



DJT

EMPLOYMENT TRIBUNALS

Claimant
Mr J Delgado

v

Respondent
Integrated Cleaning Management Ltd

PRELIMINARY HEARING

Heard at: Birmingham

On: 9 February 2017

Before: Employment Judge Britton

Appearances:

For Claimant: In person and Ms Eugenia de Sousa (Interpreter)

For Respondent: Miss H Parmar (HR Manager)

JUDGMENT

1. The claims of arrears of pay, unpaid holiday pay and notice pay were not presented in time despite it being reasonably practicable to do so and were not presented within a further reasonable period.
2. The claim of age discrimination was not presented in time and it is not just and equitable to extend time.
3. All of the claims are therefore dismissed.

REASONS

1. The preliminary issue that I have to determine is whether the claimant's claims for age discrimination, notice pay, holiday pay and arrears of pay were presented within the Employment Tribunal time limits and, if not, in any case whether there are grounds to extend time to allow the tribunal to hear them. These are matters of jurisdiction because if the claims are not accepted as being presented in time then they will have to be dismissed.
2. The relevant law in relation to the holiday pay claim is within the Working Time Regulations 1998, Regulation 30. That regulation makes it clear that the claim for unpaid holiday pay has to be presented before the end of three months beginning with the date the payment should have been made,

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 the period of three months.

3. The time limit in relation to the claims for notice pay which is brought under the breach of contract provisions within the Employment Tribunals Extension of Jurisdiction Order 1994. Regulation 7 largely mirrors Regulation 30 above. The claim has to be presented within three months beginning with the effective date of termination of the contract or where the tribunal is satisfied that it was not reasonably practicable to present it within three months within such further period as the tribunal considers reasonable.

4. The claim for arrears of pay is subject to Regulation 7 also if it is pursued as a breach of contract or, in the alternative, Section 23 of the Employment Rights Act 1996 which is the relevant provision for a claim of unlawful deduction from wages. Section 23 of that act states: “a claim for unlawful deduction from wages has to be presented to the tribunal within three months beginning with the date of the deduction from the wages in question”; in other words from the date of each underpayment.

5. The relevant law for the complaint of age discrimination which concerns the time limit is Section 123 of the Equality Act 2010. Section 123 provides that “Proceedings on a complaint within Section 120 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or within such other period as the Employment Tribunal thinks just and equitable.” For the purpose of this complaint the act in question is the claimant’s dismissal.

6. The time period for presenting all of the claims commenced with the effective date of termination of the claimant’s employment, save for the claim for arrears of pay which related to alleged deductions during the course of the Claimant’s employment. The most generous position that can be taken for the claimant in relation to his arrears of pay claim is to assume for the purposes of this judgment that time for that complaint also runs from the effective date of termination (although it may in fact be the case that the time for that complaint began to run somewhat earlier).

The Evidence

7. The evidence that I have had regard to is a bundle of documents running to 80 pages. I have heard evidence from the claimant with the benefit of a Portuguese interpreter and I have also heard evidence from Miss Meira, a friend of the claimant, who gave evidence in support of his case. Miss Meira speaks, reads and writes good English. On the other hand the claimant does not speak English or read English notwithstanding that he has lived and worked in the UK since 2003.

Findings of Fact

8. The claimant had continuous service with the respondent at the time of his dismissal from 19 February 2003. The claimant had been employed as a

Cleaner and the effective date of termination of his employment was the date upon which the decision to dismiss him was communicated, which was 22 April 2015. The claimant was dismissed on that date for gross misconduct and was dismissed without notice.

9. The claimant attended the disciplinary hearing on 22 April 2015 with a Portuguese interpreter and understood on that day that he had been dismissed with immediate effect.

10. The claimant has heart problems and informed me that he suffers with angina. At some point following his dismissal he was taken to hospital for tests in relation to his heart but visited the hospital on one day and was not an inpatient. The claimant was unable to recall the date upon which he visited the hospital.

11. The claimant was clearly upset and distressed about his dismissal but inexplicably he did not think to investigate if he could do anything about it. He did not seek advice from anyone or attempt to obtain information from any source even though in 2005 he had visited the Citizens Advice Bureau about another matter.

12. The claimant had received a letter informing him about his dismissal which had been read to him. That letter amongst other things explained to the claimant that he had a right of appeal but the claimant did not seek to exercise his right of appeal for many months.

13. In around October 2015 the claimant befriended Ms Meira at a Portuguese café and Miss Meira being a Portuguese national with very good English began to assist the claimant with various matters. As a consequence of Miss Meira's involvement the claimant was visited at home by a DWP officer on 28 January 2016 and he applied for state pension credit.

