

mf



THE EMPLOYMENT TRIBUNALS

Claimant: Mr G Oloyede
Respondent: London Community Rehabilitation Co Ltd
Heard at: East London Hearing Centre
On: 30 April 2018
Before: Employment Judge Russell

Representation
Claimant: Mr U Eluwa (Solicitor)
Respondent: Ms A Boulter (Solicitor)

JUDGMENT

The judgment of the Employment Tribunal on the preliminary hearing is that:-

- (i) The application to reinstate is refused.
- (ii) The claims of age and/or race discrimination were presented out of time. It is not just and equitable to extend time.
- (iii) The claims of unfair dismissal, breach of contract and holiday pay were presented out of time. It was reasonably practicable to have presented in time.

REASONS

1. The Claimant was employed by the Respondent as a Probation Service Officer from 9 March 2001 until summarily dismissed for gross misconduct on 11 August 2016. The claim form and response both give the effective date of termination as 11 August 2016, the day of the disciplinary hearing. Today, Mr Eluwa tells me that the Claimant was only notified of his dismissal by letter dated 18 August 2016. This was sent by post. As such, the Claimant's case today is that dismissal was not effective until he received notice on 20 August 2016.

2. Section 207B(3) of the Employment Rights Act 1996 provides that in working out when time expires, the period of time between Date A and Date B should be

disregarded. If, however, the primary time limit would expire during the period starting with Date A and ending one month after Date B, then the time limit expires at the end of that period, see s.207B(4) ERA. The provisions apply sequentially and do not provide for alternative time limits, Luton Borough Council v Haque UKEAT/0180/17.

3. The Claimant commenced an early conciliation period with ACAS on 8 November 2016 (Date A). Early conciliation concluded on 8 December 2016 (Date B). Even if employment terminated on 20 August 2017, the primary time limit would have expired on 19 November 2017. Early conciliation extends the period by 30 days, so that the primary time limit would now expire on 19 December 2017 (the effect of s.207B(3) ERA). That is within the period beginning with Date A and ending with one month after Date B, so time expires at the end of that period (the effect of s.207B(4) ERA). In other words, the time limit expired on 8 January 2017 (one month after the end of conciliation). I reject as wrong in law Mr Eluwa's submission that one calculates the date under s.207B(4) and then adds the days spent in early conciliation under s.207B(3) ERA. The claims should have been presented on 8 January 2017. The claim form was not in fact presented until 20 January 2017 and was out of time even then.

4. Following termination of his employment, the Claimant found himself in a difficult position. He is a family man with five children. Having lost his job, he needed to make a number of difficult decisions and required financial assistance with day to day expenditure from a friend in Nigeria. He had so little money that at times he used food banks to feed his family. He unsuccessfully tried to borrow money from charities. There was some delay in the commencement of his Universal Credit payments. I do not know when payment started as the Claimant has not produced any bank statements or other financial information for the relevant period.

5. During the period following his dismissal, the Claimant sought legal assistance to bring his claim. He approached a number of law centres, solicitors and barristers but each quoted fees which were too high and which he could not afford. It was only when he found his current solicitors who offered to undertake the work pro bono that he felt able to present his claim. I do not have a precise date when the solicitors were instructed, however it must have been before 13 January 2017 when they wrote to the Respondent in what was effectively a letter before action.

6. On or around 20 January 2017, the Claimant's solicitors drafted the ET1 on his behalf, lodged it for him and made an application for remission in his name. By this date the claim was already out of time for the reasons set out above.

7. The Claimant's application for remission (or help with fees as it was formally known) was unsuccessful. I have been provided with a copy of part of the HMCTS decision letter dated 26 January 2017. It notes there are two types of benefit; one being income based and one contribution based. If benefit is income based then help with fees would be granted but if benefit is contribution based then certain sections of the form must be completed. It appeared to HMCTS that the Claimant was receiving contribution based benefits and that he had failed to complete one or more sections of the form. The part of the letter with the comments box giving details of this failure has not been provided to me today.

8. The Claimant was advised of his ability to appeal in writing setting out his full reasons for requesting the appeal and enclosing any further evidence in support. In the

alternative a payment of £250 was due by 13 February 2017. There is no evidence of any further application by the Claimant for help with fees nor of the required information being provided.

9. On 20 February 2017 the Claimant was advised that he had not paid the required fee and therefore his claim was rejected.

10. On 26 July 2017, in **R (on the application of Unison) v Lord Chancellor** [2017] UKSC 51, the Supreme Court decided that employment tribunal fees were unlawful and struck down the legislation which introduced them. Lord Reed held that the fee regime put people off making or continuing claims when bringing low value claims. In his opinion, no sensible person will bring a claim unless he can be virtually certain of success, that the award will include reimbursement of fees and that the award would be paid in full, and that **“if those conditions are not met, the fee will in reality prevent the claim from being pursued, whether or not it can be afforded.”**

11. The Supreme Court decision in Unison and the abolition of fees was widely publicised and generated considerable press coverage. This included steps which would be taken to enable applicants or claimants to apply to have their claims reinstated. The Claimant did not contact HMCTS to restore his claim which was rejected some 5 months earlier.

12. On 24 November 2017, HMCTS wrote to the Claimant’s solicitor to advise him that he could apply to have his claim considered for reinstatement. The letter stated that the application should be made as soon as possible and definitely within three months from the date of receipt of the letter.

13. The Claimant completed the application form for reinstatement on 19 January 2018.

14. The Claimant tells me that following the termination of his employment his financial problems were such that he was forced to find new accommodation, that he was not receiving letters and that he did not become aware of the possibility of reinstatement until a telephone call from his solicitor. The Claimant could not recall the date of the call, save that it may have been after Christmas. This was not the only matter upon which the Claimant’s memory was not entirely clear; others included the date he had first been advised by his current solicitor and whether any of the other lawyers he had approached had advised him of the three month time limit for a claim or the possibility of applying for remission of fees.

