EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr O Majekodunmi **v NHS Professionals Limited**

Heard at: Watford **On**: 10 April 2017

Before: Employment Judge Bedeau

Appearances

For the Claimant: In person
For the Respondent: Ms S Omeri - Counsel

JUDGMENT

1. The claimant's application for a postponement of the hearing is refused.

2. The claimant's application to amend his claim form is refused.

3. The claimant's race discrimination claim was presented out of time and is struck out.

REASONS

Background

1. The claimant said that he was employed by the respondent in a permanent administrative and clerical capacity. He presented his claim form on 29 March 2016, claiming that his work colleagues had racially discriminated and abused him. He also alleged unfair dismissal, detriment and dismissal as well as unauthorised deductions from wages and unpaid annual leave under the Employment Rights Act 1996 and disability discrimination. When he complained, it took over some time for his grievance to be concluded. It was after a grievance was taken out against him and concluded did he present his claims before the tribunal.

2. The respondent denied the claims and averred that the claimant was engaged as a flexible worker on assignments and had not been an employee since 24 September 2014. It raised a jurisdictional issues and asked that the case be listed for a preliminary hearing.

3. This case has a history as there had been a preliminary hearing before Employment Judge Manley on 7 June 2016 during which the judge wrongly believed that the claimant was not present in the building and made orders in his absence. The claimant was in attendance, apparently in the waiting room, unaware that his case had been called. When EJ Manley later became aware that he was present in the building, the orders which she issued on 7 June 2016, were varied on 18 July 2016. She had listed the case for a preliminary hearing on 30 September 2016 for an employment judge to hear and determine, firstly, whether the claimant was employed by the respondent between 24 September 2014 and the termination of his registration on 15 December 2015? Secondly, whether any or all of the complaints have been presented outside the time limit and, if so, whether time should be extended to allow them to proceed to a final hearing? Thirdly, whether any or all of the complaints have no reasonable prospect of success and should be struck out? Finally, whether any or all of the arguments or allegations have little reasonable prospect of success?

4. The claimant was dissatisfied with the way in which proceedings were conducted on 7 June and complained about his treatment. That matter came before the Regional Employment Judge and the President of the Employment Tribunals. The outcome of which was that EJ Manley's conduct could not be described as judicial misconduct as it related to the conduct of proceedings and her conduct could not be faulted. The claimant, however, remained dissatisfied with the decisions taken by the Regional Employment Judge and the President.

5. The matter came before Employment Judge Heal on 30 September 2016 to hear and determine the preliminary issues as well as a late addition, namely whether the claims should be struck out under rule 37(1)(b), (c) or (d) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, because of the claimant's unreasonable conduct of proceedings; his failure to comply with the orders of the tribunal; and in not having actively pursued his claims.

6. The learned judge did not strike out the claimant's unfair dismissal, race discrimination and unpaid annual leave claims as he had been preoccupied with his reconsideration of EJ Manley's orders and in pursuing complaints against her. In addition, there were personal matters in his life at the time.

7. EJ Heal listed the preliminary hearing for the 10 and 11 April 2017 and stated that those matters which were to be determined following EJ Manley's orders, were the same with an additional issue of whether the race discrimination claim was presented out of time. She stated that Day A was 17 December 2015. Accordingly, any acts or omissions before 18 September was, potentially, out of time.

8. The claimant was given, effectively, one month to prepare his witness statement setting out further information in relation to his employment with the respondent; details of his direct race discrimination claim; details of his unpaid annual leave; and the specific matters which he was ordered to address in the judge's Case Management Summary and Orders. She warned him in her order that if the order was not complied with on or before 28 October 2016, the claim or part of it, to which the non-compliance relates, shall be dismissed without further order.

9. The claimant complied with the order and served his witness statement dated 10 October 2017. Upon reading that fairly lengthy document, it was clear that he focussed on his race discrimination claim and not on the other matters he was ordered to address by the learned judge. Having read the witness statement, she ordered that the unfair dismissal and the unpaid annual leave claims should be struck out as the claimant did not comply with her order. The out of time issue in relation to the direct race discrimination claim would be a matter to be determined at the preliminary hearing.

