



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr W Mielnik

London General Transport
Services Limited

PRELIMINARY HEARING

HELD AT London South

ON 5 May 2017

EMPLOYMENT JUDGE BALOGUN

Appearances

For Claimant: Mr J Neckles, Union representative

For Respondent: Mr I Maccabe, Counsel

JUDGMENT ON PRELIMINARY ISSUE

1. The claims are struck out for want of jurisdiction as they are out of time.
2. The claimant is ordered to pay the respondent £600 towards its costs.

REASONS

1. By a claim form presented on 17 February 2017, the claimant complains of unfair dismissal, direct race discrimination, harassment, unlawful deduction of wages and breach of contract (notice pay).
2. This was a preliminary hearing to consider 3 matters:
 - i. Whether to strike out the claims on grounds that they are out of time
 - ii. Whether to strike out the claims on grounds that they have no reasonable prospects of success.
 - iii. Whether to order the claimant to pay a deposit as a condition of being allowed to pursue his claims on grounds that they have little reasonable prospect of success.

3. I have decided to deal with 2(i) first on the basis that if the claims are out of time, then that will be determinative of the other (ii) and (iii).
4. There is a 3-month time limit for presenting these claims. In the case of unfair dismissal and breach of contract, time runs from the effective date of termination (EDT). In the case of unlawful deduction of wages, it is the date that the disputed sum was properly payable. In the case of discrimination, it runs from the date of the act complained of.
5. The EDT is in dispute. The respondent says that it was the 29 June 2016 when the claimant was notified of his summary dismissal. The claimant contends that it was the 17 or 18 October 2016 when he received the decision on his appeal against dismissal.
6. The general chronology is not in dispute. There was a disciplinary hearing on 28 June 2016 which resulted in the claimant being advised on 29 June 2016 that he was summarily dismissed for continued adverse driving standards. [65]. He appealed the decision and that appeal was heard on 28 September 2016. The appeal was unsuccessful and the claimant was informed by letter dated 14 October 2016 that the decision to dismiss was upheld. [91] The outcome letter would have been received by the claimant in the normal course of posting, on or around 17-18 October 2016.
7. The claimant's case, in essence, was that the EDT was 17/18 October 16' because the appeal was conducted by way of a re-hearing rather than a review and therefore re-dated the dismissal.
8. Much was made of this distinction in the evidence called for the claimant and in the cross examination of the respondent's witness. However, whether the hearing took place by way of review or re-hearing is of absolutely no relevance to the EDT and the arguments that Mr Neckles puts forward in support of this have no basis whatsoever in fact or law. There is nothing in the disciplinary procedure that supports the argument. For example, some procedures provide for the continuation of the employment until the appeal outcome. This was not the case here. The EDT has a clear meaning within section 97 Employment Rights Act 1996. That the employment was being terminated with immediate effect on 29 June 2016 was communicated to the claimant in clear and unambiguous terms and there was no reason for him to believe otherwise.
9. I am satisfied that the dismissal took effect on the 29 June 2016. That date is the date from which time runs for the unfair dismissal and breach of contract claims. Mr Neckles tried to suggest that the appeal was part of the discriminatory act complained of. However I reject that assertion as the ET1 makes clear that the only act complained of was the dismissal. The appeal process is not the dismissal and there is no separate claim in relation to it. So in respect of the discrimination complaint, time also runs from the EDT.
10. As far as the wages claim is concerned, the sum sought would have been due on a date on or before the EDT or, at the very latest, the next payday after it i.e. on or before end of July 2016.
11. The claim was presented on 17 February 2017 and therefore outside the 3 month time limit. The claimant is not assisted by an early conciliation time extension as conciliation commenced on 12 January 2017, after the time limit for presenting the claim had expired. It follows that all the claims are out of time.
12. The claimant presented no evidence as to why it was not reasonably practicable to present the unfair dismissal, unlawful deduction of wages or breach of contract claims in time. Although section 123 Equality Act 2010 gives the tribunal a discretion to extend

time in discrimination cases where the tribunal considers it just and equitable to do so, it is clear from the case of Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA that the discretion should be exercised exceptionally and that the burden is on the claimant to satisfy the tribunal that there are reasons why it should exercise its discretion. The claimant offered no evidence on this. In the circumstances, and having determined that the balance of prejudice lies in favour of the respondent, I have decided not to exercise my discretion to extend time.

13. The tribunal therefore has no jurisdiction to hear the claims and they are accordingly struck out.

Costs application

14. The respondent made a costs application pursuant to rule 76(1) of the Employment Tribunal Procedure Rules 2013. It was submitted that it was unreasonable for the claimant to continue to pursue his claim in the face of the ET3 response and the respondent's costs warning letter of 25.4.17 giving him the opportunity to withdraw without cost on the basis that the claim had no reasonable prospects of success. The application was resisted by the claimant.
15. After hearing the parties' submissions, I determined that the threshold for a costs order had been met. The claim was clearly without merit and that should have been obvious to the claimant at an early stage or, at the latest, by the time of the costs warning letter. The fact that the claimant continued to pursue the case regardless was, in my view, unreasonable and has resulted in the respondent incurring unnecessary costs.
16. The respondent's costs were in the region of £5000. However, having heard evidence as to the claimant's means, I have decided to order him to pay £600 towards those costs.

Employment Judge Balogun
Date: 31 May 2017