



EMPLOYMENT TRIBUNALS

Claimant

Ms J Halliwell

v

Respondent

Swift Group Limited

PRELIMINARY HEARING

Heard at: Hull

On: 26 April 2019

Before:

Employment Judge T R Smith

Appearance:

For the Claimant: Mr Robinson-Young, of Counsel

For the Respondent: Ms Kight, of Counsel

JUDGMENT

1. The Claimants complaint of detriment contrary to section 47B of the Employment Rights Act 1996 was not presented within the time limit set out in section 48 Employment Rights Act 1996 or within such further period as the Tribunal considered was reasonable having found it was reasonably practicable for the complaint to be presented within time and it is dismissed..
2. The Claimant's complaint of automatic unfair dismissal contrary to section 103A of the Employment Rights Act 1996 was not presented within the time limit set out in section 111 of the Employment Rights Act 1996 or within such further period as the Tribunal considered was reasonable having found it was reasonably practicable for the complaint to be presented within time and it is dismissed..
3. The Claimant's complaint of harassment on the protected grounds of both sex and race were not presented within the time limit set out in section 123 of the Equality Act 2010 and it is not just and equitable to extend time and it is dismissed.

REASONS

Oral reasons having been given and a request made pursuant to Rule 62 (3) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

I began the hearing by identifying the issues which are set out below and were agreed with counsel.

Issues.

1. Was the complaint of automatic unfair dismissal contrary to section 103A Employment Rights Act 1996 ("ERA96") presented before the end of the period of three months beginning with the effective date of termination or within such further period as the Tribunal considered reasonable in a case where it was satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
2. Was the complaint of detriment contrary to section 47B ERA96 presented 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 the series of similar acts or failures, the last of them, or 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
3. Were the complaints of sex and/or racial harassment presented within the period of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable under section 123 Equality Act 2010 ("EQA10")

Documents and evidence.

4. No documents were placed before me other than the claim and response form.
5. The Claimant did not appear and did not give evidence.

Finding of fact and discussion

6. I am grateful for the helpful and succinct submissions of both counsel. If I have not referred to a specific argument it does not mean that I have not considered the same in reaching my judgement.
7. The Claimant's complaints of discrimination were limited to complaints of harassment predicated upon the protected characteristics of both race and sex contrary to section 26 EQA10.
8. Having carefully studied the claim form the last complaint made by the Claimant of harassment on the grounds of her protected characteristics are set out in paragraph 8.4. She referred to a meeting "*on or around the beginning of October 2018*" when she alleged racist comments were made.
9. There is no reference in the claim form to any other act of harassment and my conclusion, on the limited evidence before me, is that the last act of harassment

- was in October 2018. This is fortified by the contents of paragraph 26 of the claim form.
10. The Claimant's claim form was presented at the Tribunal on the 01 March 2019. Section 123 of the EQA 10 addresses the issue of limitation and states: –
“...Proceedings on a complaint ... may not be brought after the end of –
 - (a) the period of three months starting with the date of the act to which the complaint relates, or*
 - (b) such other period as the Employment Tribunal thinks just and equitable....**(3) For the purposes of this section –*
 - (a) conduct extending over a period is to be treated as done at the end of the period;*
 - (b) failure to do something is to be treated as occurring when the person in question decided on it**(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-*
 - (a) when P does an act inconsistent with doing it, or*
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”*
 11. The Claimant has not demonstrated that she presented her claim within the primary time limit set out in section 123 EQA10 and Section 140B EQA 2010 (extension of time in the case of an ACAS conciliation) cannot avail her on the facts of the case for reasons set out later in my judgement.
 12. As I find that the Claimant has failed to comply with the primary time limit, I must then consider whether or not be just and equitable to extend time. I have a wide discretion in determining whether or not it is just and equitable to extend time. That said the power is a discretion and the burden is on the Claimant to convince me that it is just and equitable to extend time. The discretion is the exception rather than the rule, see **Robertson-v-Bexley Community Centre 2003 IRLR 434 CA**. The Claimant has not given evidence and thus she has not discharged the burden that falls upon her.
 13. It follows that I have concluded that the Claimant's complaints of harassment contrary to section 26 EQA 10 is out of time and it is not just and equitable to extend time. Thus, those complaints must be dismissed.
 14. I now turn to the complaints of automatic unfair dismissal contrary to section 103A ERA 96 and the complaint of detriment contrary to section 47B ERA96.
 15. The formulation of the time limits for both an automatic unfair dismissal claim and a detriment claim is similar.
 16. Section 111(2) ERA96 provides that an Employment Tribunal will not consider a complaint unless
“.... it is presented to the Tribunal-
before the end of the period of three months beginning with the effective date of termination or

