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EMPLOYMENT TRIBUNALS

Claimant: **Mr S Smith**

Respondent: **St Aidan's Academy**

Heard at: **East London Hearing Centre** **On: 12 January 2018**

Before: **Employment Judge C Hyde (sitting alone)**

Representation

Claimant: Neither present nor represented (email sent to the Tribunal and others by the Claimant's sister Ms Charmain Smith on 11 January 2018 at 15:23)

Respondent: Mr N Williams (Counsel)

OPEN PRELIMINARY HEARING JUDGMENT

The judgment of the Employment Tribunal is that

1. **The disability discrimination claim was dismissed on withdrawal; and**

2. **all other claims were struck out forthwith.**

REASONS

1 Reasons are provided in writing as the Claimant was not present and was not represented at the hearing and a judgment was made whereby the claims were dismissed.

2 The reasons are set out only to the extent however that the Tribunal considers it necessary to do so in order for the parties to understand why they have won or lost. Further they are set out only to the extent that it is proportionate to do so.

3 This hearing was listed to determine whether the Tribunal had jurisdiction to consider the Claimant's claims and to determine and consider the issues. The claim form was presented on 20 June 2017. A Preliminary Hearing had previously been listed to take place on 18 September 2017 to determine the same issues. The Claimant attended then with his sister who had indicated towards the end of August 2017 that she was on the record as assisting her brother. Due to some technical difficulties in relation to service of the proceedings on the Respondent, and also acknowledging that the Claimant appeared unprepared to address the issues to be decided on 18 September, the hearing was postponed, to be resumed on a date to be subsequently notified to the parties. Further, in the case management summary which was sent to the parties after the hearing, Employment Judge Prichard summarised the position in terms of the Claimant's case on time limits and also set out several pointers in relation to case law and the applicable law in relation to both time limits and the disability discrimination complaints.

4 The original notice of the hearing was sent to the parties on 6 July 2017 at the Claimant's address in West Yorkshire. That address has remained the address to which all post has been sent. There have been subsequent occasions on which emails have also been sent to the Claimant's sister at her request. An issue was raised by the Claimant's sister as to whether she had received all the relevant documentation therefore the Tribunal took some time to check the file and the emails received from the Claimant's sister to ascertain exactly what it was that she had received by way of notice of the hearing and notice of the preparations to be concluded before this open preliminary hearing.

5 By a case management order which was sent to the parties on 27 November 2017, Employment Judge Gilbert made a case management order (page 38 of the bundle) whereby the parties were informed of what needed to be done by way of preparation for the hearing. There was no suggestion in the correspondence received from the Claimant's representative that she had received that case management order. As well as setting out the matters that needed to be done as preparation before the open preliminary hearing, the case management order also gave notice to the parties of the open preliminary hearing on 12 January 2018.

6 By a letter dated 29 September 2017, the parties (p.41) were sent a separate notice of the preliminary hearing and what would be decided at it. Nothing of any additional substance was added to the information already in the case management order. That letter was certainly sent to the parties by email. Once again there was confirmation by way of an email from the Claimant's sister dated 8 December 2017 that she had received both the case management order and the letter of 29 November. She indicated to the Tribunal that she had mislaid the letter and could not remember its content.

7 Briefly, without setting out all the correspondence, it appeared that by a further email from the Tribunal dated 28 December 2017 a member of staff of the Employment Tribunal, Ms Quayle, re-sent electronically a copy of the case management order and the letter giving notice of the preliminary hearing. The Tribunal was satisfied that the Claimant's representative definitely received that email because she included copies of the email and the attachments in her postponement request dated 4 January 2018.

8 That postponement request was considered by Employment Judge Gilbert on 10 January 2018 and she refused it. In the letter to the parties informing them of the decision to refuse the postponement it was stated among other matters:

> "*The Preliminary Hearing will proceed as listed to consider whether the Tribunal has jurisdiction to consider the claim.*
>
> *The case remains listed for hearing on* ***12 January 2018***."

