



## EMPLOYMENT TRIBUNALS

**Claimant**

**Mr M Kamara**

**Respondent**

**v Builders Depot Limited**

## PRELIMINARY HEARING

**Heard at:**

**On: 25 May 2017**

**Before: Employment Judge R Lewis**

**Appearances:**

**For the Claimant: Ms N Prempeh, Solicitor**

**For the Respondents: Mr B Harwood, Counsel**

## JUDGMENT

1. The claimant's claim for a redundancy payment is dismissed on withdrawal.
2. The claimant's claims of unfair dismissal, breach of contract (notice) and holiday pay are dismissed. They were presented out of time in circumstances in which it was reasonably practicable for them to have been presented in time.
3. The claimant's claim of disability discrimination is dismissed. It was presented out of time and it is not just and equitable to extend time.

## REASONS

1. These reasons were requested by Ms Prempeh.

### **This hearing**

2. This was a preliminary hearing to determine whether the tribunal had jurisdiction to hear the claimant's claims. There had been considerable delay and confusion in listing. I asked both parties to confirm at the start of the hearing that they had come prepared to deal with the time point, which both confirmed. I noted in

particular that Ms Prempeh had accepted instructions only shortly before the hearing.

3. Although both parties were represented, I proceeded with very considerable informality, and I record my appreciation of the cooperation given to the tribunal. Mr Kamara briefly gave evidence, during which he unfortunately became distressed. Mr Harwood was wise not to cross examine.

### **The factual matrix**

4. The claim was presented on 28 September 2016. It said that employment had ended on 22 April. The response form agreed that that was the effective date of termination. Ms Prempeh agreed that her written submission, suggesting an EDT in July, was mistaken.
5. In fact, I find that the claimant was dismissed by letter posted to him on and dated Friday 22 April 2016. I find that his effective date of termination was Monday 25 April. He received his final pay the following Thursday, 28 April, and therefore any claim for holiday pay under the Working Time Regulations would run from that date. Nothing turns on any discrepancy between these dates other than the desire for accuracy.
6. The circumstances of dismissal were that the claimant had suffered an accident at work, and a back injury. He had been off work since September 2014. I was told that personal injury proceedings are underway, but I know no more about them. The claimant did not attend a meeting on 21 April 2016 to discuss his employment. He agreed that at that time he had been off work without break for 19 months due to ill health, and in reply to my question, he said that he has continued to be certified unfit since then.
7. The claimant consulted Messrs Levenes solicitors in 2014, in relation to his accident. He later asked for their help about his employment. The firm is known to be employment law specialists.
8. Ms Prempeh showed me a letter from Levenes of 31 August 2016 in which they withdrew from any further assistance with the employment dispute or claim, as their costs budget had been exhausted. The letter contained two further significant points. It said that the firm had already indicated on 5 July its reasons for not agreeing to conduct the claim on a contingency or no-win no-fee basis. While the letter which I saw did not explain that decision, common sense and experience indicate that the solicitors did not think the merits of the case warranted the risk of offering a no win no fee agreement.
9. More importantly was that the letter stated the limitation date was Friday 16 September 2016 (which was underlined). It explained that if the claim was not presented by that date it was likely that a claim could not continue. The letter was correctly addressed to the claimant and stated that it had also been sent by email to his cousin, Mr Muana, who was present in the tribunal, and who, as the tribunal file showed, had corresponded with the tribunal on the claimant's behalf.

10. Although that was the end of the claimant's relationship with Messrs Levenes, he nevertheless gave their contact details in the claim form in case the tribunal wished to have any further information.
11. As stated above, the effective date of termination was in the last week of April. Day A was 19 July 2016, and Day B was 19 August. The claim was presented on 28 September. Ms Prempeh agreed that it was at least 10 days out of time.

### Medical information

12. The claimant, or Mr Muana on his behalf, had sent the tribunal earlier in the year some medical information and medical documents. They were incomplete, disorganised, and had not been made available to the respondent. They had not been placed in the form of a bundle for this hearing. After some discussion, it seemed to me right to take a break for Ms Prempeh to discuss the position with her client, and he then gave evidence.
13. The medical information related in part to the claimant's continuing back problem, and I disregarded that for the purposes of this hearing.
14. In relation to the claimant's mental health, it showed that he had in the past had counselling sessions, from which he had been discharged, and was prescribed an antidepressant, Citalopram, 20mg per day. The prescription appeared to have been continuing for some time. There was no evidence of any further relevant psychiatric support.
15. The documentation indicated that on 23 August 2016 the claimant had gone to his GP and been referred to A&E, where he had been seen by the Mental Health Liaison Service, who on that day had written a letter "to whom it may concern", which evidently aimed to assist him in dealing with a housing problem. The letter stated in effect that the claimant had been discharged from the service after being seen that day.
16. On 2 September, the claimant was seen by his GP with acute tonsillitis. The GP recorded that the claimant had stated as follows:-

