EMPLOYMENT TRIBUNALS

Claimant: Mr. M Blenkinsop

Respondent: ASDA Stores Ltd

Heard: in public by telephone in the North East Region

On: 13 April 2023

Before: Employment Judge Ayre, sitting alone

Representatives:

Claimant: In person
Respondent: Mr. F Mortin, counsel

JUDGMENT AT PRELIMINARY HEARING

1. The name of the respondent is amended by consent to ASDA Stores Ltd.

2. The original claim for whistleblowing detriment is dismissed on withdrawal.

3. The Tribunal does not have jurisdiction to hear the complaint of breach of contract as the claimant is still employed by the respondent.

4. The claimant's application to amend the whistleblowing claim is refused.

5. The claimant's application for an anonymisation order under Rule 50 is refused.

6. The discrimination claims are struck out on the basis that they were presented out of time and there are no reasonable prospects of the claimant persuading the Tribunal that it would be just and equitable to extend time.

REASONS

Background

1. On 20 December 2022 the claimant presented a claim to the Employment Tribunal following a period of Early Conciliation that started on 6 November 2022 and ended on 18 December 2022. The claimant is still employed by the respondent but has not worked since 21 November 2020. He was suspended on 22 November 2020 and in December 2020 began a period of sickness absence which is ongoing. The claim relates entirely to matters which the claimant says occurred in the period prior to his suspension.

2. The case was listed for a Preliminary Hearing today to consider the following issues:

    a. Whether any of the discrimination claims should be struck out because they were presented outside of the time limit and the claimant has no reasonable prospect of showing that it would be just and equitable to extend time;

    b. Whether any of the whistleblowing claims should be struck out because they were presented outside of the time limit and the claimant has no reasonable prospect of showing that it was not reasonably practicable to present them in time, or that they were presented within a reasonable period;

    c. Whether any of the claims should be struck out in any event because they have no reasonable prospect of success;

    d. Whether the claimant should be ordered to pay a deposit as a condition of continuing with any of the claims because they have little reasonable prospect of success;

    e. Whether the claim should be transferred to the Newcastle Tribunal; and

    f. To make case management orders and list a further hearing as appropriate.

3. In advance of today's hearing the claimant made an application under Rule 50 of the Employment Tribunal Rules of Procedure for his name to be anonymised on all documents. I also considered that application.

The proceedings

4. There was a bundle of documents running to 84 pages. I heard evidence from the claimant and submissions from both parties. Mr. Mortin submitted a written skeleton argument for which I am grateful.

5. At the start of the hearing, it was agreed that the name of the respondent would be amended by consent to ASDA Stores Ltd.

6. We discussed in some detail the claims that the claimant is bringing. These are as follows:

    a. A complaint of direct sex discrimination relying upon hypothetical comparators. The less favourable treatment alleged by the claimant is:
        i. Toni Parkinson telling him to lift more shopping for customers 'because he is a big strong man' on a daily basis up to approximately 22 October 2020; and
        ii. Expecting the claimant to carry more shopping than women prior to his suspension on 22 November 2020.

    b. A complaint of harassment related to sex. The alleged conduct is the same conduct identified in the direct sex discrimination claim.

    c. A complaint of indirect age discrimination. The PCP (provision, criterion or practice) relied upon by the claimant is the requirement for all workers to work at the same speed. The claimant says that this placed employees in the 45-55 age bracket at a disadvantage, and placed him at a disadvantage, because they and he are less fit and unable to work as fast. This complaint relates to the period up to 22 November 2020.

7. The claim form also contained a complaint of breach of contract. I explained to the claimant that the Tribunal only has jurisdiction to hear claims for breach of contract if they arise or are outstanding on the termination of an employee's employment (Article 3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994). The claimant accepts that he is still employed by the respondent.

8. The claim form also contained a claim that the claimant had been subjected to whistleblowing detriment contrary to section 47B of the Employment Rights Act 1996. The claim form described the whistleblowing claim as "*based on verbal notifications from managers in Asda stating because I have previously taken a company to court for breach of contract they wanted me out*".