15. In advance of today’s hearing, the Claimant was ordered by Employment Judge Brown to send to the Tribunal and the Respondent a witness statement and copies of any documents on which he relies in reinstating his claim. The Claimant did produce a witness statement which I considered today. It comprised 12 paragraphs, each no longer than two sentences. It lacked detail on the central issue of the Claimant’s inability to pay the fees, stating simply **“the Claimant tried in vain to raise funds to lodge his claim at the Employment Tribunal”** and **“the Claimant was unable to raise the fee of £250 required to continue the proceedings”** and finally **“the Claimant avers that his claim was rejected because he could not pay the required fees”**.

16. The Tribunal have been provided with no financial information beyond the oral

evidence of the Claimant, no bank statements, no details of credit card bills, other debts or benefit payments during the relevant period. The Claimant's evidence is that all such evidence was provided in the unsuccessful application for help with fees.

Conclusions

17. Under the fees regime, the Tribunal had a discretion as to whether or not to reinstate a claim which has been rejected for failure to pay a fee or apply for a fee remission. The effect of the **Unison** decision is that otherwise valid claim forms rejected for failure to pay a fee may also be reinstated. There is not an automatic right to reinstatement, rather it is within the discretion of the Tribunal.

18. In deciding the application today, I considered it relevant to take into account the substantial causes of the initial rejection of the claim, the fact that the claim is now out of time, the relative prejudice to the parties (including a broad view of the merits) and whether the fees or any other factor warranted an extension of time. For the unfair dismissal and money claims, on the basis that it was not reasonably practicable for the Claimant to have presented in time and had done so within a reasonable time thereafter. For the discrimination claims, whether or not it is just and equitable to extend time on the facts of this case. The burden is on the Claimant to persuade the Tribunal that an extension of time is appropriate on the facts of his case; **Unison** grants no automatic extension of time.

19. I considered firstly whether the claim had been rejected for failure to pay a fee, in other words the effect of the fees regime. At first glance, this would appear to be the case not least as this is what HMCTS stated in its letter dated 20 February 2017. However, the Claimant has given evidence of extremely difficult financial circumstances of a sort which would certainly have entitled him to help with fees. The application for remission was not rejected because of the Claimant's finances but because he failed to complete the required form. He was given an opportunity to remedy this omission but did not do so to the satisfaction of HMCTS. There is no evidence of any further information being provided to HMCTS. This was at a time when the Claimant had the benefit of pro bono legal representation. The substantial cause of the rejection in February 2017 was the Claimant's failure to complete the relevant section of the remission application form.

20. As for time matters more generally, the claims should have been presented by 8 January 2017 and were already out of time by the date that the claim form was presented. As **Unison** recognised, many people were deterred from bringing claims at all because of the fees regime. That is not the case here. On the Claimant's own evidence, he was not aware of the need to pay a fee until advised by his current solicitors by which date the claims were already out of time. The substantial cause of the Claimant's failure to present his claims in time was his inability to afford legal representation. Whilst I have great sympathy with the Claimant and appreciate that he could not afford legal representation, the Tribunal deals with very many litigants in person who can and do present their claims in time without legal assistance. Indeed, many represent themselves successfully through to the conclusion of their claim. The inability to pay for legal representation was the substantial cause of the Claimant's delay to present his claim before 20 January 2017, it was not in any way the existence of the fees regime.

21. After the Unison judgment, the Claimant made no effort to reinstate his claim until prompted to do so by the HMCTS letter dated 24 November 2017. Even then, it took two months for the application to be made.

22. I have taken into account the relative prejudice to the parties. In refusing the application to reinstate, the Claimant is deprived of an opportunity to have his claims heard. By contrast, if I allow the application to reinstate the Respondent will be put to considerable time and expense in dealing with a claim that was out of time when presented, is substantially out of time now.

23. The claim as pleaded is that the Claimant was unfairly dismissed from his job as a Probation Officer at a disciplinary hearing. The reason for dismissal was gross misconduct, namely a criminal conviction on 29 March 2016. The Claimant's case is that the sanction was harsh, pre-determined and discriminatory. The details of complaint do not give particulars of the facts relied upon to found a claim in age or race discrimination. Today, the Claimant explained that the basis for the discrimination claims is that he (a Black British 59 year old) had been dismissed for a criminal conviction but that another employee (black Jamaican, possibly in his 40s but the Claimant was not sure) had not been. The claimant could not remember if the same decision makers had been involved in those cases; the comparator's offence dated back to 2010 or 2011. I am satisfied that the passage of time since dismissal to date has already substantially affected the quality of the evidence which a Tribunal would hear. The failure to give any particulars of discrimination in the claim form is such that the Respondent has not until now known the case alleged and therefore has not been able fairly to take instructions or investigate the same. Moreover, given the nature of the Claimant's employment and the fact that dismissal was because of a criminal conviction, the merits of the unfair dismissal, notice pay and discrimination claims do not appear strong. Whilst there is no detail of the holiday pay claim at all. The prejudice to the Respondent in being required to defend an apparently weak claim is greater than the prejudice to the Claimant at being deprived of the opportunity to advance such a claim.

24. For all of these reasons, I am not persuaded that it is appropriate in this case to exercise my discretion to reinstate the claim. Nor am I presented that it would be appropriate to extend time whether on the "reasonably practicable" or "just and equitable" test for claims which were presented out of time in the first place.

Employment Judge Russell

23 May 2018