



EMPLOYMENT TRIBUNALS

Claimant: Mr A Concepcion

Respondent: Disclosure and Barring Service

Heard at: Liverpool

On:

22 June 2018

Before: Employment Judge Buzzard

REPRESENTATION:

Claimant: Not in attendance – written submissions received

Respondent: Mr Williams of Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that the claimant's claims as presented on 27 March 2018 are dismissed having been presented to the Employment Tribunal beyond the three month limitation period for presentation of claims in circumstances where the claimant has failed to establish that it was not reasonably practicable for him to present the claims within time.

REASONS

Issues

1. This preliminary hearing was convened to deal with a number of potential jurisdictional and other preliminary issues which arise in relation to the claimant's claims. The preliminary hearing was ordered by Employment Judge Robinson who listed the potential issues to be dealt with as follows:

- (1) Whether the claimant's claims should be struck out on the basis that:
 - a. the claims were made out of time and it was reasonably practicable to bring them within time;
 - b. the claims have no reasonable prospect of success;
 - c. the claims have little reasonable prospect of success and a deposit order should be made;
 - d. the claimant cannot re-litigate previously struck out proceedings; and

and if the claimant's claims are not struck out,

- (2) whether the respondent's response should be struck out; and
- (3) whether the Home Office should be a respondent for all or any of the claimant's claims.

2. The approach taken at the preliminary hearing was to consider initially if the first point above; that is whether the claimant's claims were submitted within time and therefore within the jurisdiction of the Employment Tribunal.

3. Given the finding, explained below, that the claimant's claims were not submitted within time, the claimant's claims were all dismissed as being outside the jurisdiction of the Employment Tribunal to consider.

4. Accordingly, the further preliminary issues set out above no longer fell for determination.

Application for an anonymisation order

5. This preliminary hearing was initially listed as a private hearing. The listing was changed to an open hearing when it became apparent that there were numerous jurisdictional issues, rather than mere case management issues, to be dealt with at the preliminary hearing.

6. The claimant objected to the preliminary hearing being an open hearing, and requested that an order was made preventing the public disclosure of all aspects of the proceedings to preserve the claimant's "*convention rights*". This application was acknowledged by Regional Employment Judge Parkin by a letter dated 18 June, who indicated therein that the application would be treated as an application for an anonymisation order.

7. The claimant was not in attendance at the preliminary hearing and relied upon written submissions. The claimant's written submissions set out no detailed reason why an anonymisation order would be required. Having considered the claimant's pleadings and the issues to be dealt with at this preliminary hearing, it is unclear on what basis an anonymisation order would be either appropriate or necessary. This is, in part, on the basis that the initial issue, regarding the jurisdiction to hear the claims based upon the relevant time limit, does not require consideration of the detailed merits of the claims, or the identification of specifics set out in the claimant's claim form which could be amended by an anonymisation order.

8. In reaching this conclusion consideration has been given to the importance of open hearings and transparency in ensuring a fair hearing. This has been balanced against any potential concerns raised by the claimant, noting that no such credible concerns were specifically identified by the claimant.

The Law

9. The claimant's claims are that he suffered multiple detriments as a consequence of making public interest disclosures.

10. The time limit for presenting such claims is three months from the date of the detriment. The detriment can be an act or an omission. In the case that the detriment is an omission the date of that detriment is taken to be the date by which the act which was omitted to be done should reasonably have been done.

11. In the event that a claim is not presented within three months of the date of the detriment, the Tribunal only has jurisdiction to extend time in the event that it concludes that it was not "*reasonably practicable*" for the claimant to present his claim within three months. In such a case the claimant would only be granted such additional time which would have been reasonable to allow the claimant to present his claim.

The Facts

12. The claimant was not present at the hearing. The respondent was represented and made oral submissions. The claimant made written submissions. No evidence was heard.

13. On the basis of the submissions and pleadings the following relevant dates are apparent:

- (1) The claimant alleged he made a number of protected disclosures during his employment. His employment ended on 3 November 2016.
- (2) The claimant made a number of employment claims to the Employment Tribunal on 23 January 2017, having undertaken ACAS early conciliation between 8 December 2016 and 8 January 2017. This claim was made against the respondent.
- (3) The claimant's claim was subsequently dismissed by the Employment Tribunal, following the failure to comply with a deposit order made on 31 May 2017.
- (4) In August 2017 the claimant wrote to the Employment Tribunal indicating that he wanted to submit a further complaint of whistle-blowing. At that time no actual claim was presented to the Tribunal. The claimant appears to have believed that the dismissal of his claim for failure to comply with a deposit order was unlawful, in that the claimant's claim had been dismissed for failure to make a payment. The claimant appears to have confused the requirement to meet a deposit order with the requirement to pay an Employment Tribunal issue fee or hearing fee. The imposition of issue and hearing fees in the Employment Tribunal was ruled unlawful by the Supreme Court in late July 2017.
- (5) The claimant contacted ACAS on 12 March 2018 and then presented an Employment Tribunal claim on 27 March 2018. This claim was again against the respondent. It is this claim which the respondent now contends was presented out of time.

