at some time in January as they were writing letters on his behalf in February.
13. The claimant accepted that he was aware of the three month time limit for bringing a claim in or about January 2021. Nevertheless he waited until he had resigned and he had worked his notice before bringing his claim on 21 March 2022.
14. I have to consider all the circumstances. I first consider the reason for the delay. In my judgment the claimant was not ignorant of his right to bring a claim to the employment tribunal and by January 2021 must have been aware of the three month rule for doing so. I do not find that ignorance of the three month rule was reasonable in delaying until 21 March 2022.
15. The length of the delay is considerable in the context of employment tribunal proceedings, being three months and nine days.
16. As already recorded I doubt very much whether these claims would have been brought but for the subsequent events surrounding the claimant’s resignation. That can only be because the claimant had decided that he was not going to bring them and they have only been included in this claim as a result of the subsequent alleged constructive dismissal.
17. As regards the other aspects of the Limitation Act I accept that the cogency of the evidence is unlikely to be adversely affected although I do adopt Employment Judge Moore’s observation that the length and complexity of the hearing would be significantly extended were these claims to be included in the final hearing. As such there is some prejudice to the respondent in my judgment.
18. Accordingly, I find that the claims for age discrimination arising out of the seven applications in 2021 are out of time and that it would not be just and equitable to extend time. Consequently those claims must be struck out.

The removal of Mr Dean Mansfield from these proceedings

19. The claimant accepted that he makes no discrimination claims as against Mr Dean Mansfield and accordingly I remove him from these proceedings.

The respondent’s application to strike out the claim of constructive unfair dismissal.

20. The respondent has applied to strike out the whole of the claimant’s constructive unfair dismissal claim on the basis that he has failed to comply

with the order of Employment Judge Moore to particularise the acts he is complaining about as constituting breaches of the implied term of mutual trust and confidence. Given the time constraints on this hearing I dealt with this somewhat pre-emptively and robustly by indicating early on to Mr McCrossan that I was not going to strike out the claimant's claim for constructive unfair dismissal. Firstly, it is clear beyond doubt that the catalyst for the claimant's resignation was the receipt of the outcome of his grievance on 2 December 2021 which he characterises as the last straw. At the very least, the claimant is entitled to litigate that issue. Secondly, the claimant did not wholly fail to comply with the order of Employment Judge Moore. He did provide a document dated 17 May 2023 which in turn cross referenced to the details contained in his 19 page claim form. As such, in my judgment, he has not wholly failed to comply with the case management order. I agree with Mr McCrossan that the details of the claimant's claims remain ill defined and consequently I have decided to give the claimant a last chance to get his case in order so that a list of issues can be drafted.

Employment Judge Alliott

Date: 31 July 2023.....

Sent to the parties on: ..25 August 2023.

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For the Tribunal Office