14. During the course of this visit on 28 January 2016 the DWP officer informed the claimant and Miss Meira that if he remained unhappy about his dismissal and his treatment by the respondent then he may be able to bring a claim to an Employment Tribunal. They were informed by the DWP officer that should first contact the claimant's former employer and they were also informed of the need to contact ACAS.

15. Acting upon the information received on 28 January 2016, Miss Meira wrote to the respondent on the claimant's behalf on 12 February 2016 and received a reply on 20 February 2016 which indicated that the Respondent were not willing to hear an appeal after there had been such a lengthy delay. In due course Miss Meira did investigate the ACAS requirements using the internet and made an Early Conciliation notification on 8 March 2016.

16. The notification of early conciliation that was made on the claimant's behalf by Miss Meira was made in the presence of the claimant, who spoke briefly to ACAS to confirm that she had his permission to speak on his behalf. As a consequence of this contact with ACAS Miss Meira was informed and

duly passed on to the claimant the news that the ability to conciliate via ACAS was no longer available and therefore ACAS would only issue a certificate. They were also informed by ACAS that the claim that the claimant intended to present to a tribunal was already outside of the normal time limit for presenting such claims and that the time limit was three months from the date of termination in most cases. ACAS informed Miss Meira that in some circumstances, however, the tribunal may be willing to extend the time limits. This information was passed on promptly by Miss Meira to the claimant.

17. The documentation within the bundle contains the Early Conciliation Certificate which shows that it was emailed by ACAS to Miss Meira as the Claimant's representative on 8 March 2016. The information given to ACAS regarding Miss Meira's email address was not stated to have been incorrect when Miss Meira gave evidence and there is no obvious reason why Miss Meira would not have received the Early Conciliation Certificate on 8 March 2016 which was the date that it was issued. In my judgment it is inherently unlikely that the Early Conciliation Certificate would not have been received by Miss Meira on the date that it was sent to her by ACAS.

18. When giving evidence Miss Meira informed me that the Early Conciliation Certificate was not received until the end of May 2016 and that she had to chase ACAS for it. Whilst I find this unlikely, assuming that there may have been some delay until the end of May 2016, the Claim Form was not received by the tribunal until 15 September 2016. The reason for the delay in sending the tribunal Claim Form was that Miss Meira was sorting out the claimant's papers. However this is not a case where there is likely to be numerous documents to collate prior to being able to present a claim and it ought to have been possible to present the claim promptly after May 2016, especially as Miss Meira and the claimant were by 8 March 2016 (at the very latest) aware of the need for urgent action to present his claim.

The Law

19. The onus of proof of proving that presentation in time was not reasonably practicable rests on the Claimant "that imposes a duty upon him to show precisely why it was that he did not present his complaint;" *Porter v Bandridge Limited* [1978] ICR 943 CA. This is a two stage test, if the Claimant satisfies the Tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his favour. It is necessary for me then to go on to decide whether the claim was presented "within such a further period as the Tribunal considers reasonable".

20. An Employment Tribunal has a broad discretion in deciding whether to extend time under the "just and equitable" principle. In *Robertson v Bexley Community Centre* [2003] IRLR 434 Lord Justice Auld in the Court of Appeal noted that:

"Whilst Tribunals have a wide discretion to extend time, time limits in Employment cases are exercised strictly. There is no presumption that a Tribunal should exercise discretion to extend time unless it can justify not

doing so. It remains for the Claimant to convince the Tribunal that it is just and equitable to extend time and unless the Claimant can convince the Tribunal of such it cannot hear a complaint that is out of time.

To establish whether a complaint of discrimination has been presented in time it is necessary to consider when the act complained of was done and to distinguish a single act of discrimination from a continuing act of discrimination extending over a period of time, where, in such circumstances for the purposes of the 3 months time limit the act is treated as being done at the end of that period.”

21. In determining whether it would be “just and equitable” to extend time to allow a claim to proceed the Tribunal should have regard to the checklist under the Limitation Act 1980 as modified by the EAT in *British Coal Corporation v Keeble & Others* [1997] IRLR 336 and should consider the prejudice which each party would suffer as a result of the decision reached and have regard to all of the circumstances in the case and, in particular:-

- The extent of and the reasons for the delay;
- The extent to which the cogency of the evidence is likely to be affected by the delay;
- The extent to which the parties sued had co-operated with any request for information;
- The promptness with which the Claimant acted once he or she knew of the facts given rise to the cause of action and
- The steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action;

Conclusion

22. The claims that have been presented for age discrimination, arrears of pay, notice pay and holiday pay were all presented outside of the normal time limit.

