



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr B AKINWANDE

Respondent

ABM FACILITY SERVICES UK LIMITED

OPEN PRELIMINARY HEARING JUDGMENT

HELD AT: London Central (CVP audio call)

ON: 15 October 2020

BEFORE: Employment Judge Russell (sitting alone)

REPRESENTATION:

Claimant: Mr Ogun, Solicitor

Respondent: Mr O'Neil , Solicitor

Judgment

The Tribunal has no jurisdiction to hear the Claimant's Claims which are dismissed .

Reasons

Findings of Fact

1. The Claimant was dismissed on 26 March 2019 and knew this on or before 12 April 2019 which he admitted (an email of the dismissal letter was sent to him and received by him on that day) , after first denying that he knew of this dismissal until October 2019. His unreliable evidence throughout this case has been a concern and there are many examples of this including the fact that he stated his address had changed from Applegarth House in December 2018 (after which time he expected the Respondent to contact him at a (then) unstated new address) before he then accepted he had still been asking the Respondent to still use the Applegarth address (which had remained a family home) in March 2019 . And also when he stated he had told James Okolombu (who gave evidence himself for the Respondent as well as evidence being given by the Claimant himself) of his successful Home office appeal in July when he said he was told the Respondents wanted him to wait until he had received his biometric card before coming back to work. This was (as he eventually accepted on cross examination and having been taken to the relevant text and documentary evidence) patently not true.
2. Whilst the Respondent's appeal outcome letter was not (at least initially) received by the Claimant he certainly knew of the outcome and his unsuccessful appeal on or before 24 September which he (again eventually) accepted and I find he probably

knew by 30 August. And in any event even if he was waiting for the outcome of the internal procedure / appeal there was no need for him to wait to make his claims after 24 September at the latest.

3. He received legal advice from Springboard , solicitors whether this was in late July or (more likely I find) towards the end of September 2019. And that advice included him being told , and /or reminded ,that he only had 3 months in which to make his ET claim from the date of dismissal of 26 March. Yet he did not do so and has given no medical evidence or other substantive reason for that failure . He stated that he chose not to act on the Solicitor's advice but understood it and when he did finally submit , through his advisers, an ACAS complaint he then left it a further month or so before filing his ET1 on 2 December making the ET claim around 3 months late.
4. The Respondent is not without some blame . For instance, it has seemingly not sent the Claimant his P45 and would now do so immediately if , on checking , this is the case. The appeal outcome was delayed getting to the Claimant . The Respondent used his wrong address when it should have known the correct one . However, the main fault for the delay in issuing the claim lies with the Claimant.

Legal Findings

5. The effective date of termination was 26 March and as a result all of the Claimant's complaints (direct race discrimination – being the act of dismissal, unfair dismissal, breach of contract in respect of notice pay , unpaid holiday and unpaid wages) were presented well out of time.
6. The Claimant's claim was presented on 2 December 2019 nearly 5 months late.
7. In the case of all his complaints other than the race claim I have to consider whether it was reasonably practicable to have presented those complaints in time and, if not, were they presented within such further period as was reasonable.
8. The time for presenting a claim is extended for the duration of ACAS Early Conciliation (section 207B Employment Rights Act 1996, section 140B Equality Act 2010, and Article 8B Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623).However given that the ACAS EC process was started after the primary time limit had already expired the ACAS " freezing" of the time limits does not assist the Claimant (*Pearce v Bank of America EAT 0067/19*).

Unfair Dismissal (section 94 Employment Rights Act 1996)

9. The provision on the time limitations applicable to this claim is set out at section 111 Employment Rights Act 1996

"S111 (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer. (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal— (a) before the end of the period of three months beginning with the effective date of termination, 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. “

10. The onus of proving that presentation in time was not reasonably practicable rests on the claimant: “[there is] a duty upon him to show precisely why it was that he did not present his complaint”. (*Porter v Bandridge Ltd 1978 ICR 943 CA*)
11. What is reasonably practicable is a question of fact - “*The test is empirical and involves no legal concept*” (*Wall’s Meat Co Ltd v Khan 1979 ICR 52, CA*) Shaw LJ.
16. It is not a question of reasonableness but whether it was impracticable to present a claim in time (*Trusthouse Forte (UK) Ltd v Halstead EAT 213/86, EAT*)
12. The existence of an impending internal appeal was not in itself sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit (*Palmer and anor v Southend-on-Sea Borough Council [1984] IRLR 119, CA*).
13. The Respondent correctly states

“*Whether a claim was submitted within a further reasonable time means a Tribunal must consider all the circumstances of the particular case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred.*”
14. It is clear from my findings that the Claimant knew of the importance of at least limiting his delay but simply chose not to be concerned - or at least concerned enough- about it. It was certainly reasonably feasible for him to have filed his claim on time.
15. As a result, he fails to pass the “reasonable practicability” test and nor has he filed his claim within a reasonable period thereafter. Despite by then having had full legal advice but choosing to ignore it .
16. The same test applies to the Claimant’s Breach of Contract claim (Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623) holiday pay claim (Regulation 30 The Working Time Regulations 1998) and Unlawful Deductions claim (section 13(1) Employment Rights Act 1996) in considering time limits and , if the claim is out of time , whether such claim is presented within such further period as the tribunal considers reasonable. “Not reasonably practicable” is to be given the same meaning whenever they appear in an equivalent context in comparable legislation. (*GMB v Hamm EAT 0246/00*).
17. And so, my findings in respect of the unfair dismissal claim apply to the Claimant’s other claim other than discrimination. In each case the “reasonable practicability” test is to be applied for the claims as none are within the time set against the primary 3 month time limit nor did the Claimant show he filed the claims within a reasonable period thereafter . So ,in each case, for the same reasons as stated above, the Claimant has failed to show the Tribunal has jurisdiction to hear any of these claims.

Direct Discrimination (under section 13 EqAct 2010)

“Section 123(1) Equality Act 2010

Subject to [sections 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”

18. The burden still rests with the Claimant on this time limit and “the exercise of discretion is the exception rather than the rule” *Robertson v Bexley Community Centre [2003] IRLR 434*. However the test of whether to extend time is wider than that with e.g. an unfair dismissal complaint and in the case of the discrimination complaint I have to consider if it was just and equitable to extend time.
19. In nevertheless determining that there are no just and equitable grounds for extending time I have taken account of the case authority of *Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA* including the factors set out in that case to be taken into account in determining whether to exercise my discretion or not. In particular the length of, and lack of reasons for, the (excessive) delay without any good reason delay count against the Claimant who knew of but choose to ignore the applicable time limits for at least 2 months.
20. My findings above in respect of the more onerous test applicable to e.g. unfair dismissal time limits still apply in respect of his discrimination claim. In particular the serious and wholly unnecessary delay.
21. It is going too far to say that just because an internal appeal procedure is unexhausted, delay to await its outcome will excuse an application otherwise out of time. Internal procedure is just one factor to consider. *Apelogun-Gabriels v London Borough of Lambeth [2002] IRLR 116 CA*. And in any event he had plenty of time to file his claim after he knew the appeal had been unsuccessful.

For all these reasons the Claims are dismissed as the Tribunal has no jurisdiction to hear them.

EMPLOYMENT JUDGE

9 November 2020
Order sent to the parties on

10/11/2020

for Office of the Tribunals