



EMPLOYMENT TRIBUNALS

Claimant: Mr W Broomes

Respondent: Wates Living Space Ltd and Wates Living Space (Maintenance) Ltd

Heard at: London South

On: 4 February 2019

Before: Employment Judge Moore

Representation

Claimant: Mr S Martins, Legal Representative

Respondent: Ms Gannon, Counsel

RESERVED JUDGMENT

1. The Claimant's claim that he was subjected to a detriment contrary to Section 44 (1) (c) Employment Rights Act 1996 is prima facie in time and can proceed to a full hearing.
2. The Claimant's claim for direct race discrimination contrary to Section 13 Equality Act 2010 is out of time and is dismissed.

REASONS

Background

1. This was a Preliminary Hearing to determine whether the Claimant's claim(s) were presented out of time. The claim was presented on 1 May 2018 following an ACAS early conciliation period which commenced on 11 March 2018 and ended on 3 April 2018. The Claimant was employed as Plumber Multi Trader. The date he commenced employment is in dispute and not determined for the purpose of this hearing, but this was either 15 November 2016 or 3 April 2017. He resigned on 14 December 2017 giving one week's notice.
2. The Claimant presented claims for unlawful deduction from wages, direct and indirect race discrimination and that he had been subjected to

detriment(s) contrary to section 44 (1) (c) ERA 1996. There was an agreed bundle and the Claimant gave brief evidence relevant to the issues to be determined at the hearing. I also took into account the Claimant's Scott Schedule and the information contained in his amended claim in reaching my decision. There was a list of issues and written submissions prepared by Counsel for the Respondent. The Respondent's position is that save for the unauthorised deduction from wages claim, all of the claims are out of time.

The Law

3. S44 ERA Claim

Complaints to employment tribunals

1 An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section [43M], 44, 45, [46, 47] [[47A, 47C(1)],] 47E [, 47F or 47G]].

.....

3 An employment tribunal shall not consider a complaint under this section unless it is presented—

- a. before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
- b. within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

4. For the purposes of subsection (3)—

- a. where an act extends over a period, the 'date of the act' means the last day of that period, and
- b. a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer[, a temporary work agency or a hirer] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonable have been expected to do the failed act if it was to be done.

4. Race discrimination claim

Section 123 EQA 2010 - Time limits

- 1) [Subject to section 140A and 140B] proceedings on a complaint within section 120 may not be brought after the end of—
 - a) the period of 3 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.

.....

(3) For the purposes of this section—

- a) conduct extending over a period is to be treated as done at the end of the period;
- b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

- a) when P does an act inconsistent with doing it, or
- b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Evidence in relation to time points

5. On 11 November 2017 the Claimant alleges he suffered an injury at work namely a cut to his hand (this was clarified at the hearing as having happened on 11 November 2017 and not 11 December 2017 as set out in paragraph 64 of his amended claim). The Claimant alleges the same day he brought this to the attention of his line manager Barry Hamilton who subsequently failed to record the accident claiming he could not find the accident book. The Claimant relies on this as an ongoing “failure to act”. A further ongoing failure to act was the Respondent was alleged to have failed to support the Claimant after the accident in failing to provide support and continuing to allocate emergency jobs. The Claimant also clarified that these other ongoing failures to act took place on 11 November 2017.
6. On 30 November 2017 the Claimant alleges he was asked to attend a property where he says asbestos had not been properly cleared. It should be recorded that the Respondent disputes this. The Claimant says he took some photographs of a broken asbestos panel in an area he had been sent to work. He contacted the office the same day to raise the matter with his supervisor. He spoke to Carly Roseman, manager, and informed her of the situation. Ms Roseman asked the Claimant if he had touched anything which he informed no and advised Ms Roseman that he needed to understand why he had been sent to the area when in his view the Respondent had full knowledge there was asbestos. The Claimant says Ms Roseman committed to look into the matter and get back to the Claimant who was expecting to receive a follow up to his complaint.
7. The Claimant’s last day of actual work for the Respondent was Thursday 7 December 2017. He was due to attend work on the following day but called in sick as he was suffering from a flu or cold. He remained unwell over the weekend. He says on or around 14 December 2017 he decided to resign. He had concluded that the Respondent was not going to act on his complaint about the asbestos incident as well as the discrimination he says he had experienced. He did not return to work after 7 December 2017. He recovered from his flu and cold on or by 14 December 2017.
8. The Claimant gave evidence that he initially did not intend to bring an employment tribunal claim however on reflection he decided he wanted to bring the Respondent to task as he had not had any response to his complaints he had raised. He therefore went online and attempted to submit a claim and discovered that he had to first go through the early conciliation process. He could not recall the date, but it was on or around 11 March 2018. He contacted ACAS on 11 March 2018. Early conciliation ended on 3 April 2018. It took the Claimant approximately 5 days to draft his claim and submit it which he did on 1 May 2018. After he submitted his claim, he

sought advice and through a recommendation became represented by The Employment Law Service. He had not sought legal advice until after he submitted a claim and believed that the Citizen's Advice Bureaus had closed down.

