



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms L Brown

v

GXO Logistics Limited

Heard at: Bury St Edmunds

On: 6 December 2023

Before: Employment Judge K J Palmer (sitting alone)

Appearances

For the Claimant: Ms L Brown (in person)

For the Respondent: Mr P Sands (Solicitor)

JUDGMENT

Pursuant to a Public Preliminary Hearing

It is the judgment of this Tribunal as follows:

1. That the Claimant's claim for breach of contract is a claim which cannot be entertained by this Tribunal as the Claimant remains employed by the Respondent. The Tribunal has no jurisdiction to hear this claim and it is dismissed.
2. The Claimant's claim for direct discrimination under s.13 of the Equality Act 2010 is out of time under s.123 of the Equality Act 2010. It is not just and equitable to extend time in the circumstances. The Tribunal has no jurisdiction to hear the claim and it is dismissed.

REASONS

1. This matter came before me today pursuant to a Preliminary Hearing which had taken place by telephone before Employment Judge Caiden in a Watford Employment Tribunal on 12 October 2023.

2. The Claimant had lodged her claim at the Employment Tribunal on 6 April 2023 pursuant to completing ACAS early conciliation which she started on 10 February 2023 and 14 March 2023 was when that conciliation terminated.
3. In her ET1, which was home made, the Claimant was very brief in setting out her claims. Essentially, these fell into three categories and it was those categories that EJ Caiden attempted to explore and expand upon during the Case Management Hearing in October 2023.
4. Employment Judge Caiden split the three claims into three paragraphs, numbered 4, 5 and 6 in Judge Caiden's Summary. In essence, the three claims were described as the contract or ground one claim, the equal pay or night shift allowance claim as ground two and the festival responsibility payment as ground three.
5. At that hearing the Judge then listed a further Preliminary Hearing to last one day by CVP which is the hearing before me. The principle purpose of that hearing, as listed in October 2023, was to determine whether claim 3, or ground three of the Claimant's home-made claims was, in fact, in time. The Judge had described that claim at paragraph 6 as a claim for direct sex discrimination under s.13 of the Equality Act 2010, owing to non-payment of an allowance in the 2021 festival season. I am charged with determining whether that claim was raised out of time and if it was out of time, whether I should extend time under the just and equitable principle set out in s.123 of the Equality Act 2010.
6. That was essentially the claim before me today. A second issue also arose during the course of correspondence which is on the Tribunal file and which was referred to EJ Caiden. The second issue relates to ground one, or what is described as the contract claim in the ET1. There was an exchange of correspondence between the parties pursuant to Orders made by Judge Caiden and accordingly, Judge Caiden indicated that the application of the Respondents to strike out the ground one claim would also be considered today at today's hearing as well as a clarification of the nature of a ground one claim and whether it was necessary for that claim to be amended. It was also listed that the Judge today consider if the ground one claim consider, if the ground one claim was indeed a potential claim under s.11 of the Employment Rights Act 1996 or something else for which the Employment Tribunal has no jurisdiction to determine under the Rules permitted. So, therefore I have two considerations today. I heard evidence from the Claimant but only in relation to the second out of time point and I heard detailed submissions from Mr Sands and also from Miss Brown. I retired to consider my judgment and when I returned Miss Brown raised further submissions, as did Mr Sands which I also considered.

The contract claim or ground one.

7. In discussing this with the Claimant today and having due cognisance of the detailed documents in the bundle before me running to some 201 pages, it is clear that in her ET1 the Claimant was seeking, at ground one, to articulate complaints which she had raised to her employers during the course of the period of time towards the end of 2022 through into 2023. She had raised a grievance in November of 2022, the first point of which was concerning her contract of employment. In essence, the Claimant argues that she was employed on an URTU agreement, which was agreed collectively with the Unions from 2007. It is worth noting that the current Respondents acquired the Claimant's employment via TUPE, due to a TUPE transfer in 2012. It is the Claimant's position that in 2009, when her job title was changed to that of supervisor, she was asked to sign a fresh contract by the Respondent's predecessors. This is, of course, prior to the TUPE transfer. She claims that while she signed it she did then raise queries about it and indicated that she was not happy to continue under its terms and she then was told that she was employed under the original 2007 contract. After the TUPE transfer it emerged that the Respondents were treating the Claimant as having been employed under the 2009 contract. They say that this is the contract which she was employed under at the time she transferred to them under TUPE. The Claimant disputes this and says she remains employed on the 2007 contract and that she is disadvantaged in this respect in a number of ways. Those ways manifested themselves when she first raised a complaint about the different treatment of holiday in 2013 and that was resolved. There was then a second complaint placed by her in 2022 which subsequently led to her grievance and these proceedings.
8. Having examined the documentation and heard from the Claimant it is clear that the Claimant is not seeking to pursue a claim under s.11 of the Employment Rights Act 1996 for a statement of terms and conditions under s.1 and s.4 and I accept Mr Sands' submissions that, in examining s.1 and s.4 it could not be construed that this was a claim in that respect. It is clear to me, both from the ET1 which is brief, but more particularly from the grievance raised and the discussions I have had with the Claimant today and the evidence that I have heard, that the claim that she is seeking to pursue under ground one is the contract claim which she has raised in her grievance during the course of the early part of 2023. In essence, she says that the Respondents have, for many years, treated her as being employed under the contract dated 2009 when she should have been treated as being employed under the 2007 contract. The Respondents refute that and say that there is evidence to show that she was de facto employed under the 2009 contract. In a contract case that issue would be played out by the hearing of appropriate evidence to determine which, on the balance of probability, was the most likely. The difficulty the Claimant has in this case is that she remains employed and the Tribunal is only empowered to her claims of breach of contract by virtue of the Employment Tribunal's Extension of Jurisdiction (England and

