



EMPLOYMENT TRIBUNALS

Claimant: Miss T Inglington-Jemmott

Respondent: Picturehouse Cinemas Ltd

Heard at: In Chambers **On:** Friday 22 January 2021

Before: Employment Judge Matthews

Representation:

Claimant: In Person

Respondent: Mr S Stevens of Counsel

JUDGMENT

1. Miss Inglington-Jemmott's claim for wages by reference to section 23 of the Employment Rights Act 1996 was not presented to an employment tribunal before the end of the period specified in section 23 of the Employment Rights Act 1996. The employment tribunals have no jurisdiction to hear that claim.
2. Miss Inglington-Jemmott's claim that she was discriminated against because of the protected characteristic of her race by reference to the Equality Act 2010 was not presented to an employment tribunal before the end of the period specified in section 123 of the Equality Act 2010. The employment tribunals have no jurisdiction to hear that claim.
3. Accordingly, Miss Inglington-Jemmott's claims of discrimination and for wages (for the avoidance of doubt, being the only claims before the employment tribunals in these proceedings) are dismissed.

REASONS

INTRODUCTION

1. By a Claim Form presented to the London South office of the employment tribunals on 28 October 2019, Miss Tanya Inglington-Jemmott (the “Claimant”) brought claims of race discrimination and for “other payments”. It seems clear from the papers and the Claimant’s oral evidence that her claim for “other payments” is a claim for wages in respect of alleged unpaid overtime (as far as the papers are concerned, see pages 35-37 and 42 of the bundle).
2. On 21 November 2019, Mishcon de Reya, Solicitors for the Respondent Company, wrote to the London South office of the employment tribunals attaching the Company’s Response in these proceedings. The letter included an application to strike out the Claimant’s claim by reference to rules 27 and 37 of the Employment Tribunal Rules of Procedure 2013 (the “strike-out application”). The letter can be referred to for its full content. In essence the grounds for the application were:
 - The claim was made out of time;
 - The employment tribunals have no jurisdiction under the Modern Slavery Act 2015 (during this hearing the Claimant confirmed that any such claim was not pursued in the employment tribunals and it is not referred to again in the Judgment);
 - The claim had not been presented in a form that can sensibly be responded to and should have been rejected by reference to rule 12(1)(b) of the Employment Tribunal Rules of Procedure 2013;
 - The claim had no reasonable prospects of success.
3. The Tribunal will deal with the applications in that order. It is evident that, if the employment tribunals have no jurisdiction to hear the claims because they were out of time, the other applications fall away.
4. By a letter dated 29 February 2020 Employment Judge Cheetham QC set this case down for a preliminary hearing “*to consider the Respondent’s application to strike out the claim.*”
5. The Claimant gave evidence, principally as to the timing of the presentation of her claims to the employment tribunals. The Claimant

did not produce a written statement but was referred to some documentation as referred to in the findings of fact below.

6. The Tribunal had before it an “electronic” bundle of documentation and Mr Steven’s Skeleton Argument. Because the index to the bundle is included in the PDF bundle, the PDF numbering and the bundle numbering do not agree. References in this Judgment to pages are to the pages as numbered in the bundle.
7. The Hearing was a remote hearing using the Common Video Platform consented to by the parties. The Claimant was able to join only by audio link (mobile telephone) but was content to proceed on that basis. A face-to-face hearing was not held because of the constraints placed on such hearings by precautions against the spread of Covid-19. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.
8. In light of the communication difficulties and the time allowance for the hearing, judgment was reserved.