"Went to A&E after last meeting and saw Psych team. Now has a Psych Liaison Officer who is helping him with his social issues. Currently feeling well supported. Denies any thought of suicide at present and has a contact that he sees regularly from the MH Team."
17. The claimant gave evidence about the sources of his depression. He stated that he did not have a very good memory of events around August and September 2016, but he was depressed by a number of social issues, including the problems of sharing accommodation with a relative of some challenging behaviour.
18. In reply to my question, he stated that he cannot read English (or any other language) and is heavily reliant on Mr Muana for reading and writing for him.
19. Ms Prempeh explained that although Levenes' letter of 31 August had been sent by email to Mr Muana, Mr Muana had not kept an eye on emails at the time due to other commitments, and had not read it or understood it; he had thought that

time was generally extended by the early conciliation process; and he experienced some difficulty in presenting the claim through the online system.

**Reasonable practicability**

20. I dealt first with the test of reasonably practicability, which applied to all claims other than disability discrimination.
21. The claimant had had the benefit of support from specialist employment lawyers for some time. I infer that they had advised the claimant on the merits of his claim early in July 2016; had then entered early conciliation on his behalf; and had withdrawn on 31 August, stating plainly the limitation date. They had also explained the risks of missing limitation. They had sent the letter both in hard copy to the claimant and by email to Mr Muana.
22. It seemed to me unlikely that the letter of 31 August was the first time the claimant had been advised of limitation, as I notice in particular that early conciliation began just under three months before the claimant was dismissed.
23. I accept the claimant's assertion of his own illiteracy. I find it difficult to accept that Mr Muana did not see or understand the email from the solicitors. He must have seen in his inbox that there was a letter from an important source, Levenes.
24. I accept that there was some evidence of a personal crisis on 23 August, although not so great a crisis as to require the Mental Health Liaison Officer to suggest that the claimant be seen by a psychiatrist or any other emergency intervention. The wording of the GP's note of 2 September strongly suggested that the crisis had blown over and that the claimant was coping.
25. The position therefore by 2 September at the latest, was that the claimant had over a week within which still to present his claim. He and Mr Muana had been firmly told in writing about the time limit, and the risk of missing it. The claimant had told his doctor that his mental health was coping. It seems to me that it was reasonably practicable for the claim to be presented at that point.
26. I would require cogent independent evidence of an inability to undertake ordinary functions before I could find that that the claimant was, when limitation ran out, so depressed that it was not reasonably practicable to present a claim. It seems to me that it was, and that that being so, the above heads of claim are struck out.

**Just and equitable**

27. When it came to disability discrimination, I was more concerned with a broader question, which was that at the time of dismissal the claimant had not attended work for 19 months and gave no indication of a date of return. Any argument that more time might have made a difference seemed to me to be overtaken by the information given today that he had remained off sick in the 13 months between dismissal and this hearing.
28. I asked Ms Prempeh to explain precisely what the disability discrimination claims were. She said that they related to the claimant's back injury and she indicated

three broad types of claim: a failure to make reasonable adjustments in relation to the location of the dismissal meeting which the claimant did not attend; a failure to make reasonable adjustments in failing to commission an Occupational Health Assessment to be undertaken at the claimant's home; and a difference in treatment, which was essentially a complaint of failures of due process before the claimant's dismissal, formulated in the language of direct discrimination.

29. Ms Prempeh did not convince me that what appeared to be a flimsy claim was such that there was an interest in justice in allowing it to proceed out of time. There was no reason to believe that the reasonable adjustments which she suggested would in fact help the claimant overcome any disadvantage and so return to work. I note also the authority to the effect that carrying out occupational health assessment of itself is not a reasonable adjustment within the meaning of the section (Tarback v Sainsbury's Limited [2006] IRLR 664).
30. The third claim would require the claimant to prove that after 19 months absence he was dismissed because of disability, when the overwhelming likelihood is that his claim would best be formulated as a claim under s.15 Equality Act, namely that he was dismissed for something arising from disability (long term absence, with no evidence of a return) in which case the defence of justification would in the circumstances almost certainly succeed.
31. I could see no interest of justice in permitting such a weak claim to proceed out of time and accordingly I dismiss the claim.

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**Employment Judge R Lewis**

Date: 17 June 2017

Sent to the parties on:

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For the Tribunal:

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