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EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr Odusinia

AND

Royal Borough of Kensington & Chelsea

Heard at: London Central

On: 17 December 2019

Before: Employment Judge Russell

Representation

For the Claimant: In person

For the Respondent: Ms A Palmer, of Counsel

JUDGMENT

The Tribunal has jurisdiction to deal with the Claimant's claims of discrimination, direct discrimination and victimisation and time shall be extended to allow these claims to continue to a full hearing. However, the Claimant's claim of breach of contract / unauthorised deduction of wages is dismissed.

Reasons

1. The Claimant's outstanding claims as of the hearing of 17 December were discrimination, direct discrimination and victimisation and breach of contract / unauthorised deduction of wages (he claimed that he had not been paid his legal entitlement to four weeks rather than three weeks' notice) his unfair dismissal having previously been dismissed as he did not have two years continuous employment.

2 However, the Claimant initially failed to get an ACAS EC Certificate. He says that he was unaware that this was a breach of the statutory requirement as a pre-condition to making the Employment Tribunal complaint. His original claim through his ET1 was filed on 7 March after an effective date of dismissal of 28 December 2018 and so his claim on the face of it was well in time but was rejected due to the absence of any Certificate and this happened on 5 April 2019. He contacted ACAS again on 15 April and a Certificate was issued on that same day and Employment Judge Potter determined the defect had been rectified and accepted as at 30 April but this was still subject to any potential argument on

time limits and in fact because of his initial failure to obtain the EC Certificate he was some 26 days out of time in filing his claims.

3 As a result, after a couple of false starts in terms of preliminary hearings, the matter came before me on Tuesday 17 December to consider the issues identified by Employment Judge Hodgson in his preliminary hearing of 23 October. Specifically had the Claimant's breach of contract been presented with the period allowed under regulation 7 Employment Tribunals extension of jurisdiction (England and Wales) order 1994 and if not was it reasonably practicable to present the claim in that time and if so was it presented in such further time as reasonable. Secondly, have the claims of discrimination and, victimisation been presented within the period allowed by s.123 of the Equality Act 2010 and if not, should time be extended to allow these claims as the Employment Tribunal may consider doing if it considers it is just and equitable to extend time.

4 It was not in fact disputed that none of the claims were presented in time so the focus of the hearing was if there was a justification to extend time. The Respondent did not provide written evidence by way of a statement and in fact was dilatory in complying with the Employment Tribunal Orders for which Ms Palmer, Counsel for the Respondent apologised. The explanation was there had been a change of personnel at the Respondent and that there was no prejudice to the Claimant who was content to rely on the recently served short bundle of documents and I observe that they contained principally pleadings and publicly accessible documents relating to online Employment Tribunal applications.

5. The Claimant gave evidence on Oath and claims that although he spoke to ACAS before he made the original claim on 7 March he was advised (when he told ACAS that the Respondent would, in his view, not consider any conciliation) that he did not need an early conciliation certificate and that it was "not a compulsory requirement". In any event that was his understanding of what was said although he now accepted that it was also a misunderstanding of the legal position albeit he did not know that at the time. He was reluctant to blame ACAS and in submission the Respondent's Counsel (Ms Palmer) stated it was inconceivable ACAS would have told him other than that ACAS EC Certificate was obligatory. And the fact that in her view he would never had been told that he could proceed without an ACAS Certificate and should have been, as an intelligent man, very aware of the requirements when filing or in the course of filing his online application. In summarising the legal principles for me to consider as to whether or not time should be extended Ms Palmer highlighted that the burden was on the Claimant to show that there was a justification for the delay and in view of the compulsory nature of the ACAS regime that the extension of time should not be granted. I was referred to the case in support of the Respondent's application of Robertson v Beckley Community Centre 2003 dealing principally with the determination as to whether or not it was just and equitable to extend time in a race discrimination case. These are my findings:

6. The Claimant did speak to ACAS. I cannot find that he was told that he could proceed without a certificate and it seems that this is most unlikely given

that this is a compulsory requirement in all but a very few cases and certainly it was a requirement in respect of all the Claimant's claims.

7. The Claimant did misunderstand the position. Whether this was his fault or that of ACAS. It was more likely to be his fault. However, I do find it was a genuine misunderstanding, he could have got the early certificate very quickly as he did on 15 April and there was no advantage to him in a failure to do so prior to filing his original claim on 7 March. He made his application on line and in do so he would have had access to information from a number of sources including Google and the ACAS website itself and should have seen that the early conciliation certificate was required. However, I accept his evidence that he says he did not. The Claimant did not have, in filing his claim, any legal or other employment advice but acted as a litigant in person.

8. His claim was well in time if he had got the EC certificate as he could have done. This is not a case where he did not bother to speak to ACAS pre filing his claim nor one where the original claim was filed outside the three-month period. So, he did not for instance even need the stay that he could have got from getting an EC certificate its simply that he did not do so and therefore his original claim was rejected for that reason and that reason alone.

Legal Position

9. The burden is on the Claimant here and the time limits given by the Employment Tribunal are short for good reason. There are also strict time limits particularly in respect of (in the Claimant's case) the claim of breach of contract – unauthorised deduction from wages. In that case the applicable law is contained within s.111 of the Employment Rights Act 1996 as well as in the Employment Tribunal Rules as identified by Employment Judge Hodgson. As the Claimant did not present his claim before the end of the three months beginning with the effective date of termination as explained above he is obliged under s.111(2) to do so within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the Claimant to be presented before the end of that period of three months.

10. The Employment Tribunal shall not however consider a complaint unless it is presented to the Tribunal in time or with such extension being granted. And in this particular case I cannot say that it was not reasonably practicable for the Claimant to have complied with the requirements of the Employment Tribunal as to time for filing the claim, with the requirement in respect of contacting ACAS prior to making his complaint, and in consequence I cannot give the extension in respect of his breach of contract claim. However, I note that the time limits in respect of his discrimination and victimisation claim are dealt with under a less stringent regime through s.123 of the Equality Act and in this case s.123(1b) says in respect of a claim outside the period of three months starting with the date of the Act to which the complaint relates that I am permitted to extend time for "such period as the Employment Tribunal thinks just and equitable" and I therefore can permit the extension of time if such an exception applies.

11. Turning now to the Robertson case which Counsel for the Respondent referred to me I do note that in the Court of Appeal summary it is stated that an Employment Tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time but that when Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. On the contrary a Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, the exercise of the discretion is thus the exception rather than the rule.

12. But the ACAS regime as a pre- conditioned to Employment Tribunal claims is a fairly new procedure. The Claimant is not represented and I found that he did act out of a misunderstanding and that this was genuine. I have also found that he could have been well in time if he had simply got the EC certificate and whatever the reason for his misunderstanding he was obviously shocked when his claim was rejected as he did not think that he had done anything wrong and when he did find out he then acted as expeditiously as he could to put matters right. Having given this considerable thought in these circumstances I do believe it is just and equitable to extend time in respect of discrimination and victimisation claims and in the particular circumstances of this case. In particular I believe that the Claimant was confused in his ignorance and his claim should not be dismissed merely because of a misunderstanding in the conversation that he had with ACAS. Particularly as acted swiftly to make amends. I can quite see how this might have happened although the Claimant should perhaps feel himself fortunate that the claim is not dismissed at this stage. But on balance having considered the positions of both parties and the reasons for the delay I will allow the disclination and victimisation claims to continue on the basis that time can be extended.

Employment Judge Russell

Dated: 13 January 2020

Sent to the parties on:

17 January 2020

For the Tribunal Office