10. The tribunal informed the claimant and the respondent's representatives in a letter dated 21 November 2016, of EJ Heal's orders striking out the two claims. The claimant, before me, said that he did not receive that document but it is interesting to note that the following day, on 22 November 216, he emailed the tribunal stating the following:

> "Dear Judge
>
> I write in response to your notice of ruling of on my case that I did not comply with your order. May, inform your office that I will be appealing your decision with facts as expected. I think its evident that Watford Employment Tribunal will have to transfer my case away to another tribunal as it is becoming obvious daily that justice will always be sway to the big organisation for obvious reason.
>
> Am serving this as my notice of appeal of your decision kill the unfair dismissal and in paid leave allowance…."

11. The response by the tribunal was sent to the parties dated 6 December 2016, in which it was stated:

> "Thank you for your letter dated 22 November 2016, the contents of which are noted. Employment Judge Heal has instructed that I inform the claimant that:
>
> "The employment tribunal does not hear appeals.
>
> He may make an application under Rule 38(2) to have the order set aside on the basis that it is in the interests of justice to do so and explaining why the application was not made within 14 days of 21 November 2016.
>
> If he wishes to appeal, however, he must apply to the Employment Appeal Tribunal."

12. The claimant said that he also did not receive that letter from the tribunal.

13. The respondent, on 31 January 2017, applied for the time allocated for this preliminary hearing of two days, to be reduced to one day. They wrote, amongst other things, the following:

> "It is the respondent understanding that the tribunal initially listed the matter to be heard over two days based on the claimant having three heads of claim at the point of the preliminary hearing on 30 September 2016. On 21 November 2016 the tribunal confirmed to both parties that the claimant's complaints of unfair dismissal and unpaid annual leave had been struck out, and therefore only the complaint of race discrimination would proceed."

14. The claimant responded on 1 February objecting to the application as he wanted the matter to be held in public and made reference to calling on the Home Office to release his passport and other documents.

15. The matter came before EJ Manley, who, after considering a further email from the claimant on 7 February 2017, objecting to the decision to strike out his two claims, ordered that the two days' allocation for the preliminary hearing should remain undisturbed.

The issues

16. The issues before me are:

    16.1 The claimant's application for the postponement of the hearing.

    16.2 The claimant's application to amend.

    16.3 Whether the claimant's race discrimination claim was presented in time and, if not, whether time should be extended on just and equitable grounds?

The Evidence

17. I did not hear any evidence, only submissions. I, however, was referred to a number of documents by the respondent. In addition, I considered documents in the tribunal's file for assistance.

The Law

18. On the issue of postponing a hearing, I have taken into account rule 30A Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended and the case of Teinaz v London Borough of Wandsworth [2002] ICR 1471. In that case the Court of Appeal held that the tribunal's discretion is broad and must be exercised judicially. In Pye v Queen Mary University of London UKEAT0374/11, Langstaff J, President, held that the discretion must be exercised with "due regard to reason, relevance and fairness" and subject to the overriding objective. I have also taken into account Article 6, European Convention on Human Rights, namely the right to a fair trial.

19. The claimant raised the matter of his treatment by EJ Manley at the Preliminary Hearing on 7 June 2016. He accused various individuals and organisations of having manipulated his case and documents. He said he made an application for witnesses to be called but there had been no response. He was not prepared to deal with his case today as he is not a lawyer. The whole process, he said, was one of corruption and, as a consequence, he informed a number of people about his treatment including the Prime Minister as well as a few international organisations. The upshot of his application was that he was unaware of EJ Heal's order striking out the two claims. He believed, based on EJ Manley's more recent decision to allow the case to be heard over the two days, implied that today all matters would be considered, namely the three claims and issues arising therefrom. He also referred to some documents which he said were handed to him by the clerk to this tribunal and believed that the joint bundle had been reduced to 20 pages. For all of the above reasons, he applied for a postponement of the hearing.

20. Ms Omeri, counsel on behalf of the respondent, went through what happened at the hearing on 30 September 2016 as she was present. She explained to me that EJ Heal asked whether the claimant's attendance was the first time he attended a preliminary hearing, to which he confirmed that it was. The judge then gave him time to prepare his witness statement and took into account personal issues he was dealing with at the time. At his suggestion, the preliminary hearing was listed in April 2017.

21. Ms Omeri was of the view that if there was to be an adjournment, the case would not be any further forward as it was more likely that the same issues would be raised by the claimant. To assist the claimant EJ Manley, when she later became aware that he was present in the building, varied her orders to give the claimant more time to comply. The claimant did not appeal EJ Heal's order. For those reasons the hearing should proceed without a postponement.