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 period of three months

17. Section 48 ERA 96 is in similar terms save for a significant qualification set out in section 48(3)(a) which reads: -
“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...”
18. Dismissal itself cannot be an act of detriment.
19. Having studied the Claimant’s claim form the last act of detriment appeared to have occurred on or about 13 October 2017, see paragraph 17 of the claim form.
20. The effective date of termination was agreed between the parties as 06 November 2018. It follows, discounting any extension of time under the ACAS early conciliation procedure that the claim form should have been presented on or before 05 February 2019. This was agreed by both counsel. I will refer to this as the primary presentation period.
21. However, in this case it is pertinent that I set out the provisions of Section 207B ERA 96, which relate to the effect of ACAS early conciliation and has the effect of extending the primary presentation period.
22. It is only necessary for me to set out subparagraphs three and four which provides as follows: -
“(3) in working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted
(4) if a time period set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period”.
23. The Claimant contacted ACAS on 10 January 2019 and received her early conciliation certificate on 31 January 2019. This is not in dispute.
24. Both parties agreed that for the purposes of section 207B ERA 96 that Day A was 10 January 2019 and Day B was 31 January 2019.
25. Applying the provisions of section 207B (3) it was agreed that 21 days should be added to the primary time limit and thus the claim form should have been presented on 26 February 2019. It follows, therefore, that section 207B (3) does not assist the Claimant. Again, this was agreed by both counsel.
26. Having regard to the decision of the EAT in **Luton Borough Council -v- Haque 2018 ICR 1388** I derive from that decision that a Claimant is entitled to take advantage of whichever extension of time is most favourable under either section 207B (3) or (4).
27. The simple question I have to determine is therefore whether the Claimant can benefit under section 207B (4) so that her claim of automatic unfair dismissal is in time.

28. The early conciliation provisions of section 207B do not assist the Claimant in relation to a detriment claim, which is well out of time, subject to any discretionary extension, a matter I will discuss later in my judgement.
29. It is common ground that section 207B (4) is the only provision that can assist the Claimant to establish she has any claim lodged within the primary time period.
30. Mr Robinson-Young's argument is that one month should be added to Day B (31 January 2019) which would produce a hypothetical date of 31 February 2019. As February does not have 31 days it must be the next calendar date and thus the last date of presentation would be 01 March 2019, the very date the claim form was presented.
31. Despite the attractiveness of that argument I preferred the submission of Ms Kight that the proper approach is as set out in **Dodds and Walker 1981 1 WLR 1027**, a decision of the Supreme Court which held that time runs from the date of the event in question to the corresponding date in the following month, even where the relevant provision use the term "after". The principle in **Dodds** was expressly adopted and approved by Her Honour Judge Eady QC in **Tanveer -v- East London Bus and Coach Company Limited UKEAT/0022/16**.
32. I also take into account under the Interpretation Act that a month is a calendar month.
33. In my judgement therefore, the claim form should have been presented, at the latest, on the 28 February 2019 being one month after Day A and thus the claim of automatic unfair dismissal is also out of time.
34. I should briefly deal with Mr Robinson Young's novel argument based on CPR rule 2.8.1 which sets out that when a step has to be taken within a period described as "*beginning with*" a specified day, then that day is included in the period; but if the period is described as running "*from or after a specified date*" then that day is not included in the period.
35. I reject that argument the following reasons.
36. The CPR sets out rules of civil procedure, and the Tribunal has its own rules as set out in the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013. At best the CPR rules would only be of persuasive merit if there was a lacuna in the Tribunal's own rules. There is no such lacuna and even if there was, I do not accept that the 2013 rules are applicable in any event. The reason the 2013 rules are not applicable is that they are secondary legislation and I must have regard to the primary legislation which deals fully with the issue of time limits. It is for those reasons that I reject Mr Robinson Young's submission on this point.
37. As I have found the complaints of automatic unfair dismissal and detriment are both out of time, I must now consider whether time should be extended.
38. Under section 111 ERA96 there are two hurdles for the Claimant to surmount firstly that it was not reasonably practicable to present within the primary time period and if that is satisfied the Claimant must then present her claim form within such further period as I consider reasonable, see **Marley (UK) Ltd – v- Anderson 1996 IRLR 163**

39. The burden of proof is on the Claimant to satisfy the statutory requirement and standard of proof is the balance of probabilities.
40. A thorough review of the relevant case law was undertaken in **Palmer -v- Southend on Sea BC 1984 IRLR119** to which I had full regard.
41. No evidence was adduced by the Claimant as to why it was not reasonably practicable for her to present her claim form in time and thus, I must hold that the complaints of detriment contrary to section 47B and automatic unfair dismissal contrary to section 103AERA 96 must also be dismissed.

Employment Judge T R Smith

2 May 2019

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