Neutral Citation Number: [2024] EAT 168

Case No: EA-2023-SCO-000108-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 1 November 2024

Before :

THE HONOURABLE LORD COLBECK

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Between :

MS TRACEY SMITH **Appellant**

- and –

THE RESTAURANT GROUP (UK) LTD **Respondent**

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Michael Briggs (instructed by Allan McDougall Solicitors) for the **Appellant**
Alice Stobart (instructed by Mills & Reeve LLP) for the **Respondent**

Hearing date: 22 October 2024

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JUDGMENT

THE HONOURABLE LORD COLBECK:

Introduction

1. I refer to the parties as the claimant and respondent, as below. The claimant commenced employment with the respondent on 25 April 2022. She was employed as an assistant manager until the termination of her employment on 17 November 2022. The claimant's employment was terminated as she had failed to pass the probationary period.
2. Two days prior to the termination of her employment, the claimant had submitted a grievance. A grievance meeting took place on 21 December 2022, with the outcome notified on 23 January 2023. On 23 January 2023 the claimant initiated early conciliation, naming a trade union representative as her representative. An early conciliation certificate was issued on 3 February 2023. On 15 February 2023 the claimant's solicitor started a second early conciliation process. A second early conciliation certificate was issued on 29 March 2023. An ET1 form was presented on 29 April 2023. The outcome of the claimant's grievance appeal was notified on 17 July 2023.
3. The claimant brought claims of disability discrimination in terms of sections 13, 15 and 20 of the **Equality Act 2010** and of unauthorised deduction of wages in terms of section 23 of the **Employment Rights Act 1996**. A claim for breach of contract was initially made but then withdrawn.
4. A preliminary hearing was fixed to determine two issues: (i) whether the claimant was a disabled person within the meaning of section 6 of the **Equality Act 2010**; and (ii) time bar. Following a hearing in Glasgow on 2 October 2023 before Employment Judge Wiseman, in a judgment sent to parties on 1 November 2023, the tribunal held that the claimant was a disabled person at the relevant time and that the claims were time barred and a tribunal did not have jurisdiction to determine them. The claimant appeals in relation to the decision on time bar.
5. Central to the question of time bar was the issue of two separate early conciliation certificates. It was a matter of agreement that if the first certificate was that which fell to be relied upon the claim was brought 54 days late; and if the second certificate was that which fell to be relied upon the claim was brought in time.
6. Rejecting the argument advanced on behalf of the claimant that the first certificate was defective by reason of the respondent being incorrectly designed, the tribunal held that the first certificate was valid and that the claim was brought out of time.

The first ground of appeal

7. The first ground of appeal advanced by the claimant was in the following terms:

> "The Employment Tribunal was in error in following **HM Revenue and Customs v Sera Garau** [2017] UKEAT/0348/16/LA and holding that the [claimant's] claims were presented out of time. **Sera Garau** can no longer be considered good law in the light of the Court of Appeal's decision in **Sainsbury's Supermarkets Ltd v Clark** [2023] EWCA Civ 386."

8. The ratio of **Sera Garau** was that the effect of section 18A of the **Employment Tribunals Act 1996** was to prevent a claim being brought without the claimant first obtaining an early conciliation certificate under section 18A(4), after which the prohibition against bringing a claim contained within section 18A(8) no longer applied, Only one certificate was required and the reference to "the certificate issued" in section 207B of the **Employment Rights Act 1996** and section 140B of the **Equality Act 2010**, when excluding time spent on early conciliation for limitation purposes, referred to the mandatory certificate obtained under section 18A(4) of the **Employment Tribunals Act 1996** and not to a purely voluntary second "certificate".
9. The claimant sought to argue that **Sera Garau** can no longer be considered good law by reason of the decision of the Court of Appeal in **Sainsbury's Supermarkets Ltd v Clark** [2023] EWCA Civ 386. Such an argument was not advanced before the tribunal. Counsel relied on paragraphs 35 – 37 of **Sainsbury's Supermarkets Ltd**. That part of the judgment of the Court of Appeal deals with the EAT's analysis of certain rules, which were not considered in the present case. Two other points are of note. Firstly, whilst **Sainsbury's Supermarkets Ltd** was concerned with early conciliation certificates, the point in issue in that case was what were the consequences of an ET claim form not giving the appropriate certificate number. Secondly, **Sera Garau** was not mentioned in **Sainsbury's Supermarkets Ltd**. In such circumstances it cannot be said that **Sera Garau** is no longer good law standing the decision in **Sainsbury's Supermarkets Ltd**.
10. That, however, is not the end of matters. **Sera Garau** was considered by the then President of the EAT (Simler J, as she then was) in **Romero v Nottingham City Council** [2018] UKEAT/0303/17/DM. At paragraph 24, the President set out the established principles in relation to the EAT departing from a previous EAT decision. That may only happen in

exceptional circumstances (see **Secretary of State for Trade & Industry v Cook** [1997] IRLR 150). In **Romero** it was held that as **Sera Garau** was not decided per incuriam and was not manifestly wrong, it should be followed. Only one mandatory early conciliation process was enacted by the applicable provisions in section 18A of the **Employment Tribunals Act 1996**. A second certificate, where obtained and relating to the same matter, had no impact on the limitation period.