9. During the hearing I explained to the claimant the definition of protected disclosure contained in sections 43A and 43B of the Employment Rights Act 1996. I asked him to explain what protected disclosures he relied upon in relation to the whistleblowing claim. The claimant said that he had misunderstood the whistleblowing legislation and accepted that he had not made a protected disclosure about having taken another company to court. He indicated that he did not wish to pursue his original whistleblowing claim, and it was agreed that that claim would be dismissed on withdrawal.

10. The claimant then indicated that he wished to pursue a different whistleblowing detriment complaint. He said that he had made protected disclosures verbally on numerous occasions (he could not remember dates) to Toni Parkinson and Nick Jackson. He also said that the protected disclosures related to him not being given the correct PPE or equipment, being given duties that others were not given and to damage to his van. He said that he had been subjected to a detriment as a result

of making the disclosures in that he had been denied the correct equipment. He alleges that both the disclosures and the detriment happened before he was suspended.

11. As this is a new allegation it required an application to amend. I have set out my decision on the application to amend below.

Findings of fact

12. The claimant is still employed by the respondent but is currently on long term sick leave. He was diagnosed with depression following his suspension in 2020 and is still receiving treatment for his depression.

13. The claimant is not currently receiving any salary or sick pay from the respondent. He receives Universal Credit of approximately £400 a month. He is renting a house from his sister and pays £100 a month in rent. He has a car worth £3,000.

14. The claimant has his own business in the motor trade, which he has been running for some years. Whilst he has been off sick, he has continued to run his business, except for times when he was too ill to do so and has been applying for other jobs. He is not currently receiving any income from his business.

The Law

Time limits – discrimination claims

15. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination may not be brought after the end of:

> "*(a) the period of 3 months starting with the date of the act to which the complaint relates, or…*
> *(a) Such other period as the employment tribunal thinks just and equitable.*

16. Section 123 (3) states that:

> "*(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(a) Failure to do something is to be treated as occurring when the person in question decided on it.*"

17. Where a claim is presented outside the primary time limit, the burden is on the claimant to persuade the Tribunal that it would be just and equitable to extend time. There is no presumption that time should be extended, and extensions of time should be the exception rather than the rule (***Robertson v Bexley Community Centre [2003] EWCA Civ 576***).

Time limits – whistleblowing detriment claims

18. Section 48(3) of the Employment Rights Act 1996 provides that:

"*An employment tribunal shall not consider a complaint under this section unless it is presented –*

(a) Before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

Strike out

19. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides that:

"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –

(a) That it is scandalous or vexatious or has no reasonable prospect of success;
(b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious; …
(e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response…"

20. Strike out is a draconian sanction and not one that should be applied lightly. In ***Cox v Adecco and ors [2021] ICR 1307*** the Employment Appeal Tribunal gave guidance to Tribunals dealing with strike-out applications against litigants in person. It held that when considering strike out of claims brought against litigants in person, the claimant's case should be taken at its highest and the Tribunal must consider, in reasonable detail, what the claims and issues are. A Tribunal should not strike out a claim where it does not know what the claim is. There should, therefore, be a reasonable attempt at identifying the claim and the issues before considering strike out. The EAT also said that, if the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual tests that apply to amendments.

21. In ***Ezsias v North Glamorgan NHS Trust [2007] ICR 1126*** Maurice Kay LF commented that in order to meet the threshold of not having 'no reasonable prospects of success' the claim needs to have "a realistic as opposed to merely a fanciful prospect of success".

22. It is well established that in discrimination cases in particular the test for striking out a claim is a high one (***Anyanwu v South Bank University [2001] IRLR 305***). This principle has also been held to apply to other types of claim. In ***Balls v Downham Market High School & College***

[2011] IRLR 217, a case involving a claim of unfair dismissal, Lady Smith said that:

"*the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the claimant's claim is likely to fail not is it a matter of asking whether it is possible that his claim will fail… It is, in short, a high test."*

Deposit Orders

23. The power to make Deposit Orders is contained in Rules 39 of the ET Rules:

> "*(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
>
> *(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit…*"

Applications to amend

24. When exercising their discretionary power to allow amendments, Tribunals should seek to do justice between the parties (***Chapman & others v Goonvean & Rostowrack China Clay Co Ltd [1973] ICR 50***.)

