



EMPLOYMENT TRIBUNALS

Claimant
Mr K Jaff

v

Respondent
Bestway Wholesale Ltd

PRELIMINARY HEARING

Heard at: Watford

On: 28 March 2018

Before: Employment Judge Smail

Appearances:

For the Claimant: In person
For the Respondents: Mr P Gorasia, Counsel

PRELIMINARY HEARING JUDGMENT

1. The unfair dismissal claim is dismissed, having been presented out of time.
2. It is just and equitable to entertain the claimant's disability discrimination claim which proceeds.

CASE MANAGEMENT ORDERS

1. The respondent must indicate by **11 May 2018** whether it accepts the claimant is a disabled person by notifying the claimant and the tribunal its position. The claimant has today provided a consent form for the respondent to obtain all relevant medical records.

Listing of telephone preliminary hearing

2. There will be a telephone preliminary hearing on 30 May 2018 at 9.30am before, if possible, Employment Judge Smail, to make further case management orders.

The issues

3. The claimant submits that the respondent applied the following PCPs to him:
 - 3.1 Until July 2016 requiring him to do the delivery job without a driver's mate.
 - 3.2 Throughout, requiring him to perform the driver's job to include lifting heavy goods. He says that put him at a serious disadvantage and that reasonable adjustments would be:
 - 3.2.1 working with a drivers' mate up to July 2016
 - 3.2.2 working in the warehouse lifting lighter goods
 - 3.2.3 working in security
 - 3.3 The issue as to whether the claim in relation to the failure to provide a driver's mate is time barred is not affected by this judgment and remains an open issue.
4. The disability relied upon by the claimant is a lower back condition associated with disc damage.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

REASONS

1. By a claim form presented on 9 November 2017 the claimant claims unfair dismissal and disability discrimination. He was employed by the respondent wholesaler between 6 July 2007 and 6 June 2017. He was dismissed for allegedly using the van for personal matters. He was a driver. He says the dismissal was procedurally and substantively unfair. He claims disability discrimination it seems in terms of failure to make reasonable adjustments to duties, namely being given lighter duties to limit the pain caused by a lower back condition which he says amounts to a disability. On the face of it, his unfair dismissal and disability discrimination claims are arguable subject to limitation.

In this preliminary hearing I am to decide whether the claims have been brought in time or whether time can be extended.

2. The claimant was told by the CAB to refer his claim to ACAS early conciliation. He was given a leaflet. He filled in the EC notification online at his cousin's house assisted by his cousin's wife. He does not have the internet at home. This was on 2 August 2017. He had a phone conversation with Ian Gregory, the conciliator, on or about 5 August 2017. Mr Gregory said he would make contact with the respondent. The claimant indicated he would probably want to go to court anyway but it was left that the respondent would be contacted.
3. The claimant heard nothing further until he chased up the conciliator on 8 November 2017, some three months or so later. The conciliator told him that the conciliation certificate had been emailed to him on 2 September 2017. Indeed, the email was duly found that day, on 8 November, in the junk mail folder on the computer at his cousin's house. That it was in the junk mail folder has less significance than at first it seemed in the case because the claimant accepts that he had not been monitoring his emails, nor had his cousin nor his cousin's wife. Upon learning of the fact that the conciliation certificate had been emailed, the claim was issued the following day on 9 November 2017.
4. The dismissal being on 6 June 2017 the primary period of limitation on the face of it expires on 5 September 2017, that has to be adjusted for the conciliation dates. The certificate having been issued prior to the expiry of the primary period of limitation, the 31 days duration of the conciliation period has to be added making the adjusted primary period of limitation to be 6 October 2017. The claim was in fact presented, as we know, on 9 November 2017 some one month and three days late.
5. The time limit for unfair dismissal is laid down in s.111(2) of the Employment Rights Act 1996:

“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.”
6. In terms of the time limit for the disability discrimination claim, that is provided for by s.123 of the Equality Act 2010 which provides at sub-section 1:

“Relevant proceedings may not be brought after the end of -

- (a) The period of three 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.”

7. I analyse the disability discrimination claim and the failure to make reasonable adjustments as operating throughout the latter period of the claimant's employment including up to his dismissal. The claim is that lighter duties should have been provided. There is a passage in the claim which makes reference to having some assistance in the later period but I reject Mr Gorasia's invitation to interpret the claim form as meaning that the last act of discrimination was some 15 months prior to the presentation of the claim. I interpret both the unfair dismissal claim and the disability discrimination claim as operating as at the last date of employment being 6 June 2017.
8. The claimant's explanation for the delay is that he was expecting a return call from the ACAS conciliator. He never got one. Time had passed in the meantime. During that time he was suffering from his back condition and caring for his autistic four year old child who requires intense supervision. There is no dispute from the respondent that the claimant has an autistic child. The claimant is a manual worker with limited English. That he suffers from pain in the back and is heavily pre-occupied with caring for his disabled son is confirmed in a statement from Mata Thorburn, a social worker employed by Brent Council in the capacity of a senior family support worker.
9. Mr Gorasia on behalf of the respondent submits that the claimant could have rang ACAS back earlier to check the position. He could have rang back earlier than the three months it took him to do so. Similarly, he could have monitored his emails either by himself, his cousin or his cousin's wife and of course the claimant sent the conciliation notice by email on 2 August. I have concluded that Mr Gorasia's submission is regrettably right. It seems to me that the claimant could and should have rang back some four to six weeks after his conversation with the conciliator on or about 5 August to check the position. He could and should have monitored his emails, after all he sent by email the ACAS notification. If he had done any of those things by four to six weeks after first contact he still would have had plenty of time to present a claim by 6 October 2017. I have somewhat struggled in reaching this conclusion because I do see the claimant has limited English and has had to rely on advice, for example, from the Citizens Advice Bureau, but applying the phrase "was it reasonably practicable", well it was reasonably practicable for him to perform those checking activities. So, I have been unable to make a finding that it was not reasonably practicable for the claimant to present his unfair dismissal claim in time. Accordingly, his unfair dismissal claim fails.
10. That said, I accept the explanation that he has given to me. I accept that he assumed there would be a phone call back from ACAS and even though he might have checked earlier he was awaiting a response and was concerned in the meantime with his own health and with caring for his child. I accept that explanation. It is an explanation which explains the delay and approaching the issue of a just and equitable extension of time for discrimination, it is important that he does have an explanation and an explanation he has.
11. Further, the respondent does not adduce evidence to say it is in any sense disadvantaged by that short period of delay from dealing as a matter of evidence with the disability discrimination claim, which is going to be about reasonable adjustments and will involve, no doubt, an element of personal injury if indeed the

claimant was a disabled person. I take into account also that the claimant acted promptly as soon as he discovered the problem with the conciliation certificate. He presented the claim with the assistance of Ms Thorburn the following day so in that respect at least he acted promptly. So, I exercise my discretion to extend time for the disability discrimination claim. It is often on the face of it a contradictory position that the tribunal excludes an unfair dismissal claim but allows in a discrimination claim. It is contradictory in result but it is not contradictory in the sense that the legal tests are different. As I say, I have not been able to find a factual scenario to suggest it was not reasonably practicable to present the unfair dismissal claim in time. It was, but accepting the claimant's explanation otherwise and noting that the respondent is not evidentially prejudiced and noting that as soon as he was alert to the problem he put in a claim immediately, the claimant may proceed with his claim of disability discrimination.

Employment Judge Smail

Date: 27 April 2018

Sent to the parties on:

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For the Tribunal:

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