



EMPLOYMENT TRIBUNALS

Claimant

Mr K Scotland

v

Respondent

Abellio London Limited

Heard at: Watford

On: 8 September 2023

Before: Employment Judge R Lewis

Appearances

For the Claimant: Did not attend and was not represented

For the Respondent: Mrs T Patala, solicitor

JUDGMENT

1. The claimant's claims are struck out.

REASONS

Events before this hearing

1. I provide these reasons of my own initiative. It is in the interests of justice to do so as the claimant did not attend the hearing.
2. The ET1 was presented on 28 July 2022. Day A was 5 May and Day B was 15 June. The claim was for unfair dismissal and race discrimination. The narrative in boxes 8.2 and 15 was to the effect that the discrimination complaint related to alleged inconsistency of treatment between the claimant and other drivers who had done what the claimant had done.
3. By its response the respondent claimed that the claim was wholly out of time; that the claimant could not complain of unfair dismissal, as his service was about 7 weeks; and denied discrimination. It wrote that the claimant was fairly dismissed for gross misconduct, ie using his mobile phone while driving a bus (which then hit another vehicle).

4. On 30 March 2023 the tribunal listed a preliminary hearing in public to consider strike out on three grounds: limitation; inadequate length of service; and under rule 37, having no reasonable prospect of success.
5. The preliminary hearing was listed in June, but was postponed by the tribunal. Notice of today's hearing was sent on 8 September.
6. The ET1 named as the claimant's representative Mr Mahad Mohamed of Unite. The tribunal sent all its correspondence about the case to him on the claimant's behalf. On 30 August he notified the tribunal that he did not represent the claimant.
7. Mrs Patala told me that she had contacted the claimant direct by email about this hearing, and had sent him the bundle electronically; and that none of her emails had bounced back. She also said that a hard copy of the bundle had been sent to him urgently, and was shown on Royal Mail tracking as 'refused to accept.' She confirmed that the envelope showed her firm's name as sender. I accept those points.
8. On the morning of the hearing, a member of staff, at my request, checked that there was no recent correspondence from the claimant in the tribunal's inbox. She telephoned the number on the ET1, and heard, 'Number unavailable.' She telephoned Mr Mahad's number, which went to Voicemail.
9. I was satisfied that the claimant had been properly made aware of this hearing, and had had the opportunity to attend, and / or to contact the tribunal himself. I was satisfied that there was no reason to adjourn.

Issues decided at this hearing

10. The first point was straightforward. The claimant was not qualified to bring a claim of unfair dismissal, as he did not have two years' service. His claim of unfair dismissal was mistakenly accepted by tribunal staff, and should have been rejected. It is struck out because the claimant had no right to bring it, and the tribunal has no power to consider it.
11. I identified three bases for strike out of the claim of race discrimination. Although it is not strictly necessary, I deal with all three of them separately. I find that each of the first two, taken separately, was grounds for strike out.
12. First, rule 47 gives the tribunal power to dismiss a claim in the absence of a party, once it has made inquiries about the reasons for the absent party's non-attendance. I was satisfied that the tribunal had done all it could to find out why the claimant was absent. I find that I had reason to dismiss the claim under rule 47, and I would have done so if that had been the only grounds for strike out.
13. Secondly, I agree with Mrs Patala that the claim was out of time. I accept the analysis set out in the Grounds of Resistance. Even allowing for the extension of time allowed by the 'stop the clock' provisions of early conciliation, the claim

was brought late. The tribunal has powers to extend time, and allow a late claim to proceed, if it is satisfied that it is just and equitable to do so. The claimant had put forward no material on which I could base a decision to that effect. I therefore find that the claim has been brought of time and that it is not just and equitable to extend time. I would have struck it out on that ground alone if there had been no other grounds to do so.

14. The third ground was that Mrs Patala submitted that the claim had no reasonable prospect of success (rule 37). The claim had manifest weaknesses. The obvious one was that the claimant, who at dismissal had held a passenger vehicle licence for about 25 years, must have known that use of a mobile phone while driving is a criminal offence, and had, a matter of weeks earlier, signed for receipt of the respondent's prohibition policy. His breach of that rule (ie use of the mobile phone) was evidenced on CCTV.
15. The claimant's one viable argument on paper was to complain that white comparators had not been dismissed in the same circumstances. He had raised this point during the disciplinary process, and again in the ET1. In its response the respondent had written that it had been able to identify only one comparator from the information given by the claimant. It explained in its Grounds of Resistance why that person had not been dismissed. Its explanation was that for reasons relating to the comparator (which the claimant may not have known about) the comparator's circumstances were materially different from the claimant's.
16. It seemed to me premature to strike out under rule 37 (or, if asked, to order a deposit under rule 39). If the matter had proceeded, I would have directed the claimant to give full information about any comparator relied on; with leave to the respondent to amend its response in light of what it could find out about the comparators. The application(s) for strike out or deposit orders could be reconsidered after that had been done. If an application under rule 37 had been the only matter before me today, I would not have struck out the claim, but instead would have directed the steps set out in this paragraph.
17. In light of the delays in the tribunal's systems, I asked Mrs Patala to email the claimant to inform him of today's outcome, and that Judgment and Reasons would be sent in due course.

Employment Judge R Lewis

Date: 8 September 2023

Sent to the parties on: 13 October 2023

T Cadman

For the Tribunal Office