Wales) Order 1994. That Extension of Jurisdiction Order is very specific and details that Employment Tribunals are only empowered to hear contract claims from employees when their employment has terminated. The Claimant remains employed and her employment has not terminated and is therefore not within this Tribunal's jurisdiction to consider the Claimant's claims in this respect. I would point out that the Claimant hasn't articulated or particularised her claims in terms of the breaches that she says she suffered and any losses arising out of those breaches but that is, of course, something that she could have done in the ordinary course of events. The problem that she has is that the Tribunal has no jurisdiction to hear her claim.

9. When questioning her today she did raise the possibility that the claim was something different. She said that it was a discrimination claim arising out of a contract awarded to a comparator called Andy Day who was also a supervisor working in the same role and that he enjoyed the URTU contract from 2009 to 2018 when he left. Mr Sands agreed that that is the first that he had heard of that potential claim today and on the face of all the documentation before me, including all of the documents in the bundle, it is clear that he has never previously been raised as a claim, nor was it mentioned to Judge Caiden at the first Preliminary Hearing. I cannot therefore accept that this is the claim that the Claimant was seeking to pursue under ground one in her ET1. It is clear that she was seeking to pursue the contractual element of her claim that she had raised as a grievance to her employers which was subsequently rejected.
10. Therefore, for the reasons have set out above, the Tribunal has no jurisdiction to hear this contract claim and it is dismissed.

Sex discrimination claim under s.13 of the Equality Act 2010.

11. This is the claim set out briefly by Judge Caiden at paragraph 6 of Judge Caiden's Case Management Summary and this relates to a period of time when the Claimant was seconded to work for the Respondent at various festival events. It had been the practice in previous years during such a secondment that the Claimant would be paid a festival allowance, compensating for the lack of overtime that could be claimed in such circumstances. It is the Claimant's case that she worked on secondment in 2021 and was paid no such allowance and that subsequently, at the end of the festival season in 2022, she ascertained that a fellow male worker had, during 2022, worked at the festival season and had received an allowance. That is essentially the nature of that claim in a nutshell. The difficulty for the Claimant is that on analysis of the facts, the act complained of which is the non-payment of a festival allowance, took place in or about September/October 2021. That is the reason why Judge Caiden had listed this matter for my consideration as an out of time issue in this Preliminary Hearing today.

12. It is clear that the act complained of was indeed in 2021 and that is not something that is disputed between the parties. The Claimant, however, relies upon the fact that she was unaware that she could bring such a claim or in fact that she had suffered any such discrimination until she ascertained, on 1 October 2022, that a male comparator who had worked during the festival season in 2022, had been paid such an allowance. It therefore falls to me to consider initially whether the claim she issued in this respect is in or out of time and if it is out of time, whether I should exercise my discretion to extend time under the principles set out in the relevant legislation.
13. Turning to that legislation, discrimination claims and time limits are governed by s.123 of the Equality Act 2010. Section 123 says as follows:

“Proceedings on a complaint within section 120 may not be brought after the end of:

 - a. The period of three months starting with the date of the act to which the complaint relates, or
 - b. Such other period as the Employment Tribunal thinks just and equitable.”
14. In terms of the timing, it is clear that the act complained of took place in the Autumn of 2021 and that ordinarily, therefore, a complaint should have been raised to the Employment Tribunal within three months of that time. Clearly it was not, the early conciliation initiated by the Claimant started on 10 February and the claim was presented on 6 April. As Mr Sands points out to me, the period of early conciliation is not relevant and where the initial three month time limit has expired prior to the initiation of the ACAS early conciliation and that is s.140(b). Therefore, early conciliation would have had to have been commenced within three months of October 2021. It manifestly was not done so and was not commenced until February 2023. Therefore, the claim is clearly out of time.
15. The Claimant asks me to exercise my discretion under s.123 1(b) and validate the claim on the basis that it was presented within other period as the Tribunal thinks is just and equitable. She says the reason for this is that she did not know that such a claim existed until 1 October 2022. The difficulty she therefore faces in that respect is that, even on that analysis, time for early conciliation should have been in the beginning of January yet in fact she did not issue her claim until 6 April 2023. So, even on the basis of her hearing about the possibility of a claim in October, she still waited some six months before presenting a claim to the Tribunal and that even on that analysis she is out of time and therefore bound by authority in terms of considering whether to exercise my discretion to extend time and I am rightly referred to the relevant authority by Mr Sands of Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, which is a Court of Appeal case. That tells Tribunals that when Tribunals are considering exercising the discretion under s.123 1(b), 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.