25. Tribunals must have regard to all of the circumstances, and in particular any injustice or hardship resulting from either allowing or refusing the amendment (***Cocking V Sandhurst (Stationers) Ltd & anor [1974] ICR 650***).

26. Relevant factors to consider include:

a. The nature of the amendment: is the amendment merely the correction of clerical errors, is it the addition of factual details or relabelling of existing claims, or does it involve the making of entirely new factual allegations which change the basis of the existing claim?
b. The applicability of time limits: if the amendment includes a new claim, is that claim in time and, if not, should time be extended to allow it in?
c. The timing and manner of the application.

(***Selkent Bus Co Ltd v Moore [1996] ICR 836***)

27. The key test is the balance of injustice and hardship to each party in allowing or refusing the amendment, which involves a balancing exercise

and the consideration of the practical consequence of allowing or refusing an application (***Vaughan v Modality Partnership [2021] ICR 535***).

28. Where an amendment involves a new cause of action, the Tribunal must consider the extent to which the new cause of action is likely to involve substantially different areas of enquiry. The greater the difference between the factual and legal issues in the claim as originally pleaded and in the amended claim, the less likely it is that the amendment will be allowed (***Abercrombie v Aga Rangemaster ltd [2014] ICR 209***).

Privacy and restrictions on disclosure

29. Rule 50 of Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 contains the Tribunal's powers to make anonymisation orders of the type sought by the claimant. It provides as follows:

"*(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.*

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include -
(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;
(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;
(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;
(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.

(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.
…
(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998."

Conclusions

Application for anonymisation order under Rule 50

30. The claimant applied for an order that his name be anonymised and not mentioned in any Tribunal documents. The reason he gave for his application is that he wanted to prevent anyone, including potential new employers, finding out about his claim.

31. Mr. Mortin indicated that the respondent did not object to the making of an anonymisation order, but on the condition that the name of the respondent was also anonymised.

32. The principle of open justice is an important one. Derogations from that principle should be no more than are strictly necessary in the interests of justice, or to protect the Convention rights of an individual. There was no evidence before me to suggest that the claimant's Convention rights would be infringed if an anonymisation order were not made. The mere fact that a potential future employer may find out about a claim is not in itself sufficient to engage the Convention rights. If it were, that would potentially open the floodgates to anonymisation orders being made in every Tribunal claim.

33. The fact that the respondent does not object to the making of an order does not make it in the interests of justice to make one, particularly since the lack of an objection is conditional upon the respondent's name also being anonymised.

34. There are in my view no grounds in this case for making an anonymisation order. The claimant's application is therefore refused.

Application to amend

35. The amendment that the claimant seeks to make to his claim is not merely a relabelling, rather he seeks to bring an entirely different whistleblowing detriment claim, alleging different protected disclosures and detriment. The amendment contains new factual allegations that are not mentioned or referred to in the claim form. A new factual line of enquiry would be required should the amendment be permitted.

36. The application to amend is made for the first time today and relates to events that took place at least two and a half years ago. The claimant is therefore seeking to bring a new claim which is significantly out of time. Time limits exist for an important public policy reason, to ensure finality in litigation and that, as far as possible, claims are litigated within a reasonable period of time when evidence is still fresh.

37. The application was made verbally during today's hearing in response to a question from the Employment Judge and after the claimant had realised that his original whistleblowing claim was entirely without merit because there was no protected disclosure. Whilst the claimant is a litigant in person, he provided no valid reason as to why the allegations he now seeks to advance were not included in the claim form.

38. If the amendment were allowed there would be prejudice to the respondent as it would face allegations about alleged oral disclosures made on unspecified dates at least two and a half years ago. Memories will inevitably have faded in the time that has elapsed. It also seems

unlikely that the claimant would be able to establish that the alleged disclosures relied upon were made in the public interest, as they appear to relate to his personal situation. The balance of injustice and hardship favours not allowing the amendment.

39. For the above reasons the application to amend the claim is refused.

Strike out

40. The claimant submitted that the discrimination claims should not be struck out because the reason they were submitted late was because he was depressed, and it is unfair to expect someone with depression to comply with time limits.

