THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Brown	**v**	**Royal Borough of Kensington & Chelsea**

Heard at: London Central **On**: 19 September 2017

Before: Employment Judge Walker

Members: Ms T Breslin
Mr J F Noblemunn

Representation:

Claimant: In Person
Respondent: Mr S Perhar, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that the Claimant's claims are struck out on the basis this Tribunal has no jurisdiction to consider them.

REASONS

1. The claim, which was brought by Mr Stephen Brown against the Respondent, Royal Borough of Kensington and Chelsea, has two parts to it. The first part is the claim for unfair dismissal and the second part is a claim for disability discrimination.

2. The Respondent has today made an application to the Tribunal to strike out all the Claimant's claims for lack of jurisdiction. The basis for the application is the question of time. At the Case Management Hearing on 5 August 2016, before Employment Judge Gay, when the issues were identified, one of the issues was the question of jurisdiction by reason of the limited time within which claims maybe brought. The Case Management Order records the fact that the Claim Form was presented on 7 June 2016 and it was noted that the ACAS early conciliation did not impact on the time limit because it was completed during the notice period. As the

effective date of termination was 7 March 2016, the Claim Form was presented one day late. The impact of that was that the Tribunal may not have jurisdiction, even as to the dismissal let alone any earlier matters. The Order records that the Claimant said in the course of the Preliminary Hearing that there had been some employment Tribunal technical or IT glitch on the evening of 6 June 2016 so that he could not send the Claim Form online through the usual system.

3. Employment Judge Gay's Order asked the clerical staff at the Tribunal to ascertain the position and record it on the file, but noted the Claimant must expect to have to prove this matter. The relevant issues which followed on from that were identified as follows:

> "in respect of the unfair dismissal claim, does the Claimant prove that it was not reasonably practicable for him to present the Claim Form in time and he presented it within such further time as was reasonably practicable".
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> "in relation to the discrimination claim, does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of that period. If so, is such conduct accordingly in time. Alternatively was any complaint presented within such other period as the Employment Tribunal considers just and equitable".

4. At the outset of this hearing today, in accordance with normal procedure, the Tribunal took time to read the witness statements. One of these was a witness statement from the Claimant. Having read it, we noted that it did not address the time issues identified above, despite Employment Judge Gay having drawn this to the Claimant's attention. Accordingly the Tribunal explained to the Claimant, since that evidence was necessary, that we would ask him to verify his witness statement and then give him a period of time in which to address that point by way of oral evidence before moving on to cross examination. To facilitate that, as Employment Judge, I asked some questions of the Claimant with a view to prompting him to explain what delayed his bringing his application before the Tribunal. In the course of asking the questions, I explained to the Claimant that it was essential that he tell us everything he possibly could about the situation because if we did not hear enough from him we may not have sufficient information on which to assess this issue in his favour. After asking some questions I checked that the Claimant had

told us everything that he wanted to about the circumstances which led up to his filing the Claim Form on 7 June 2016. He told us he had said everything he wanted.

5. The facts we found were as follows. The letter giving notice to him, which the Respondent says was dated 8 December, although we cannot find the date on it, was received by the Claimant around about 14 December 2015. He applied to ACAS for an early conciliation certificate on 14 January 2016. The certificate was issued on 4 February 2016. His dismissal was effective on 7 March 2016. He was not required to work after the letter of dismissal and therefore he did not work but was paid through to 7 March 2016.

6. The Claimant had union support through the process of his ongoing and problematic relationship with his employer and particularly during the procedure which took place when the employer became concerned over his sickness absence leading up to his dismissal. That union support continued for a while after his dismissal. The Claimant explained that the union told him they would not assist him with filing the Tribunal claim form, but he says that he knew from both union and his discussions with ACAS what the time limits were.

7. The Claimant was not happy that the union were not willing to assist him with the ET1 process and he says he challenged the union on that. However, the Claimant told the Tribunal that at the latest, about a week before, if not longer, possibly 2 weeks before, he was absolutely clear that there was no question that the union would assist him with the claim form.

8. The Claimant told us that he had another issue going on. The Claimant said that he had been made homeless. We understand that that happened about a month before his dismissal and so in practice that was sometime in October or November 2015. As a result of that, the Claimant said he had ongoing litigation with the mortgage company, though he did not tell us what this amounted to or what was happening in the few weeks before he filed the Tribunal claim form.

9. We were told that the Claimant had an iPad which he used as his only computer and that had technical glitches from time to time. This happened again on the day when he was preparing the Claim Form which was the last day he could file the claim. The glitch was not an Employment Tribunal system glitch and indeed our own staff checks had confirmed there was no such glitch at that time. What the

Claimant said was that he started at about 9 a.m. in the morning working on the online application. He said some parts of it were straightforward such as his name and the employer's name and he also told us he had collated all the information in advance and gone through it quite carefully in order to present a convincing case, but at some point he could not get his iPad to work so as to submit the Claim Form and he continued trying to do this until eventually he managed to do it, he said about 2.50 a.m. the following day. The glitch was with his iPad and it was something that had happened before.

10. The Tribunal heard submissions from the Respondent and submissions from the Claimant. The Respondent essentially said that there was no evidence before the Tribunal which would meet the test of it not being reasonably practicable to submit the Claim on time and in those circumstances we should find that the Claim was out of time. Similarly, the Respondent submitted there was nothing before us in relation to the question of just and equitable extension which would give rise to circumstances in which the Tribunal might properly extend time.