Conclusion

22. I have taken into account the claimant's application and the response to it by Ms Omeri. I am satisfied that he was made aware, in September 2016, that this preliminary hearing would be heard on 10 and 11 April 2017. He had sufficient time, in fact more than what the tribunal would normally order in the circumstances, to prepare his case in relation to the issues EJ Heal had set down for me to hear and determine. I am also satisfied that he was aware that EJ Heal had struck out his unfair dismissal and unpaid annual leave claims in November 2016 as he responded to that order. In addition, he prepared a witness statement in preparation for this hearing. I asked the claimant, on five occasions, whether he was prepared to proceed today but he did not answer. I am satisfied that he was given sufficient notice and adequate time to prepare his case for hearing today. His application for a postponement is refused. There was also no medical reason advanced by him that would cause me to grant an adjournment.

Application to amend

23. During the course of the hearing I invited the claimant to clarify whether he was relying on additional matters over an above what he had stated in his claim form and in his witness statement. He told me that he was relying on a number of matters, namely that he was refused a copy of the minutes of the grievance meeting held with Mr Cameron Khan, Recruitment Operations Manager, and it was Mr Khan who conducted the grievance investigation. Also that Mr Khan and Ms Fiona Worrell, Senior Human Resources Adviser, refused to allow him to refer to documents about training and on his rights in relation to the grievance process. He also stated that the grievance outcome of 22 May 2015, was racially discriminatory; that the grievance appeal conducted by Ms Helen McMullan, Head of Organisational Development and Training, was also racially discriminatory, in that she advised him to "let go" and accused him of being racially discriminatory towards Julie, a fellow Nigerian. He said documents he requested were not disclosed; that the respondent preferred the evidence of Sandra, a white Hungarian national, in preference to his account; that he was the only one suspended; and that the termination of his registration was also racially discriminatory. He told me that in or around August 2015, he was homeless and it was a particularly difficult time for him. He was provided with accommodation by a member of his family and had access to a computer.

24. Ms Omeri submitted that the claimant did not include all of the matters which I have outlined in his claim form and he had not provided adequate reasons why he had delayed in raising them. As to the grievance minutes, she took me to documents which clearly disclosed that the claimant was provided with a copy of the grievance minutes for him to make any amendments and/or corrections to. He also knew, as the respondent had made it quite clear to him that he was always a flexible worker and not a permanent employee. She drew my attention to the documents in support of her submissions. In particular, she referred me to a letter dated 23 October 2014, in which the claimant was informed that he was suspended. Thereafter he was not given any further assignments. In the letter, it stated that the respondent's view was that he was a flexible worker. His registration was terminated by the letter sent to him by Ms Tamara Rubery, Human Resources Business Partner, on 15 December 2015 to which he did not appeal notwithstanding the fact that he was advised of his right of appeal. Ms Omeri submitted that the claimant did not allege, in relation to the internal proceedings, that Mr Khan and Ms McMullan had behaved in a racially discriminatory manner towards him.

25. Ms Omeri further submitted that if the claimant was told, as he had claimed in his witness statement, to await the outcome of the grievance investigation before contacting ACAS and before issuing proceedings, the grievance appeal outcome was communicated to him by way of a letter dated 9 September 2015, yet he did not contact ACAS in respect of proposed proceedings until 17 December 2015. He had been notified in writing on 21 October 2015, that the investigation into the complaint against him, lodged in September 2014, would commence. When he appeared before EJ Heal

he did not say to the judge that he was at the time or sometime in August 2015, homeless. He was given adequate time to prepare and serve his witness statement and to prepare for this hearing. No timeous application to amend had been made by him. There was no adequate or good reason provided by the claimant as to why his application to amend, made yesterday, was made late. In any event, having regard to the contemporaneous documentary evidence, the matters which he hoped to rely upon were, in themselves, weak claims. For those reasons, she invited me to dismiss the claimant's application.

The law

26. I have taken into account the cases of Cocking v Sandhurst (Stationers) Limited and another [1974] ICR 718, a judgment of the Court of Appeal; and Selkent Bus Co Ltd v Moore [1996] ICR 836, a judgment of the Employment Appeal Tribunal; and Ali v office of National Statistics [2005] IRLR 201, Court of Appeal. In addition, I have taken into account the Presidential Guidance on General Case Management.

