



EMPLOYMENT TRIBUNALS

Claimant: Miss A Tariq

Respondent: Smart NYD Limited t/a New York Diner

Heard at: Manchester

On: 18 June 2021

Before: Employment Judge Slater

REPRESENTATION:

Claimant: In person

Respondent: Ms S Khan, Manager

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. I refuse the application to amend the claim to include complaints of breach of contract in relation to notice pay and failure to provide itemised payslips.
2. The Tribunal does not have jurisdiction to consider the complaint of unfair dismissal brought under section 103A of the Employment Rights Act 1996 (whistleblowing) which was presented out of time and this complaint is dismissed.
3. The Tribunal does not have jurisdiction to consider a complaint of “ordinary” unfair dismissal under section 98 of the Employment Rights Act 1996 because the claimant had less than two years’ service and this complaint is dismissed.
4. The Tribunal does not have jurisdiction to consider the complaints of unauthorised deductions from wages which were presented out of time and these complaints are dismissed.
5. The Tribunal does not have jurisdiction to consider the complaints of sexual harassment and the complaint of harassment related to disability which is about Ms

Khan allegedly pointing out the claimant's self-harm scars. These complaints are dismissed.

6. It is just and equitable to consider the following discrimination complaints out of time to the extent that the acts formed part of a continuing act of discrimination ending with the dismissal or shortly before the dismissal. These allegations are as follows:

- (1) A complaint of victimisation, that the claimant was dismissed because she raised allegations of sexual harassment;
- (2) The following complaints of direct age discrimination:
 - (a) making the claimant work 11 hours a day;
 - (b) in relation to the taking of breaks;
 - (c) in relation to deductions from wages when the claimant had forgotten items in the customers' orders;
 - (d) in relation to being paid less than the National Minimum Wage for her age whereas another employee, Peter, was paid more than the National Minimum Wage applicable to his age; and
 - (e) in relation to dismissal.
- (3) A complaint of indirect age discrimination, the provision, criterion or practice being that of having to throw out intoxicated customers and deal with violent and aggressive customers on her own.

7. These complaints will proceed to a final hearing together with the complaint of harassment relating to Ms Khan's email of 2 December 2019 which was presented in time. It will be for the Tribunal at the final hearing to determine whether the acts of discrimination earlier than the effective date of termination, or shortly before that date, formed part of a continuing act of discrimination ending with something on the effective date of termination or shortly before that date, and, if not, to decide whether it would be just and equitable to allow those earlier complaints to be considered out of time.

REASONS

Findings of Fact

1. The claimant was 16 years old at the time of relevant events. She was suffering from anxiety and depression from before the time she began working for the respondent. Her condition did not, however, at that stage prevent her either from working for the respondent or attending the college – she was a first year A Level student at that time. The claimant says, however, that her attendance at college was worse after she experienced sexual harassment from a fellow employee, which the claimant says stopped on 8 March 2019.

2. The claimant was dismissed with effect from 13 June 2019 on the claimant's account and on 4 May 2019 on the respondent's account. The exact date does not matter for the purposes of this decision.
3. The claimant was unaware of her rights to bring a Tribunal claim until this was suggested to her by her college counsellor in early November 2019. She then consulted the Citizens Advice Bureau and, on their advice, wrote the respondent a letter received on 11 November 2019. The respondent replied to this on 2 December 2019, having previously suggested by text that they meet, a suggestion which the claimant had rejected.
4. The claimant then contacted ACAS and obtained a certificate of early conciliation on 3 December 2019. The claim was presented to the Tribunal on 4 December 2019.
5. Although the claimant has not presented any medical evidence at this hearing, I accept her evidence that she suffered worse anxiety and depression after her dismissal than before. She found it difficult to get out of bed after her dismissal.
6. The claimant has access to the internet.

The Relevant Law

7. In relation to amendment applications, I apply the principles set out in **Selkent Bus Company Limited v Moore** [1996] ICR 836. I must consider all relevant factors, including time limits. I must consider the balance of hardship and injustice of allowing the amendment as against the injustice and hardship of refusing it.
8. The relevant time limit for bringing complaints of unfair dismissal, unauthorised deduction from wages, breach of contract and failure to provide itemised payslips is three months from the effective date of termination, other than for the unauthorised deduction from wages complaint, where the time runs from the date on which payment should have been made. If the claimant notifies ACAS of the potential claim under the early conciliation procedure within the relevant time limit, time spent in early conciliation will extend the time for presenting a claim. I need not explain the effect of early conciliation on time limits further because, in this case, the claimant did not notify ACAS within the primary time limit, so those provisions do not apply to extend time.
9. The complaint must be presented within that time limit unless it was not reasonably practicable to present it within that time. If it was not reasonably practicable to present it in time, the Tribunal will have the power to consider the complaint if they consider the complaint was presented within a reasonable time thereafter.
10. In relation to complaints of discrimination under the Equality Act 2010, the time limit is three months beginning with the act of discrimination, but the Tribunal may extend time to consider complaints if they consider it to be just and equitable to do so in all the circumstances.