FACTS

9. The Claimant worked as a Food and Beverage Manager at the Company’s Ritzy Picturehouse in Brixton, London. The Claimant’s employment started on either 4 or 8 October 2018 and ended on 7 June 2019. If there is a difference between the parties about the start date, it need not be resolved for the purposes of this Judgment. The circumstances of the employment relationship ending are not clear but the Claimant is in no doubt that it ended on 7 June 2019 and the Respondent agrees. In the absence of evidence to the contrary, the Tribunal finds 7 June 2019 to be the effective date of termination of the employment contract.
10. The Claimant alleges acts of race discrimination at various dates, the last of which was on 3 June 2019 (35).
11. The Claimant clearly contacted ACAS because ACAS issued an Early Conciliation Certificate under reference number R528689/19/37. The Certificate specified the date of receipt by ACAS of the EC notification as 5 August 2019 and the date of issue by ACAS of the Certificate as 5 September 2019 (13).
12. As noted above, the Claimant presented her Claim Form to the employment tribunals on 28 October 2019. In it the Claimant gave scant information about her claim. Box 8 was ticked to record that the Claimant was making a claim of race discrimination and a claim that she was owed other payments (6). There was a reference to modern day slavery (6) and to race discrimination, terms and conditions of

employment, work relations and bullying and harassment (8). Beyond that there was no information about the claim.

13. Again, as noted above, the Company's Solicitors made the strike-out application on 21 November 2019. In response to this the Claimant sent to the employment tribunals and the Company's Solicitors the two documents respectively headed "*Statement 26.04.20*" and "*Doc 2 (No reasonable Prospect of Success*" (29-38) (together, the "particulars"). These were, in effect, the Claimant's grounds for opposing the strike-out application and a detailed particularisation of her race discrimination claim, which also touched on the claim for other payments.
14. During the hearing the Claimant suggested that the particulars had been attached to her Claim Form. It was pointed out that this did not fit with the date on the particulars. The Claimant withdrew the suggestion.
15. In the particulars, the Claimant includes a heading "*Time bounds: Response*" (29). This includes the Claimant's response to the time points in the strike-out application.
16. The Claimant describes herself as dyslexic (29). The Claimant also writes that she had been receiving counselling for depression and anxiety and had been unable to go outside (29). The Claimant writes that she is sometimes unable to walk as a result of fibroids flaring up.
17. The Claimant says she had limited internet access at the relevant times. Notwithstanding, the Claimant confirmed she had been able to use the Google search engine to research cases from home and eventually filed her claim form on-line.
18. In the particulars the Claimant goes on to write this (29):

"Ignorance I was under the impression that the date of me making my application form was from the last contacted date made by Acas on the 1st October 2019, from this date I had 3 months to make my application...Due to suffering from the above matters I was very confused at this time suffering from depression.

Faulty legal advice

I also received information via Greenwich law Centre a support agency offered to my due to my current situation. That last correspondence that I have three month to complete my application from.

Technical problems. I do not have any internet access in my property to complete the application form”

19. The Claimant’s oral evidence was that she “*didn’t understand the information from ACAS*” and was “*told she had a further three months*”.
20. In one important respect, the Claimant’s oral evidence to the Tribunal was clear. The Claimant had not lodged her claim with the employment tribunals earlier than she did primarily because she was unaware of and misinformed about the time limits.
21. One aspect of the Claimant’s evidence on this subject was particularly unsatisfactory. The Claimant’s oral evidence was that she had not received any advice from Greenwich Law Centre before she lodged her Claim Form. This contradicted what the Claimant had written, as recorded in paragraph 18 above. These events took place over a year ago and, no doubt, the Claimant wished to put her case in the strongest light possible. Nevertheless, the Claimant’s evidence on this point was clearly wrong and it reinforced the Tribunal’s view that the Claimant’s evidence generally was unsafe.
22. It is clear from the bundle that, no later than 20 August 2019, the Claimant had been in touch with Greenwich Talk Time, from which organisation the referral to the Greenwich Law Centre would have come (39). In her oral evidence the Claimant said that she had received “*wrong legal advice from Greenwich Law Centre*”.
23. The Claimant’s particulars record that she had been in contact with “*Legal Employment Agency (Solicitors)*” (from the Claimant’s oral evidence this is a reference to a Solicitor at Greenwich Law Centre) and “*Union Representative*” (of which no further detail was forthcoming (31)).

APPLICABLE LAW

24. Section 23 of the Employment Rights Act 1996 (the “ERA”), so far as it is relevant, provides as follows:

“23 Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal -

(a) that his employer has made a deduction from his wages in contravention of section 13”....

“(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –

(a) in the case of a complaint relating to a deduction by the employer, the date of the payment of the wages from which the deduction was made,”....

