



EMPLOYMENT TRIBUNALS

Claimant
Mr M Smith

v

Respondent
Sterlite Technologies UK
Ventures Limited

PRELIMINARY HEARING

Heard at: London South by CVP

On: 4 November 2024

Before: Employment Judge Truscott KC

Appearances:

For the Claimant: In person
For the Respondent: Mr J Munro solicitor

JUDGMENT on PRELIMINARY HEARING

1. The claimant's claim of discrimination was presented within the time limit imposed by section 123 of the Equality Act 2010. Accordingly, the Tribunal has jurisdiction to entertain the claim.
2. If the claimant's claim of discrimination was not presented within the time limit imposed by section 123 of the Equality Act 2010, it is just and equitable to extend the time for the presentation of the claim. Accordingly, the Tribunal has jurisdiction to entertain the claim.

REASONS

Preliminary

1. This preliminary hearing was fixed at a Case Management Hearing on 24 July 2024 in order to determine whether the claimant's claim of disability discrimination should be struck out as being out of time. That hearing also set out the issues to be decided at this hearing, as follows:

Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 23 May 2023 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section

123 of the Equality Act 2010? Given the Claimant confirmed by letter to the Tribunal dated 20 February 2024 that the last act of discrimination was his dismissal of 17 May 2023, the Tribunal will decide:

1.2.1 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.1.1 Why were the complaints not made to the Tribunal in time?

1.2.1.2 In any event, is it just and equitable in all the circumstances to extend time?

2. The claimant represented himself and said that he continued to be unwell because of his cancer treatment. The respondent was represented by Mr J Munro solicitor. The claimant had been ordered to provide a statement to this hearing addressing the issues above, he said he had done so but this was not available to the respondent or the Tribunal. The Tribunal took the evidence of the claimant orally.

3. There was a bundle of documents to which reference will be made where necessary.

Findings

1. The claimant commenced employment as Head of Delivery for the respondent on 7 November 2022. On 8 November 2022, he was diagnosed with bowel cancer and informed the respondent. He had an operation for that condition on 16 November 2022 and has been having treatment ever since including chemotherapy. His cancer is terminal. He described his mind as being “all over the place” and feeling unwell and tired.

2. The claimant’s employment was terminated by letter dated 18 May 2023. The terms of the letter are:

“...We will not require you to work your notice period and will terminate your contract with immediate effect. We will make a payment to you in lieu of notice on 30th June 2023.

I would like to summarise as follows:

1. Your last day of employment will be 31st May 2023
2. You will be paid as normal for May on 31st May 2023...”

3. In the period since 18 May 2023 in addition to the treatment above, he was overnight in hospital on two occasions.

4. ACAS early conciliation ran from 22 August 2023 until 26 September 2023.

5. The claim form was presented on 10 October 2023. The claimant has brought a claim for direct disability discrimination.

6. The contact with ACAS and the submission of the ET1 form were made by the claimant’s son as he was unable to do so.

Submissions

7. The Tribunal received oral submissions from the solicitor for the respondent.

Law

Just and equitable extension

8. Section 123(1)(b) permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable. Section 140B of the Equality Act 2010 serves to extend the time limit under Section 123 to facilitate conciliation before institution of proceedings.

9. The Tribunal has reminded itself of the developed case-law in relation to what is now Section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Some attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR 279, the approach adopted by Smith J. in **British Coal Corporation v. Keeble** [1997] IRLR 336, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

10. The Tribunal also noted in passing the guidance offered by the Court of Appeal in the cases of **Apelogun-Gabriels v. London Borough of Lambeth & another** (2002) IRLR 116 and observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

11. The Tribunal noted that it had been held that ‘the time limits are exercised strictly in employment cases’, and that there is no presumption that a tribunal should exercise its discretion to extend time on the ‘just and equitable’ ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, ‘the exercise of discretion is the exception rather than the rule’ (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but, more importantly, see LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** where he said in relation to what LJ Auld said “there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised.”

12. The Tribunal’s discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

- the length and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information;

the promptness with which the claimant acted once she knew of the possibility of taking action; and
the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

13. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

14. The Tribunal has additionally taken note of the fact that what is now the modern Section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as “the just and equitable power” has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

DISCUSSION and DECISION

15. The claimant was unwell at the time of the hearing but sought to extend time for his claim if that was needed.

16. The letter of termination is contradictory. It is dated 18 May 2023. On the one hand, it terminates employment with immediate effect but on the other hand states that the date of termination is 31 May 2023.

17. The Tribunal considered that the respondent is bound by the statement in its own letter that the employment ended on 31 May 2023. The Tribunal determined by reliance on the terms of the letter that the effective date of termination was 31 May 2023. That being so, the claim is in time.

18. If the alternative case is considered, and on some basis the EDT is 18 May 2023, the claim is 5 days out of time. The terms of the letter are sufficiently unclear as to make identifying relevant dates difficult. The Tribunal accepted the claimant’s evidence about his ill health. The only prejudice the respondent prayed in aid was that they would have a claim to meet which is significant in its own right. The respondent faces a focussed claim of a specific type of discrimination extending over a short period.

19. If it was necessary, in considering whether it was just and equitable to allow the claim to proceed, the Tribunal determined that weighing either separately or together the confused contents of the letter of 18 May 2023 and the claimant’s health and the consequences of his treatment as the relevant factors, that it is just and equitable to extend the time for lodging the discrimination claim, if need be, but the primary finding is that the claim is in time.

Employment Judge Truscott KC

Date 4 November 2024

Sent to the parties on:

20th November 2024

For the Tribunal:

**For the Tribunal
O.Miranda**