16. I therefore have to take the authorities into account and the evidence that I have heard from the Claimant. The Claimant admitted that she had been seeking some legal help and is a little confused in her evidence as to precisely what the nature of that advice was and when she was seeking it. It is clear that later in the process when she was pursuing her grievance she was being assisted by both an internal Union Representative at the Respondents and a more senior Representative, Joanna Richards, at the URTU Union. She had also had contact with ACAS and she admitted that she was aware that she was able to bring complaints in the Tribunal but in evidence said that she did not know that there was a time limit within which she had to bring those claims, albeit she did somewhat contradict herself in this respect by indicating that during the process she was being pressed by the ACAS officer in terms of the necessity to comply with time limits. It is clear that the Claimant was confused as to when she should pursue claims in this Tribunal but she did have the benefit of some assistance both from the Union Representative, from ACAS and from her own knowledge. She indicated in evidence that she had also been looking at a legal helpline to assist her. It is clear to me that she was aware of her rights but was not aware of the specific nature of them. She seems to have misunderstood the fact that she was pursuing a grievance for the necessity to present a claim to this Tribunal within the three month time limit. Of course employees should pursue grievances in respect of issues they are complaining about but that does not stop the clock in respect of the statutory time limit to make an application.
17. Moreover, as soon as the Claimant became aware that she potentially had a claim in sex discrimination on 1 October 2022, she could have presented a claim immediately. She did not do. She proceeded to follow through her grievance, albeit not to the end prior to presenting a claim the following April. In short, the Claimant has not convinced me sufficiently that I should exercise my discretion on the basis of the just and equitable principle and extend time to validate her claim. Her claim is out of time and it is manifestly out of time. I have taken into account the fact that she did not know of the possibility of a sex discrimination claim until October 2022 but even had time started to run at that point, which it did not, she would still be out of time by some months.
18. Taking into account all the circumstances and applying the authorities I have indicated above, it is not just and equitable to extend time. The claim is out of time and is therefore dismissed.
19. There remains one claim, that identified by EJ Caiden at paragraph 5 of EJ Caiden's Summary.

Equal pay claim

20. The Claimant's claim is pursued on the basis that she says that she was engaged in "like work" with a male comparator, Mark Ellul. I do not propose to tinker with that set out by EJ Caiden at paragraph 5 of EJ Caiden's Summary. The claim revolves around an allowance the Claimant is paid as a night shift supervisor compared to the comparator's allowance being enshrined as part of his basic contractual pay. The Claimant's allowance remained static whilst the comparator's, being part of his basic contractual pay, enjoyed the various uplifts over the years due to increases in pay. This left a disparity between the Claimant and the comparator. I understand the period of time over which this has happened started in 2015 and continues.
 21. That, in a nutshell, is the Claimant's claim.
 22. Like work involves the following elements:
 - a. That the work of the Claimant and the comparator, Mr Ellul, was the same, or if not the same, then it was broadly similar; and
 - b. That any difference in the work that was done as between the Claimant and Mr Rose was not of "practical importance" in relation to the terms and conditions of employment.
- When looking at that comparison, the Tribunal will consider the frequency with which differences between their work occurred in practice and the nature and extent of those differences.
23. It will be for the Claimant to prove that she did the same work, or work of a broadly similar nature, to Mr Ellul but, to the Respondent falls the evidential burden of showing any differences of practical importance.
 24. It should be noted that if the Claimant succeeds in establishing she was engaged in like work with Mr Ellul, the Respondent is seeking to rely upon a material factor defence.
 25. I have made provision for the Respondents to plead to this remaining part of the Claimant's claims as they have hitherto not had the opportunity of doing so prior to clarification of that claim both today and in the Summary of Judge Caiden. I make an appropriate Order in that respect below. As this is the only remaining claim, we discussed a Full Merits Hearing and it was agreed that three days in Cambridge, in person before a full Tribunal would be appropriate. I duly listed the matter for a three day hearing as detailed below.
 26. I made such other appropriate directions as are necessary, see separate document.

Employment Judge K J Palmer

Date: 15 January 2024

Sent to the parties on: 23/1/2024

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For the Tribunal Office.