“(3) Where a complaint is brought under this section in respect of -

(a) a series of deductions or payments,”....

“the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.”....

“(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.”

25. Section 123 of the Equality Act 2010 (the “EA”), so far as it is relevant, provides as follows:

“123 Time limits

(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120” [the Tribunal has not set out the relevant part of section 120 but it includes the complaints of discrimination that the Claimant appears to bring in these proceedings] “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.”

26. There are statutory provisions that, in many cases, will extend the time limits applicable to bringing claims for wages and discrimination in the employment tribunals where there has been a period of early conciliation under the auspices of ACAS. The relevant provisions here are section 207B ERA (wages) and section 140B EA (discrimination).

27. The Tribunal was referred to Mechkarov v Citibank NA UKEAT/41/16 [2016] ICR 1121, Hasan v Tesco Stores Ltd UKEAT/0098/16/BA and Mbuisa v Cygnet Healthcare UKEAT/0119/18/BA.
28. A recent Court of Appeal decision (Adedeji v University Hospital Birmingham NHS Trust [2021] EWCA Civ 23) cautions against using the traditional approach of going through the factors in section 33 of the Limitation Act 1980 when applying the “just and equitable” test. In his leading Judgment, Lord Justice Underhill made it clear that the focus in applying the test, should be on the factors behind the delay. Further, Lord Justice Underhill pointed out that the employment tribunals have a wide discretion in this area.
29. Lord Justice Auld made it clear in Robertson v Bexley Community Centre [2003] IRLR 434 (another case dealing with the “just and equitable” test) that there is no presumption that a tribunal should exercise its discretion to extend time, that time limits are exercised strictly in employment cases and the onus is on the claimant to justify the claimant’s failure. Lord Justice Auld was supported in this approach in Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 (again, a case dealing with the “just and equitable” test).
30. Sedley LJ said this in Caston (paragraphs 31 and 32):

“31. In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them.

32. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgement, to be answered case by case by the tribunal of first instance which is empowered to answer it.”

CONCLUSIONS

31. The claim for wages

32. The effective date of termination of the Claimant's employment contract was 7 June 2019. The Claimant contacted ACAS for early conciliation on 5 August 2019 and ACAS issued an Early Conciliation certificate notifying the end of the conciliation period as 5 September 2019. Section 207B ERA provides that the period from 6 August 2019 to 5 September 2019 (inclusive, that is 31 days) is not to be counted in calculating the time limit for presenting the claim in respect of wages. Therefore, the time limit for presentation of the claim expired on 7 October 2019. The Claimant presented her claim on 28 October 2019, some three weeks out of time. The claim for wages was not, therefore, presented to the employment tribunals before the end of the period of three months specified in section 23(2)(a) of the ERA. (For this purpose, the Tribunal has taken the date of payment of the wages from which the deduction was made as the effective date of termination of the contract of employment, 7 June 2019. That may be wrong, but it puts the Claimant's case on the point at its highest.)
33. The Tribunal must, therefore, decide whether or not it was reasonably practicable to present the claim in time and, if it was not, whether it was presented within such further period as the Tribunal considers reasonable. The onus of proving that presentation was not reasonably practicable in time is on the Claimant.
34. On the evidence, the Claimant's primary case is that it was not reasonably practicable for her to present the claim in time because she was unaware of and/or misinformed about the applicable time limits.
35. There are three difficulties with this.
36. First, the Claimant knew from her contact with ACAS (which began no later than 5 August 2019) that there were time limits. The Claimant says she was very confused by the information ACAS gave her on the subject. The Claimant also says, in essence, that she thought she had three months to lodge her claim starting on the last date she had contact with ACAS, which date was 1 October 2019. In light of the rest of the factual matrix, it is highly improbable that the Claimant did think that.
37. Second, the Claimant consulted a Solicitor at the Greenwich Law Centre before she presented her claim. The Claimant is unclear about when that happened.
38. Third, at some stage the Claimant appears to have contacted a trade union.

