



EMPLOYMENT TRIBUNALS

Claimant: Mr I Fothergill

Respondent: Leeds & Yorkshire Housing Association Limited

HELD AT: Leeds

ON: 17 October 2019

BEFORE: Employment Judge Shulman

REPRESENTATION:

Claimant: In person

Respondent: Miss Clare Moore, Chartered Legal Executive

JUDGMENT

1. The claim of unfair dismissal is dismissed by consent.
2. The two race discrimination claims shall have time extended to validate them.
3. The applications for strike out/deposit order are dismissed.

REASONS

1. Introduction

The Claimant makes two complaints of race discrimination and made the further complaint of unfair dismissal but he accepts that he did not have two years continuous employment. Indeed the question of whether or not he was an employee is in doubt, although we did not hear argument on that question, because the Claimant accepted that the Tribunal had no jurisdiction to hear the unfair dismissal claim on continuity grounds, which was dismissed by consent.

2. The issues

- 2.1. The first issue is whether or not the Claimant, being out of time with his two claims, is entitled to have the period of three months extended on the grounds that it is just and equitable to do so, pursuant to section 123(1)(b) Equality Act 2010. He says his complaints arose on 15 January 2018 (or indeed possibly even 21 December 2017) and 18 February 2018 and his claim form was not presented until 27 June 2019.
- 2.2. The second matter is whether or not the claims or either of them should be struck out on the grounds that they have no reasonable prospect of success (Rule 37(1)(a) of the Employment Tribunals Rules of Procedure (Rules).
- 2.3. The final issue is whether or not the Tribunal should make a deposit order pursuant to Rule 39(1) of the Rules.

3. The law

- 3.1. With regard to the question of time limits there was a substantial part of the Claimant's argument that time should be extended relating to his ignorance of his rights. Regard must be had to **Perth and Kinross Council v Townsley** EAT 0100/10 which decided that such ignorance of rights must be genuine and reasonable.
- 3.2. Concerning strike out/deposit issues, as this is a discrimination case the law provides that special considerations arise if a Tribunal is to strike out a discrimination case on the grounds that it has no reasonable prospect of success – see **Anyanwu and Another v Southbank Students Union and Another** [2001] ICR 391 (Anywanwu) in which the House of Lords highlighted the importance of not striking out discrimination of claims except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination.

4. Facts/arguments

The Tribunal having carefully reviewed such evidence as was called before it and the documents in support thereof and having listened to the arguments finds as follows:

Time

- 4.1. By way of background the Claimant's job as a technical officer required him to carry out proper surveys in respect of the Respondent properties. It also required dealing with tenants' repair issues by inspection with a view to repairs being done and dealing with disrepair claims against the Respondent, the job of the Claimant being to investigate and defend claims as appropriate. The Claimant is a man of 20 years' experience in this area.
- 4.2. The Tribunal had to investigate the reason for and the length of delay. This the Claimant said in evidence was because he was not aware that he had any rights. He said that shortly after the incidents which are the subject of the claims he was being considered by the Respondent for the job of a contracts manager. He had no knowledge of discrimination laws

in this country. Then he qualified this “to some degree” but not to do with employment. In general terms he said as a member of an ethnic minority he was aware of these things. But his real awareness did not come until after the termination of his arrangement with the Respondent, which took place on 3 May 2019 when, in early to mid-May, a friend told him about such things, as that friend had experience of employment discrimination. It also appears that he did after speaking to the friend look at the internet.

- 4.3. In relation to the cogency of the evidence Mr G Fisk gave evidence to the Tribunal and he is the director of customer services of the Respondent. There is clearly unavailability of some documents relating to the relevant period as there is a policy not to retain these after 12 months and, therefore, apart from the documents which were in the bundle, matters of evidence of which Mr Fisk’s evidence this morning demonstrate, come down to memory.
- 4.4. The Claimant says that he never took legal advice as he was not aware of any of his rights until June 2019. He says time was not mentioned.
- 4.5. As far as the claim itself is concerned there were two jobs which the Claimant applied for, one in a decision against him on 15 January 2018 and the second one resulting in a decision against him on 19 February 2018. The Claimant was not particularly concerned about the first decision, because he was satisfied that the other candidate did have a little more experience than him, but it was the appointment of the second candidate, a Mr Bennett, that upset him because in his view Mr Bennett did not have the experience but as he said and because of the possibility of another job he did not think about the question of his rights.
- 4.6. It is clear that the Respondent did not have responsibility for the delay in the Claimant making application to the Tribunal.
- 4.7. As to the question of prejudice, if anything, there is more prejudice to the Respondent than the Claimant because of the missing documentation. However Mr Fisk clearly described to the Tribunal the process of finding and appointing candidates. There is a short-listing and then applicants are scored against the person specification then the highest ranked are chosen for interview. He described this process as a careful recruitment process with criteria clearly set out and selection by two members of staff with a short list (six in this case) and an assessment made in the interview. As it happens in the second process Mr Bennett scored more highly than the Claimant. Mr Fisk suggested that his memory of matters had faded but he clearly described remembering his surprise and disappointment at the Claimant’s performance in interview and he remembered Mr Bennett doing well. He remembered the distinction between the two.

5. Determination of the issues

(After listening to the factual and in the case of the Respondent’s legal submissions made by and on behalf of the respective parties the Tribunal decides as follows):

- 5.1. Time - The Tribunal is of the view that the reasons which the Claimant gave in his evidence about his ignorance of his rights so far as he is concerned outweigh the importance of other matters to be taken into account. Of course the Tribunal has considered the prejudice against

the Respondent, because they are in effect affected by their own hand and policy and the destruction of documentation. Taking all matters into account the Tribunal finds that the Claimant's ignorance of his rights was genuine and was reasonable.

- 5.2. The Tribunal is not concerned with the time from termination (3 May 2019 to 27 June 2019) but much more with the length of time since what we will call the Bennett incident. As the Tribunal has indicated it was that incident which ignited the earlier claim.
- 5.3. In all the circumstances the Tribunal will extend time sufficient to validate the claim of the Claimant which was presented to the Tribunal on 27 June 2019 on the grounds that it is just and equitable to do so.
- 5.4. Strike out/deposit - We have already indicated to the parties and the Claimant has agreed that, having regard to the Claimant's ability to pay, a deposit order does not seem appropriate.
- 5.5. As to strike out there is a degree of conflict on the evidence, which means that it would be unwise to overlook the guidance of the House of Lords in Anyanwu. In the circumstances both the claims for strike out and for a deposit order fail.

Employment Judge Shulman
Date 23 October 2019