11. The Claimant was given time to consider the Respondent's submissions and consider what he wanted to explain to us. I reminded him of the issues which we had to consider and after taking some time alone to prepare he gave us his submissions. Essentially the Claimant said that there was no specific reason as such for his delay. He wished, with the benefit of hindsight, he had filed the claim a week before or even a day before he had in fact prepared the form, but he pointed out to us that he thought he had done his best, that he had worked hard on it, that he had had the circumstances of having litigation with his mortgage provider and the lack of support from the union. He admitted that there was no specific reason why he had not been able to do it on the day other than the IT glitch with his iPad, but he asked the Tribunal to exercise its discretion.

12. Having heard all the evidence the Tribunal considered the matter carefully. On the question of the unfair dismissal claim, the test is whether it was not reasonably practicable for the Claimant to present the claim form in time. If we consider that was the case then we must go on to consider when it was actually submitted. We analysed carefully what the Claimant had said about the presentation of the claim form.

13. While we noted that the Claimant had had issues with his mortgage provider and with his union, it was clear from what he said that he was in a position to know the time limits and he knew that he had to do this alone. The ET1 process is one which is designed for Claimants to deal with without legal support and many individual claimants use it themselves. The Claimant knew his iPad could have glitches as it had been troublesome before. This was not the first time he had had problems with it. Despite all this, the Claimant chose to leave the ET1 application until the last day. In his submissions, it was made clear by the Claimant that was not essential. He accepted that he could have done the ET1 application a week or so beforehand and even a day beforehand. In those circumstances there is no basis for us to reach a finding that it was not reasonable practicable for him to have brought the claim in time. In the circumstances the Tribunal has no jurisdiction over the unfair dismissal claim and therefore that claim has to be struck out.

14. In relation to the discrimination claim, the test is different. The test is whether it would be just and equitable to extend time. The case law makes it clear that notwithstanding that we found that the unfair dismissal claim is out of time, it does not follow that the discrimination claim should be treated in exactly the same way. We have to apply a different and distinct test. However, we also have to bear mind the authorities and the Court of Appeal, in the case of *Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434* CA, said that when Employment Tribunals consider exercising the discretion "there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of the discretion is the exception rather than the rule". The onus is on the Claimant to convince the Tribunal that it is just and equitable to extent time.

15. Having borne that in mind, we then looked at all of the factors. The EAT in British Coal Corporation v Keeble and others 1997 IRLR 336, suggests that the Tribunal would be assisted by considering the factors in Section 33 of the Limitation Act 1980. Those factors include balancing the prejudice which each party would suffer as a result of the decision and having regard to all of the circumstances of the case, in particular the length of and reasons for the delay, the cogency of the evidence and the extent to which it is likely to be affected and the question of whether the Respondent has cooperated with any requests for information as well as the promptness with which the Claimant acted once he or she knew of the facts giving

rise to the cause of action and steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

16. We have considered the Limitation Act factors. The length of the delay was not more than one day. We have already set out the reasons for the delay. The evidence is unlikely to be affected by that delay. The issue of any lack of cooperation by the Respondent does not apply. The Claimant knew of the facts from the outset and had advice from the union from the outset, indeed before the dismissal took effect.

17. This is a case where the Claimant had from December 2015 when the notice of dismissal was sent to him until June 2016 to prepare the ET1 and file his claim. It is unlikely the Claimant would have wanted to issue the claim before March 2016 when the dismissal took effect, although he could have had it prepared before then. Thereafter the Claimant had a full 3 months in which to issue the claim. The Claimant knew all the facts. He had been through the ACAS early conciliation process. He knew the time limits. He also told us he was no longer suffering from the difficult effects of the Irritable Bowel syndrome that had been troubling him before. In practice the Claimant waited until the very last day to file the claim and then encountered a glitch with his own iPad, which is something he knew from past experience could happen.

18. We take account of the fact that if we exercise our discretion in favour of allowing the claim to proceed, the Respondent would only suffer the prejudice that comes from having to deal with the claim, rather than any greater prejudice because of the delay. The Respondent readily concedes that fact. Against that, the Claimant loses the ability to bring his claim entirely. Nevertheless, it is clear from the case law that it is not a question of the Tribunal being able to exercise jurisdiction just because it would be kind to do so. There must be some factor raised by the Claimant which convinces us that it is just and equitable to do so.

19. Having heard the Claimant's evidence and his submissions and having considered the evidence very carefully, we have been given no basis on which to reach the conclusion that it would be just and equitable to exercise that discretion to extend time. As we have noted, the Claimant had advice, he had the information, he had a computer or an iPad which he knew could be difficult on occasions and he knew the time limits. Although he had challenged his union, he was well aware for some time

that he would not have their support. In short, the Claimant had plenty of time to prepare the claim form himself. He had the information to do so and the process is designed for Claimants in person. On the mortgage provider litigation, we know that had been going on since October or November 2015. The Claimant did not tell us of any aspect of that claim which was impacting on him at the key time in late May or early June which affected his ability to prepare himself and file the claim at that time. The Claimant was no longer unwell.

20. In all the circumstances, this is a sad and difficult decision. Tribunals are always concerned that discrimination claims are serious matters and it is often just and equitable for them to go forward, particularly where the delay is short. Unfortunately, in this case, we have been given no explanation that gives us any basis for exercising the jurisdiction to grant a just and equitable extension. Sad as that may be, we regret we have to strike out this claim as we have no jurisdiction to hear it.

Employment Judge Walker
27 September 2017