



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr N Welling

v

Safestore Limited

Heard at: Watford

On: 3 August 2018

Before: Employment Judge Jack

Appearances

For the Claimant: In Person

For the Respondent: Ms D Masters, Counsel

JUDGMENT

1. Time is extended for the presentation of the unfair dismissal claim.
2. The two complaints of discrimination are out of time. It is not just and equitable to extend time. Accordingly, the complaints of discrimination are dismissed.

REASONS

The issues

1. By an order of Employment Judge Manley sent to the parties on the 3 August of this year, the following issue was directed to be heard at an open preliminary hearing. The issue was whether the claimant's claims have been presented within time and if not, whether it was reasonably practicable to present the unfair dismissal claim in time and whether it is just and equitable to extend the time for the discrimination claims.
2. The claimant appeared in person with his partner Debbie McGuire. The respondent was represented by Ms Masters of Counsel. The respondent cited one authority Trevelyan (Birmingham) Ltd v Norton [1991] ICR 488.

The facts

3. The claimant was born on the 24 January 1960. He started work for the respondent on the 20 August 2001. On the 2 November 2017 he was

dismissed and a P45 was issued. On the 7 November 2017 the claimant appealed against his dismissal. There were subsequently a number of exchanges of emails on the 29 November, the 1 December and the 11 December in which the claimant appeared to accept that he had been dismissed on the 2 November. The appeal was heard on the 14 December 2017. There was then a substantial delay in producing the letter which decided the appeal despite chasing emails by the claimant.

4. On the 15 January 2018 the claimant approached ACAS. I will deal in more detail with what occurred on that day later. At any rate he made an online application for early conciliation and the following day the Early Conciliation Certificate was issued. On the 22 January 2018 the appeal against his dismissal was dismissed itself.
5. On the 29 January 2018 the claimant issued County Court proceedings claiming arrears of wages between the 2 November 2017 and the 22 January 2018. On the 20 February 2018 the ET1 in the current proceedings claiming unfair dismissal, age discrimination and disability discrimination was issued.

Discussion

6. The claimant's primary case is that he was only dismissed on the 22 January 2018 when his appeal was dismissed. If that is the case he requires no extension of time. I do not however accept that the 22 January 2018 was his date of dismissal. It is true that if the claimant's appeal had succeeded then he would have continued in his employment without any break. The converse is not however true. It is well established that an employer can summarily dismiss an employee whether the dismissal is just or unjust, fair or unfair, lawful or unlawful, it has the effect of terminating the employment relationship with immediate effect. In the current case the only proper legal analysis in my judgment is that the employment contract had ended on the 2 November 2017.
7. The law on time limits is as follows: under section 111 of the Employment Rights Act 1996 the claimant had three months from the date of dismissal to present his ET1 claiming unfair dismissal. Under s.123 of the Equality Act 2010 it is the three month starting with the date of the act to which the complaint relates, thus in principle the claimant had three months from the 2 November 2017 to bring his claims. However, before presenting a claim to the Employment Tribunal the claimant must now seek early conciliation from ACAS. Section 208B of the 1996 Act and s.140B of the 2010 Act give extensions of time where early reconciliation occurs. The two sections are in virtually identical terms and I will just read 207B, subsection 2. In this section:

“(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."

8. It is right to say that that legislation is completely opaque. Employment Judges have the advantage of a specialist programme to determine the dates of A and B Days and how that affects the cut-off date for the bringing of proceedings. That is a facility not available to litigants in person or I believe the profession at large and it is noticeable that Temple Bright LLP the solicitors for the respondents were unable to apply the legislation properly either. They, in their ET3 they prepared, suggest that there is only a one-day extension given. Ms Masters properly concedes that that is incorrect because in the current case section 207B(4) applies so as to give an extension of one month from the 16 January 2018.

Mr Wellings' knowledge

9. I turn then to Mr Wellings' knowledge. He received advice during his suspension by the respondent from a solicitor and was told about the three month time limit. He also, during that period, saw an HR specialist informally (a woman whose name he could only give as Kim) and whilst suspended he spoke to ACAS who said that they could not conciliate until he was dismissed. After his dismissal on the 2 November 2017 he spoke to them again and they advised that he should follow the internal procedures for appealing which is what he did. I find the fact that he knew of the three month time limit and the need to obtain an ACAS Early Conciliation Certificate.
10. Around this time, he also obtained advice from a solicitor, firstly through the Citizens Advice Bureau and secondly privately and he was told that his date of dismissal would be the date on which his appeal was decided. That advice, as I have explained, was wrong. However, in fact it does not seem to have had any material impact on the claimant, he appears to be a belts and braces man. This is shown by the County Court proceedings which he issued on the 29 January 2018 because he thought that the County Court proceedings had to be brought within the three month time period from the date of his dismissal. In fact, the time limit in the County Court is six years rather than three months.

11. On the 15 January 2018 he telephoned ACAS once again. They advised him that he should apply for an Early Conciliation Certificate on line. It was in the course of this conversation that ACAS told him that if he obtained an Early Conciliation Certificate he would get a one month extension. He assumed that this meant one month from the 2 February 2018. In my judgment that was a reasonable mistake for him to make, as a lay person it would be the reasonable conclusion to draw. A lay person would have no reason to think that it would be one month from the date of the Early Conciliation Certificate if ACAS did not say that expressly and I have to say it is not improbable that ACAS might have said something along the lines which the claimant says. An oddity of the current case is that the Early Conciliation Certificate was raised the following day (the 16 January 2018), normally the process takes a couple of weeks and time in those circumstances would have run from around the 2 February 2018.
12. The respondent relies on the case of Trevelyan's (Birmingham) Ltd v Norton [1991] ICR 488, that was a case in which the claimant had sought advice from his solicitors who were acting in the criminal proceedings which had been brought against him arising out of the issues which led to his dismissal. The solicitors told him that he should only apply for unfair dismissal once the criminal case was out of the way. The Employment Appeal Tribunal held that the fact that his own solicitors had misadvised him did not give rise to a ground for an extension of time.
13. The current case in my judgment is different that ACAS is a third-party government funded body and the claimant reasonably relied on the advice which they gave. He had no reason to doubt what ACAS had told him and therefore no reason to go and seek further advice from another person. In my judgment it was not reasonably practicable for him to present the unfair dismissal claim in time and I extend time for the necessary four days to allow him to bring the proceedings.
14. The test for extending time in discrimination claims is different. Normally, if a party satisfies the test of it not being reasonably practicable to present a claim, it will follow almost automatically that it too is just and equitable to extend time for the discrimination claims. There is, however, no automatic linkage in that way.
15. In my judgment the merits of the discrimination claim here are very poor indeed. The claimant accepts in his ET1 and before me that he is not suffering from any disability. There are rare cases in which a claimant can rely on discrimination against someone else suffering from a disability, for example, a mother who claims discrimination because of actions taken as a result of her disabled son but that is not this case. In the absence of a disability in my judgement the claimant has no claim to discrimination on that ground. Likewise, no proper claim for age discrimination has been pleaded.
16. The reason for dismissal according to the claimant when he was making his submissions was a breakdown in relations with Mr Lishman, one of his line

managers. That is not sufficient to show that there was any discrimination on the grounds of age. He can show no comparator. In the light of the negligible prospects of succeeding on either of the discrimination claims in my judgment it is not just and equitable to extend time and I therefore refuse to do so.

Employment Judge Jack

Date: 14 / 8 / 2018

Sent to the parties on:

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For the Tribunal Office