9 At the time the application to postpone was considered, the Tribunal had also received some further information from the Claimant's representative about the draft list of issues and setting out her position as to why she had not been able to comply with the case management order to date.

10 Then by a further letter from the Claimant's sister which was sent to the Tribunal and to the Respondent on 11 January 2018 at 15:23, Ms Smith confirmed that neither she nor the Claimant would be attending the hearing on 12 January. She referred to being feverish and not in a fit state to travel anywhere via public transport which would be her only means of travel and that her brother felt unable to attend on his own. She stated that when she became aware of the various things involved in the case management order, and the deadlines which had been missed that she considered that the best thing to do was to submit a request for postponement. She appeared to be referring to the postponement request which had been rejected by Employment Judge Gilbert on 10 January.

11 In this email Ms Smith also made some further points about the draft list of issues.

12 The first matter that the Tribunal considered was whether to proceed with the hearing on 12 January given the non-attendance of the Claimant and/or his representative.

13 Having reviewed the history of this matter set out above and taking into account that the Claimant and his sister were not lawyers, the Tribunal still considered that it was appropriate to proceed with the hearing. The Tribunal had regard in particular to the detailed description in the order of Employment Judge Prichard of the discussion which had taken place as long ago as September 2017.

14 It was unclear whether the Claimant was in any event making an application to postpone but given that an application on substantially the same grounds had just been considered and rejected by Employment Judge Gilbert, it would not be consistent with the interests of justice for this Tribunal to review Employment Judge Gilbert's decision. There were in short no good grounds for doing so.

15 Further the Tribunal was satisfied that the significance of the issues relating to jurisdiction had been pointed out in some detail to the Claimant and his representative both at the hearing before Employment Judge Prichard and subsequently in writing. There was no suggestion that the Claimant and/or his representative had not duly received the case summary from the hearing in September 2017.

16 In all the circumstances therefore there was no good reason for the Tribunal not to proceed with the open preliminary hearing.

17 The Tribunal next considered the time points against the background which was set out in the case summary of Employment Judge Prichard which set out the Claimant's best position. Having reviewed the bundle of documents produced by the Respondent [R3] consisting of some 50 pages and which included the letter of resignation by the Claimant dated 20 December 2016, and in the absence of any other evidence suggesting the contrary, it appeared to the Tribunal that the termination date was 20 December 2016 and not any later date. The Tribunal quotes from the letter as follows:

> "***Constructive Dismissal***
>
> *The above rebuttal to my Appeal outcome, and information disclosed under the SAR I issued, draw attention to the matter of the school handling my Grievance in a manner that did not follow due procedure appropriately. In view of this I have no trust and confidence in the school as my employer. This has left me with no alternative but to regard my continued employment as untenable. So I am hereby notifying you of my resignation. Effective from today: 20.12.2016.*
>
> *I ask that you confirm, to myself and my solicitor, that you will allow me one month, from today, to move out of the residence that was provided with my position*."

18 There was a reference in the claim to the Claimant asserting that his employment did not terminate until 21 February 2017. The Tribunal considered on the available evidence that the only possible basis for such a contention could be an argument that allowing the Claimant to remain in the tied accommodation until 21 February 2017 (although there was no evidence before the Tribunal this was indeed the case) constituted an extension of the Claimant's employment. The Tribunal did not consider that there was an adequate legal or evidential basis for such a conclusion to be drawn or a finding to be made. To the extent however that that was the case, the Tribunal adopted, in the alternative, the reasoning as to the effect of that being the termination date of the employment which was outlined in the case management summary of Employment Judge Prichard. In short, the Claimant would still have fallen foul of the limitation period.