Discussion - Claims

9. The claims were discussed and clarified with the Claimant's representative at the hearing. It was clarified that the indirect discrimination claims were actually direct discrimination claims and therefore this claim was not pursued. These are set out below:

S44 (1) (c) ERA 1996

10. The Claimant relied upon a series of detriments he alleges he was subjected to for having raised matters of health and safety with the Respondent. The Respondent submitted that the Claimant's last date in work was 7 December 2017 and therefore this must have been the date upon which a series of acts came to an end.

11. The Claimant's case was that there was an ongoing failure by the Respondent and he had submitted his claim in time on the basis that under S 48 (4) there was a deliberate failure to act by the Respondent in respect of failing to investigate the asbestos incident. As that failure was ongoing at the time of the Claimant's resignation on 14 December 2017 this renders his claim in time.

12. Direct Discrimination

- a) Non payment of wages - this related to the 30 minutes pay the Claimant alleges he should have been paid under an express term of contract of employment. The Claimant claims that he has a different version of the contract of employment relied upon by the Respondent containing this express term. The Claimant alleges that white comparators were paid for this time and cited two comparators Matthew Hawkins and another team member called Scott (surname unknown). The date of the act complained of was set out in the Scott Schedule as 21.4.17 but this was relied upon as an ongoing act up until the date of his resignation as an ongoing failure to pay the claimant.

In the Claimant's amended claim he states that he submitted a claim for the 30 minutes pay on 21 April 2017 and continued to submit claims on his timesheets over the next few weeks. Upon checking time sheets and realising he had not been paid the Claimant says he then raised it with his supervisor and after several weeks he was told by his supervisor he would look into his pay. Further several weeks passed so the Claimant took his concerns to the branch manager who informed the Claimant he would not be paid and was not entitled to claim the payment for 7.30 – 8am and making such claims was fraudulent. From this it is reasonable to conclude that by around 2 June 2017 the Claimant knew that the Respondent was not going to make this payment.

- b) Deduction of wages - This claim was clarified to be the same as the above claim in relation to the 30 minutes pay.

- c) Failure to address written grievance. The Claimant had submitted a written grievance. It was accepted by the Respondent that such a grievance had been submitted 14 July 2017. There was a dispute between the parties about what happened with the grievance. The Respondent's position as set out in their ET3 is that they attempted on numerous occasions to contact the Claimant to progress the grievance but he did not reply. The Claimant alleges that the grievance was ignored. He relies upon a hypothetical comparator. The date in the Claimant's Scott Schedule as the date of the act complained of is set out as 17 July 2017. Other than this there was no evidence or submissions about the last act or failure to act took place in respect of the grievance.
- d) Denied the same benefit of receiving payment equivalent to a full day's wage for working less hours. This was described in submissions as a practice by the Respondent allowing white employees to claim payment for a full day even if they had worked less hours whereas black employees were not permitted to do this. The Claimant relies upon a comparator Matthew Hawkins. This practice is alleged to have occurred between December 2016 – November 2017. The last date this could have happened must have been before 28 November 2017 as this was the date the investigation into this practice (by the Claimant) began.
- e) Wrongly reprimanded and accused of falsifying time sheets (subjected to discriminatory disciplinary proceedings) whereas a white employee was the lead on the same job and was not subjected to disciplinary proceedings. The comparator relied upon is Matthew Hawkins. This related to a disciplinary process that was underway but not concluded at the time of the Claimant's resignation. The Claimant was asked to attend an investigation meeting on 28 November 2017 to discuss an allegation that the Claimant had stated on his timesheets that he had finished work at 7pm whereas his van tracker showed he had arrived home at 3pm. The Claimant was subsequently asked to attend a disciplinary hearing on 5 December 2017, initially convened for 12 December 2017 but re scheduled on 6 December 2017 to 15 December 2017. The Claimant was informed that he could be summarily dismissed. The Claimant alleges that this was direct race discrimination as he had been working with a colleague Matthew Hawkins on that day who had exactly the same movements as the Claimant and had also claimed he had worked until 7pm, yet the Claimant was subjected to an investigation and a subsequent disciplinary procedure whereas Mr Hawkins who is white, was not.
- f) Dismissal / resignation on basis the Claimant was entitled to treat himself as dismissed as a consequence of discriminatory and unjustified disciplinary proceedings. The last act complained of that led to the decision to resign must have been on or before 7 December 2017 as this was the last date the Claimant was actually physically present at work.