11. It was not suggested that exceptional circumstances arose in the present case. Having regard to the decision in **Romero**, that is unsurprising. In **Romero**, the decision in **Sera Garau** was described as "plainly correct" (see paragraph 28). It was also noted that it had been followed in **Treska v The Master & Fellows of University College Oxford & Another** UKEAT/0298/16, a decision of HHJ Eady QC, as she then was. For what it is worth, I too have formed the view that **Sera Garau** is plainly correct. Furthermore, it is a decision which is unaffected by that of the Court of Appeal in **Sainsbury's Supermarkets Ltd**.

The second, third and fourth grounds of appeal

12. The claims not having been brought in time, it was still open to the tribunal to allow them to proceed. It declined to do so. The claimant accepts that the correct statutory tests were applied by the tribunal. It is the manner in which the tribunal chose to do so with which issue is taken. The second, third and fourth grounds relate to the tribunal's decision not to exercise its discretion in favour of the claimant. They are in the following terms:

> "2. The Employment Tribunal failed to consider what forensic prejudice was caused by the delay. The Tribunal accepts at paragraph 83 that "any delay will impact on people's memories", however it does not identify whose memories will be impacted and how this will affect the respondent's ability to respond to the claim. This was in error (**Adedeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ 23).
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> 3. At paragraph 83, the Tribunal held that any prejudice to the Appellant in not exercising its discretion was "balanced" by "the possibility of a remedy elsewhere for the Claimant". The Tribunal made no findings as to what this remedy is, who it was

against or how likely it is to succeed. In the absence of such findings, it is impossible to see how much weight the tribunal could have assigned to this remedy in finding that it "balanced" the prejudice of not having a claim. This was in error.

4. The tribunal made a finding that there had been a "lack of evidence to explain the reasons for [the Claim being presented late]" (paragraph 81). This lack of reason is material to the tribunal's decision not to exercise its discretion to extend time under section 123(b), **EqA** (paragraph 83). It is also relevant to the question of whether it would have been reasonably practicable for the Appellant to have presented her claim in time.

Both the Preliminary Hearing on time bar and the first ground of appeal in this EAT1 form proceed on the basis that the Appellant believed she was entitled to rely on the second certificate to extend time. This must be true as a matter of both logic and common sense. The Employment Tribunal was in error in holding that she required evidence for such a finding."

13. Looking at the second ground, it was sufficient for the tribunal, in considering whether to exercise its discretion in the claimant's favour, to identify the relevant considerations in the case before it and to have regard to these when reaching a decision.

14. The factors taken in to account by the tribunal were (i) the claimant sought legal advice and assistance from her trade union on 8 December 2022, shortly after her dismissal and the terms of the declaration signed by her (paragraph 74); (ii) the claimant also had legal advice and assistance from a legal representative from no later than on or before 15 February 2023 (paragraph 75); (iii) the claimant initiated the first early conciliation process on 23 January 2023 (paragraph 76); (iv) the first early conciliation certificate having been sent to her legal representative on 8 March 2023, there was no evidence to explain why a claim was not presented on or about that date (paragraph 79); (v) the second early conciliation certificate having been issued on 29 March 2023, there was no evidence to explain why a claim was not submitted until 29 April 2023 (paragraph 80). It is also apparent from the tribunal's judgment

that the absence of evidence from the claimant on certain matters was a factor it had regard to.

15. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay; and (b) whether the delay has prejudiced the respondent (see **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640). The weight to be applied to those factors, and to such other factors as may arise in a particular case, is one for the tribunal. The manner in which the tribunal considered the evidence cannot be criticised. The issue of potential prejudice was a relevant consideration which the tribunal had regard to. It was not necessary for the tribunal to go in to the level of detail advocated by the claimant. The second ground is without merit.

16. Turning to the third ground, the possibility of an alternative remedy being open to the claimant was canvassed by the tribunal (at paragraph 82) in the context of assessing prejudice to the claimant. It must be stressed that all the tribunal did was identify this as a possibility. It simply did not have an evidential basis upon which to go further. It cannot be overlooked that one of the factors the tribunal had regard to was the declaration signed by the claimant in terms of which it stated that she understood that until her trade union or it's solicitors told her that they would lodge a claim with the employment tribunal on her behalf, it remained her responsibility to ensure that any legal claim she wished to pursue was presented within the time limit (which was set out in the declaration). The weight to be applied to the possibility of an alternative remedy was one for the tribunal. There is nothing within its judgment that suggests it erred in this regard.

17. Dealing lastly with the fourth ground, the tribunal's criticism was well-founded. Whilst the length of any delay is unlikely to be controversial, the reasons for that delay will, ordinarily, be known only to the claimant and their advisors. Those reasons will almost always be relevant when considering whether to exercise any discretion to extend time. If a claimant elects not to lead such evidence, it will be unsurprising if a tribunal elects to apply weight to that.

18. Having regard to the factors taken in to account by the tribunal, it cannot be said that it reached a conclusion, in the exercise of its discretion, that it was not entitled to make.

Conclusion

19. There is no merit in any of the grounds of appeal. The appeal is refused.