39. The Tribunal does not have evidence on which weight can be given to the last of these three factors, the contact with a trade union. The Tribunal will return to the second factor, the Claimant's dealings with ACAS. The third factor is the contact with a Solicitor at the Greenwich Law Centre. The Claimant produced no paperwork about this and was not forthcoming about the nature of any advice she received save that it was "*wrong legal advice*". As, in giving her evidence, the Claimant was focussed on time limits, the Tribunal concludes that the wrong legal advice was about time limits. It is trite law that a failure of this sort by professionally qualified advisers will not save an out of time claim that is subject to the "reasonably practicable" test.
40. Given the scant detail of the contact the Claimant had with Greenwich Law Centre, it might be open to the Tribunal to conclude that, notwithstanding, it was not reasonably practicable to present the claim in time. However, the Tribunal is far from persuaded that the Claimant was as ignorant of the time limits as she maintains. The Tribunal's conclusion on the written and oral evidence is that the Claimant probably did know about the time limits but was casual in her approach to them. Even if that conclusion is wrong, there is no question that the Claimant knew quite early on, from her contact with ACAS, that there were time limits. The Claimant says that the information was confusing. The onus was on the Claimant to clarify it. The Claimant now has no difficulty in understanding the time limits and, in the event, presented her claim, seemingly without difficulty.
41. In reaching its conclusion the Tribunal has taken account of the Claimant's illness, dyslexia and lack of access to the internet, all of which she clearly addressed successfully in the events leading up to presenting her claim.
42. The Claimant has failed to show that it was not reasonably practicable for her to present her claim for wages within the period allowed by the legislation. Accordingly, an employment tribunal cannot consider that complaint and it is dismissed.
43. It is not, therefore, necessary for the Tribunal to decide whether or not the complaint was presented within such further period of time as was reasonable.
44. **The claims of discrimination**
45. The date of the last alleged act of discrimination was 3 June 2019. Time ran from that date and the analysis set out in respect of the wages claim in paragraph 32 above is otherwise conducted in the same way for the discrimination claims. In this case, the applicable statutory provision is section 140B of the EA. The end result is that

the discrimination claims were presented three weeks and a few days outside the period of 3 months starting with the date of the last of the acts to which the claims relate. (The Tribunal makes no finding on whether or not there was “*conduct extending over a period*” for the purposes of section 123((3)(a) of the EA.)

46. The issue, therefore, is did the Claimant bring her proceedings in respect of the alleged act of discrimination after the end of such other period as the Tribunal thinks just and equitable. This is, of course, a very different test to the “reasonably practicable” test applied to the wages claim.
47. In this case, going through the balance of prejudice tests in section 33 of the Limitation Act 1980 has little value save to highlight the primary reasons for the delay in presentation in this particular case.
48. The Tribunal sees no particular general prejudice factor favouring either party. Nor do the extent to which the cogency of evidence is likely to be affected, the extent to which the party sued has cooperated with any requests for information or the promptness with which the Claimant acted once she knew of the facts giving rise to the cause of action have any bearing in the circumstances.
49. The delay was a little over three weeks, which is not particularly significant in isolation.
50. What are important are the reasons for the delay. These are explored in paragraphs 39 to 41 above. In the context of the “just and equitable test” the failure of legal advice referred to in paragraph 39 is no bar to the Tribunal extending time. The issues raised in paragraphs 40 and 41 are explored in the context of the “reasonably practicable” test but have even more relevance in the context of the “just and equitable” test. Having reached the conclusions set out in paragraph 40 and taking account of paragraph 41, the Tribunal does not see that it can be said to be just and equitable to extend the time limit. The Claimant has given the Tribunal no credible reason for doing so. In so deciding, the Tribunal has had the guidance in Adedeji, Robertson and Caston in mind.
51. The Respondent’s other applications
52. The Respondent says that the claim had not been presented in a form that can sensibly be responded to and should have been rejected by reference to rule 12(1)(b) of the Rules. In light of the Tribunal’s determinations on the issue of time limits, it is not necessary to decide this point.

53. The Respondent says that the claim had no reasonable prospects of success and should be struck out. Again, in light of the Tribunal's determinations on the issue of time limits, it is not necessary to decide this point.

Employment Judge Matthews
Date: 27 January 2021