Conclusions

The Amendment Application

11. The claimant seeks to add by way of amendment a complaint of breach of contract in relation to notice pay and a complaint of failure to provide itemised pay slips.

12. The complaints which the claimant seeks to add by way of amendment are new claims. They would have been out of time if they had been presented at the same time as the other complaints, and they are further out of time now. For reasons which I go on to give in relation to the complaint of unfair dismissal and unauthorised deduction from wages, I consider it would have been reasonably practicable to present those complaints at the time the claim was presented. Consistent with my conclusion which I go on to give that the Tribunal has no jurisdiction to consider the complaints of unfair dismissal and unauthorised deduction from wages, I refuse the amendment application in this case.

Jurisdiction – time limits

Unfair dismissal and unauthorised deduction from wages complaints

13. It is accepted that the claimant had less than two years' service and, therefore, the Tribunal does not have jurisdiction to consider what I will describe as a complaint of "ordinary" unfair dismissal. I have dismissed that complaint. However, the claimant has explained that she complains of unfair dismissal because of making a protected disclosure. No service requirement applies to this type of unfair dismissal complaint, brought under section 103A Employment Rights Act 1996.

14. The complaints of s.103A unfair dismissal and unauthorised deduction from wages were presented out of time. The Tribunal only has power to consider them if it was not reasonably practicable to present them in time and they were then presented within a reasonable time after expiry of the normal time limit.

15. Although I accept that the claimant had issues with her mental health, the claimant has not satisfied me that it was not reasonably practicable to present her claim in time. This is a difficult hurdle to overcome. The claimant has not satisfied me that she was not capable, within the three month time limit, of researching on the internet whether she could do anything about what she considered to be unfair dismissal and unfairness in relation to her wages, and then taking appropriate action. Information about making Tribunal complaints and time limits is easily available by searching on the internet. Given this, I conclude that the Tribunal has no jurisdiction to consider the complaint of section 103A unfair dismissal and the complaints of unauthorised deduction from wages and these complaints are dismissed.

Equality Act 2010 complaints

16. In relation to the complaints of discrimination under the Equality Act 2010, I make a distinction between, on the one hand, the complaints of sexual harassment and the complaint of harassment related to disability relating to the comments alleged to have been made by Ms Khan about the claimant's self-harm scars and, on

the other hand, the other discrimination complaints. All the other discrimination complaints are said by the claimant to have continued over a period ending with the effective date of termination or shortly before that.

17. The claimant says that the sexual harassment stopped on 8 March 2019. She then continued to work for the respondent until May or June 2019, depending on whether the claimant or the respondent is right about the effective date of termination. The claimant was, therefore, functioning sufficiently, since she could attend work, to be able to look into her rights and take action if she felt this was appropriate. In these circumstances I do not consider it would be just and equitable to extend time for the complaints of sexual harassment to be considered by the Tribunal on their merits.

18. The claimant says that the comment about self-harm scars was made once and on a date a couple of months before the effective date of termination. For the same reasons which I have given in relation to the sexual harassment complaints, I, therefore, consider that the claimant could have taken action within the relevant time limit but did not do so.

19. I conclude it would not be just and equitable in these circumstances to extend time to allow the complaints about sexual harassment and the comment about the self-harm scars to be considered.

20. In relation to the other discrimination complaints which have been clarified at this preliminary hearing, I conclude that, in all the circumstances set out in my findings of fact, it would be just and equitable to consider these complaints out of time to the extent that the acts form part of a continuing act of discrimination concluding with the effective date of termination or shortly before that. I have not heard evidence which would allow me to decide whether the earlier acts form part of a continuing act of discrimination ending with the effective date of termination or shortly before that. The Tribunal at the final hearing will, therefore, decide this point. If any acts are found to not form part of such a continuing act, it will be for that Tribunal to decide whether it would be just and equitable to consider those earlier complaints out of time.

21. The reasons I have considered, in particular, that it would be just and equitable to consider these complaints out of time are as follows:

- (1) The claimant was very young at the time, being 16 years of age;
- (2) She was ignorant of her rights;
- (3) Although she did have access to the internet which could easily produce answers to questions about employment rights, I accept that she was hampered in taking any action in looking into her rights by the depression she was suffering at the time;
- (4) Once alerted to her rights, the claimant took action swiftly. She took the action she understood she had been advised to take by the Citizens Advice Bureau of writing to the respondent, and then presented her claim swiftly after the respondent's reply to her grievance letter.

22. These complaints will go on to be considered at a final hearing on their merits, together with the one complaint of harassment which was presented in time.

Employment Judge Slater
Date: 25 June 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
28 June 2021

FOR THE TRIBUNAL OFFICE

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