Submissions

- 13. The 11 March 2018 was date claimant first contacted ACAS so the 12 December 2017 is primary limitation date.

Discrimination claims

Non payment of wages

14. Under S123 (3) (b) time starts to run from the date the person decided upon it. On the Claimant's own case as set out in his amended claim at paragraph 61 this decision was made on or around 2 June 2017 at the latest. Therefore on the Claimant's own case by around 6 weeks from first claiming the 30 minutes pay on 21 April 2017 by say 2 June 2017, the Claimant was under no doubt that the Respondent had made a decision he would not be paid for this time.
15. The last act complained of was in respect of alleged discriminatory disciplinary proceedings. The Claimant was due to attend a Disciplinary hearing on 15 December 2017 but resigned the day before, so it never took place. The Claimant says that the act of arranging the Disciplinary hearing was itself discriminatory as a white colleague in same circumstances was not being disciplined. The reason the hearing did not take place was as Claimant resigned; it was common ground that it would have taken place but for the resignation. The Claimant submits that his resignation should be taken as the last act is a series of acts and this renders his claim in time.

Conclusions

Detriment Claim

16. The Claimant's case is that there were two incidents in November 2017 which amounted to circumstances that fell within S 44 (1) (c) ERA 1996. Firstly, that he cut his hand on 11 November 2017 and when he raised this with his supervisor he was informed the respondent did not have an accident book and there was a failure to record the accident. On the Claimant's own case, as set out in paragraph 112 of his ET1 and Paragraphs 65 and 66 of his amended claim his supervisor told him the day he reported the accident that he could not find the accident book and / or there was no accident book and on the same day he was not provided with support. The date of the failure to act must have been 11 November 2017. The Claimant must have known that the accident was not going to be reported on this date.
17. Secondly on 30 November 2017 that he was sent to work in an area where asbestos had not been removed. The Claimant then relies upon an omission or failure by the Respondent to properly investigate this incident. It should be noted that the Respondent's ET3 sets out that they cannot recall that incident and therefore there was no evidence before the Tribunal as to when (if at all) there was a failure to act by the Respondent or when the decision to do nothing was taken. However, if the Claimant's allegation is taken at face value, he had concluded by 14 December 2017, only a fortnight after the incident that the Respondent was not going to proceed any investigation as to why he had been allegedly sent to an asbestos site area. The Respondent may well be able to defeat this claim but based on the information before the Tribunal, I have concluded there is a prima facie case that the claim was presented within time.

Discrimination claims

18. I have to consider what the last act was relied upon by the Claimant. I have concluded that the ongoing series of allegedly discriminatory deductions from pay cannot bring the claim within time as the Claimant knew on or around 2 June 2017 that the Respondent was not going to pay him the 30 minutes. I agree with Counsel for the Respondent on this point that under S123 (3) (b) time starts to run from the date the person decided upon it.
19. Therefore the last act in question was the alleged discriminatory disciplinary proceedings. It is necessary to consider what were the acts to which the complaint relates. The primary limitation date was 12 December 2017 so anything that happened after that date potentially brings the complaint in time. It is common ground that the Respondent intended to conduct a disciplinary hearing, which the Claimant says would have been discriminatory on 15 December 2017. Had this taken place there would have been an act within time but it did not take place as the Claimant resigned on 14 December 2017. The Claimant's resignation cannot in itself be an act to which the complaint relates as it was not an act of the Respondent. It may have been an act in consequence of an act by the Respondent, but this is not what the Section requires. In my judgment the last potentially discriminatory act by the Respondent was rearranging the disciplinary hearing on 6 December 2017. Nothing, even on the Claimant's own case can be said to have happened after that date in respect of alleged discriminatory disciplinary proceedings.
20. In relation to the other conduct complained of (being victimised by colleagues for raising that Matthew Hawkins was guilty of the same misconduct as the Claimant) the last date he could have faced any such discriminatory behaviour from colleagues or bullying must have been on his last day at work namely 7 December 2017. Therefore, in my judgment, the discrimination claim has not been brought within time.
21. Turning now to whether it would be just and equitable to extend time. I did not hear any evidence from the Claimant or submissions about why it would be just and equitable to extend time. The Claimant was in good health. He did not do anything between his resignation and contacting ACAS on 11 March 2018 to progress his claim. He did not take any advice. Whilst he was hoping the Respondent would resolve matters there was no contact between the Claimant and Respondent after his resignation that could explain why he maintained this hope. For these reasons it would not be just and equitable to extend time.
22. A separate Case Management Order will follow to set down directions for the remaining claims and address the other matters not requiring a Judgment from the Tribunal.

Employment Judge Moore

Date: 15 February 2019