14. The claimant's current claim states in the final paragraph:

“In the interests of justice as I believe that I have been subjected to systematic and detrimental mistreatment during the course of my employment with the DBS my goodwill being taken advantage of and with attempts to undermine me and treat me as a scapegoat because of institutionalised failings concerned with the covering up of business malpractice regarding the procurement and management of multimillion supply contracts in account of the Public Interest Disclosure Act I herewith legitimately submit this claim and as such request that it is rightly accepted by the Employment Tribunal in accordance with the requirements of section 48(3)(b) of the Employment Rights Act 1996.”

15. The claimant does, prior to this concluding paragraph of his ET1, set out many of the factual events which were referred to in the claim against the respondent which he presented in 2017, which was dismissed for failure to pay a deposit order. In addition, the claimant makes reference to correspondence with the National Audit Office and the publication of an investigation report by the National Audit Office on their website on 1 February 2018. Further, the claimant refers to correspondence from the National Audit Office to him dated 23 February, which he alleges only partly addresses the concerns he raised with the National Audit Office in his original disclosures to them. The claimant responded to the National Audit Office by a letter dated 25 February 2018 and copied that letter to his Member of Parliament.

Findings

16. The claimant's employment ended in November 2016. The claimant was employed by the Disclosure and Barring Service.

17. The claimant presented a claim which set out that his employer subjected him to detriment for making a disclosure in 2016 throughout the course of his employment. This claim has been presented to the Tribunal approximately 16 months after the course of his employment ended. Given the claimant alleges detriments during the course of his employment, it is clear that the claim was presented approximately 16 months after the last potential detriment.

18. The claimant does refer to actions by the National Audit Office, and also in correspondence to the Home Office. However, neither of these parties were the claimant's employer.

19. Accordingly, there was a clear delay of approximately 16 months between the last detriment to which the claimant alleges he was subjected by his employer (or former employer) which is well in excess of the three month limitation period. Further, the claimant was clearly aware of his right to make an Employment Tribunal claim having done so in 2017. The fact that the claimant's Employment Tribunal claim arose out of apparently the same facts, albeit potentially a different head of claim being raised on the basis of those facts, further suggests that the claimant was fully aware of his right to make a claim.

20. In addition to this, the claimant stated quite clearly in correspondence during August 2017 that he wished to make a claim on the basis of a detriment being suffered because he made a protected disclosure.

21. In the circumstances it is clear that it was reasonably practicable for the claimant to present his claim within the time limit. In addition, given the claimant's correspondence with the Employment Tribunal in August 2017, even if it were not reasonably practicable for the claimant to have presented his claim before then, it clearly was unreasonable for him to wait until March 2018 to present a claim.

22. The actions of the National Audit Office and/or the Home Office, which occurred more recently, cannot amount to a detriment for the purpose of litigation against the claimant's employer within the Employment Tribunal. This is for the simple reason that those alleged to have committed such acts and/or omissions were not the claimant's employer, or former employer.

23. The contents of the claimant's letter of resignation, which was before the Tribunal, were also considered. In this letter the claimant states that he has made a protected disclosure and specifies the nature of that disclosure and to whom the disclosure was made. This further suggests that the claimant was aware of his rights to make a claim as at the date of his dismissal, or at the latest at the date he presented his initial claims to the Employment Tribunal, which were subsequently dismissed for failure to pay a deposit order.

24. It is noted, in consideration of this preliminary jurisdictional point, that where a claimant has presented his claim to an Employment Tribunal the burden lies upon the claimant to establish that the claim is one which he is eligible to make. An important part of the eligibility requirements is that the claim was presented to the Tribunal within the appropriate time limit, or that an extension of time should be granted. The claimant's written submissions do not come close to setting out an explanation which would discharge this burden of proof. The claimant chose not to attend the preliminary hearing and accordingly presented no evidence to the hearing in relation to this. The claimant was given every opportunity to attend and expressly confirmed to the Tribunal, in writing, in advance of the hearing, that he did not intend to be present. The claimant submitted detailed written submissions in relation to a number of potential issues and complaints which were fully considered by the Tribunal. The conclusion was that the claimant's absence from the Tribunal was entirely voluntary.

Employment Judge Buzzard

Date ___15 July 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON
18 July 2018

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