23. The claimant failed to present any of his claims within the normal three months time limit because he was unaware of his right to do so and despite feeling aggrieved by his dismissal he took no steps to investigate whether he could bring any claim or find out how to go about it.

24. The cause of the claimant’s failure to present his claims within the normal time limit was his ignorance of his legal rights and the time limits. Whilst it is a potential explanation and a potential reason for his failure to present his claim within time, in this instance I have found that the claimant’s ignorance was not reasonable. The claimant is expected to act reasonably taking into account the knowledge that he ought reasonably to have obtained if he had made reasonable enquiries.

25. The claimant has worked and lived in the UK since 2003. He has also worked in other countries. He is a mature individual and he is not in any way inexperienced in life skills. The claimant had been to the CAB before and I do

not find that it was reasonable for him to do nothing within the normal time limit; he failed to inquire if he had any recourse to the law. The claimant did not find himself in a position where he was reasonably ignorant of his legal rights. In my judgment therefore it was reasonably practicable for the claimant to have presented his claim in time. Even though he does not speak English it is clear that he visited a Portuguese speaking café and there is evidence that he interacted with individuals at that café and he could and ought reasonably to have made some inquiries before the normal time limit expired.

26. If I am wrong and it was not reasonably practicable for the claimant to have presented a claim within the normal time limit, I would then in the alternative, consider whether the claimant presented his claim within a reasonable further period. The normal time limit expired on 21 July 2015. The claim was not presented until 15 September 2016 which was nearly fourteen months later. In my judgment it was not submitted within a reasonable time after the time limit had expired as the claimant knew of his right to bring a claim on 28th January 2016 and delayed for nearly eight months before presenting his claim. Moreover, with the help of Miss Meira and ACAS, the claimant was also well aware of the applicable time limits by 8 March 2016 and yet still failed to present his claim to the tribunal for a further six months.

27. Even if I accept for the purposes of this judgment that the Early Conciliation Certificate was not received by Miss Meira until the end of May 2016, I have not been provided with any good reason as to why the claimant's claim was not presented to the tribunal until 15 September 2016. There was a delay beyond the end of May 2016 of nearly four months which in my judgment is a significant period of further delay especially taking into account that the original time limit is only three months.

28. My conclusions regarding the claims for notice pay, unpaid holiday pay and arrears of pay are that it was reasonably practicable for the claims to have been presented in time. In the alternative, if it was not reasonably practicable the claims were not then presented within a reasonable further period. On either basis, therefore, those claims are presented to the tribunal out of time and are dismissed.

29. In terms of the age discrimination complaint, I have already found that this complaint was not presented within the time limit of three months. The question for me to determine is whether it is just and equitable to extend the time. I have had regard to the facts already found and to the statutory provision at Section 123 of the Equality Act 2010. I have also had regard to the case of Robertson -v- Bexley Community Centre which is a case to which I was referred by the respondent. Within that case it was made clear that extending time in these matters is the exception and not the rule and that the burden of proof is on the claimant to convince the tribunal that it is just and equitable to extend time; in other words the claimant's need to convince the tribunal that he has good reason for the delay and that it is just and fair for time to be extended.

30. I have had regard to Section 33 of the Limitation Act 1988 and also the factors set out in the case of British Coal Corporation –v- Keeble [1997]. The key factors in that case that are relevant to the claimant's situation would seem to be the length of the delay and the reason for the delay. In this case the period of the delay has been very substantial. The claimant was aware of his right to bring a claim from 28 January 2016 and was aware of the time limits from 8 March 2016, and yet the claim was not presented to the tribunal until 15 September 2016.

31. Whilst I have found that the claimant was ignorant of his right to bring a claim until 28 January 2016, I have also found that the ignorance of the claimant was not reasonable in all the circumstances.

32. As indicated earlier within these reasons there is no evidence that the claimant made any attempt whatsoever to make any inquiries regarding his ability to complain about his dismissal or the alleged discrimination or any of the other matters about which he complains until he was encouraged by the DWP officer on 28 January 2016 to contact his employer and ACAS.

33. In my judgment, therefore, the claimant has given no good explanation as to why he delayed in presenting his claim, certainly beyond 8 March 2016 when the Early Conciliation Certificate was issued, and he was aware of the time limits. In view of that delay of a further six months from 8 March 2016, and the lack of a good reason for it, I cannot find any basis upon which to conclude that it is just and equitable to extend the time in this case.

34. It follows therefore that the age discrimination complaint is also dismissed on the basis that it has been presented to the tribunal out of time.

I confirm that this is my judgment or order in the case of Mr J Delgado v Integrated Cleaning Management Ltd and that I have signed the judgment by electronic signature.

03 March 2017
Employment Judge Britton

Judgment sent to Parties on

7 March 2017