27. In considering whether to grant an application to amend a claim form, the tribunal must engage in a balancing exercise taking into account all relevant factors and to have regard to the interests of justice as well as the relative hardship that would be caused to the parties in granting or refusing the application, Selkent. The factors which should be taken into account are: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

Conclusion

28. I have to consider the length of the delay and the reason or reasons for it. I am not convinced that the claimant had provided me sufficient and good reasons for his delay in making his application to amend. He said to me that he was homeless in August 2015 and yet when he communicated to the tribunal and to the respondent, it was clear that he was able to do so in sufficient detail. He sent detailed emails to the tribunal in relation to matters pertinent to his case. He also was able to challenge the conduct of EJ Manley by way of lodging a grievance. From reading his correspondence, he is an intelligent man, in my view, who runs a business called Educational Promoters Ltd and has a Bachelor of Honours degree. I am satisfied that he was, at all material times, able to put his case to a tribunal.

29. The delay stems from to him being advised await the outcome of the grievance. However, the outcome of the grievance appeal was on 9 September 2015 but his application to amend was made yesterday. The delay of one year and seven months was simply too long to grant the claimant his application without a very good reason for doing so. I was not satisfied that he had provided a good reason for the delay of such a length. His witness statement is quite detailed and, in my view, there was nothing stopping him from putting in those matters which he advanced before me as part of his race discrimination claim. Furthermore, the matters which he

relied upon, having regard to the contemporaneous documentary evidence, are, in themselves, quite weak and lacked merit.

30. For all those reasons, I have come to the conclusion that this application should be refused.

Out of time

The law

31. Under section 123 Equality Act 2010, a complaint must be presented within three months,

> "starting with the date of the act to which the complaint relates" (a), "or such other period as the employment tribunal thinks just and equitable," (b) and "conduct extending over a period is to be treated as done at the end of the period," (3)(a).

32. Time limits are to be applied strictly. The Court of Appeal held that the exercise of discretion on just and equitable grounds is the exception rather than the rule, Robertson v Bexley Community Centre [2003] IRLR 434. The factors the Tribunal may consider in exercising its discretions are: the reason for and the extent of the delay; whether the Claimant was professionally advised; whether there were any genuine mistakes based on erroneous information; what prejudice, if any, would be caused by allowing or refusing to allow the claim tom proceed; and the merits of the claim. There is no general rule and the matter is one of fact.

Conclusion

33. The final issue was whether the claimant's complaint of race discrimination was presented out of time? Day A was 17 December 2015, therefore, any acts or omissions before 18 September 2015, are potentially out of time.

34. The acts the claimant relied on ended on 24 September 2014. Notification to ACAS of his claim was made on 17 December 2015. An Early Conciliation Certificate was issued on 14 January 2016 and he presented his claim form on 29 March 2016. Even if I was generous to him and took into account the delay in concluding the grievance process which was on the 9 September 2015, as being the operative date in relation to time issue as he was advised to wait for the outcome of the grievance and thereafter to notify ACAS, he ought to have done so immediately after 9 September 2015. ACAS at the most would have taken six weeks within which to conclude conciliation that would have taken the matter to the end of October 2015. He should have presented his claim form by November 2015. He delayed in so doing and presented his claim form on 29 March 2016. He did not, in my view, provide a satisfactory reason for the delay that would allow me to exercise my discretion on just and equitable grounds. It is a discretion the Court of Appeal decided in Robertson that should be exercised in exceptional circumstances and I do not find that there are any exceptional circumstances in this case. He knew, I am satisfied, of employment

tribunals' time limits as he had earlier issued proceedings against another respondent in 2014.

35. I have come to the conclusion that his race discrimination claim was presented out of time and I do not exercise my discretion to extend time on just and equitable grounds. The tribunal does not have jurisdiction to hear and determine it. Accordingly, it is struck out.

36. It follows from this that the claimant has been unsuccessful in relation to the three matters which I had to hear and determine. He does not have any other effective claims and my judgment concludes all proceedings against the respondent.

37. My oral judgment was given at the conclusion of the hearing after which the claimant asked for written reasons.

_____
Employment Judge Bedeau

Date: 13 June 2017

Sent to the parties on:

.....
For the Tribunal Office