41. The claimant also said that he had 'relied too much' on the respondent and their solicitors and that it had taken more than a year for the respondent to realise they should have contacted the police about an incident. I asked the claimant what the link was between the delay in reporting matters to the police and the discrimination claim and he replied that it was 'all linked' and 'part and parcel of the way they treated me'.

42. The claimant accepted however that whilst he was off sick, he had been running his own business at times and had also been applying for jobs. He said that he had not been aware of the existence of time limits

43. On behalf of the respondent, Mr. Mortin submitted that there was no reasonable prospect of the Tribunal extending time. The burden of proving that it would be just and equitable to extend time lies with the claimant. He could have presented his claim earlier, he had been running his own business whilst off sick and applying for jobs.

44. Mr. Mortin also submitted that information about Tribunals and time limits is readily available online. The test is not whether the claimant has no prospect of persuading the Tribunal to extend time, but whether he had no reasonable prospect of doing so.

45. Mr. Mortin referred me to the case of ***HM Prison Service v Dolby [2003] IRLR 694*** as authority for the proposition that the Tribunal should adopt a two stage process when considering whether to strike out a claim:

    a. Decide whether one of the grounds for strike out has been established; and
    b. If so, decide whether to exercise its discretion to strike out the claim.

46. The claimant had, Mr. Mortin submitted, provided no explanation as to whether he made enquiries about time limits or sought advice.

47. The key question that I have to consider in deciding whether to strike out the discrimination claims is whether the claimant has no reasonable prospect of persuading the Tribunal that it would be just and equitable to extend time to allow him to pursue them.

48. The claimant gave two reasons for not submitting his claim earlier. The first is that he was unwell. I have no doubt whatsoever that the claimant has been genuinely and seriously unwell. Depression is a serious illness, and the claimant has been suffering from it for a long time.

49. I cannot however accept the claimant's submission that time limits should not apply to those experiencing depression. To do so could potentially open the floodgates to extensions of time from those suffering from depression or indeed from other illnesses. Time limits also apply to those who are unwell although I acknowledge that ill health is a factor that a Tribunal can take into account when deciding whether to extend time.

50. In any event, I am not persuaded that the claimant's depression prevented him from issuing his claim earlier. Whilst off sick with depression he was running his own business (although I accept that there were times when he was too unwell to do so) and applying for jobs. The claimant has provided no explanation as to why he was able to run his business and apply for jobs whilst suffering from depression, but not able to submit his claim.

51. Time limits exist for an important public policy reason – to ensure finality in litigation. There is no presumption that time limits should be extended and there must be good reasons for doing so.

52. Information about time limits is easily available through a simple google or other online search, or through a quick telephone call to ACAS. The claimant knew of the facts giving rise to his claim by November 2020 at the latest, and this is not a case in which new information subsequently came to light.

53. The claims are significantly out of time. The last act complained off took place in November 2020, almost two years before the claimant presented his claim, and twenty one months later. The claim is many months out of time, not just a few days or weeks.

54. I am satisfied on the evidence before me and taking account of the submissions of the parties, that the claimant has no reasonable prospects of persuading the Tribunal that it would be just and equitable to extend time in relation to his discrimination claims.

55. I have then gone on to consider whether to exercise my discretion to strike out the claims. I am conscious that the higher courts have cautioned Tribunals against exercising their discretion to strike out claims of discrimination which are often fact sensitive and require the hearing of evidence before a decision can be reached on the merits. In this case however I am not deciding whether the discrimination claims themselves have no reasonable prospects of success, but rather whether the claimant has reasonable prospects of persuading a Tribunal to extend time. The claimant has had the opportunity today to put forward his case as to why time should be extended.

56. In light of the above, and in particular given the length of time that has passed before the claimant presented his claims, I have decided to exercise my discretion to strike out.

57. The discrimination claims are therefore struck out because they are out of time and the claimant has no reasonable prospect of persuading a Tribunal to extend time.

58. In light of these conclusions, the entire claim fails. There is therefore no requirement to consider whether to make a Deposit Order, whether to transfer the case to Newcastle or whether to list any further hearings or make any case management orders.

Employment Judge Ayre

14 April 2023