19 If the termination date was 20 December 2016 as the Tribunal has found, the claim was therefore presented in respect of all jurisdiction substantially out of time. The test for the unfair dismissal, breach of contract and whistle-blowing detriments, unlawful deduction of wages and holiday pay claims was whether it was reasonably practicable for the Claimant to have presented his claim within time. The date from which such a claim ran in respect of all the complaints was 31 December 2016 which appeared to be the normal pay date judging by the payslip which was before the Tribunal in the bundle. The end of December pay date was the relevant date from which time ran from the pay claims i.e. holiday pay and unlawful deduction of wages. In respect of the unfair dismissal, breach of contract and whistle-blowing claims, it was the date on which the employment terminated.

20 The Tribunal referred to the statement of the position set out in Employment Judge Prichard's case summary when considering whether to extend time. He stated as follows:

> "There are claims for breach of contract, disability discrimination (because the box was ticked), whistle-blowing public interest disclosure (presumably in respect of health and safety breaches), unfair dismissal and claims for notice, arrears, holiday pay, and accommodation costs. All but the disability discrimination case will be subject to a 3 month mandatory jurisdictional statutory time limit in this tribunal, with only a "not reasonably practicable" time extension provision. The disability discrimination has a potential "just and equitable" time extension. Jurisdictional means that the tribunal is duty bound to test this and to make a decision on the issue on its own initiative, whether the claim is defended by the respondent, or not. That was to be the situation today. This hearing was listed for such a hearing to determine the time limits and any possible exemptions. If there were no exemptions, all the claims would have been dismissed. The claimant was not fully prepared and he and his sister were not aware of the situation they currently face.
>
> Ms Nevison-Smith has compiled a very full and helpful narrative about how it came that this ETI claim form was late. It is as follows.
> The claimant resigned with effect from 21 February 2017. On 16 March a solicitor then acting for them referred the dispute to ACAS for Early Conciliation. [The claimant's then solicitor] attempted to negotiate but no-one could get hold of the Interim Head Teacher Joan McGraw. The certificate was issued on 10 April. As this was well within the primary time limit, the latest date then for submitting the claim was 14 June 2017 ("stop the clock" counting) which was more than a month after the certificate was issued. However the claim was not presented until 20 June 2017. On the jurisdictional "not reasonably practicable", a miss is as good as a mile.
>
> This was totally [the claimant's solicitor's] responsibility, and totally his fault that it was late. They had entrusted him with the process, he had the matter in hand, but apparently he did not. It seems impossible that, in his position, he could have been ignorant of the law. He had the resignation letter there which had been drafted by Ms Nevison-Smith. He must have known the precise date of the resignation from which time ran. How he managed to present the claim late is anybody's guess.
>
> Unfortunately the case law is very much against claimants when professional advice is wrong, whether its union advice, CAB advisors, or, in particular professional lawyer. The original case was *Dedman v British Building and Engineering Appliances* [1973] IRLR, 379, CA. Of the other cases *Marks and Spencer v Williams-Ryan* [2005] IRLR, 562, CA is probably the most liberal judgment in this area. *Riley v Tesco Stores & GL CAB* [1980] IRLR, 103, CA is another.
>
> I explained to Ms Smith today that everything but the discrimination is subject to the reasonably practicable time extension such as is found in

section 111 of the Employment Rights Act 1996, it is the same for the money claims and public interest disclosure. The disability discrimination is different but I am concerned about that claim. Time extension, perhaps the most helpful case from the claimant's point of view is *Chohan v Derby Law Centre* [2004] IRLR, 685, EAT. On the other side is *Robertson v Bexley Community Centre* [2003] IRLR, 434, CA. Ms Nevison-Smith did not really feel at home understandably in this jungle that they find themselves.

I am concerned also about the merits of any discrimination claim, see *Hutchison v Westward Television Ltd* [1977] IRLR, 69, EAT. What the claimant seemed to be saying when I asked him to describe his disabilities was he is relying on a mental impairment caused, he says, by the respondent's treatment of him. As he describes it however that might well just be a personal injuries claim. Personal injuries cannot be the subject of claims in themselves in the Employment Tribunal, certainly not under the breach of contract Extension of Jurisdiction Order 1994. Article 4 expressly excludes personal injuries damages.

Articles 5(a) & (b) exclude terms respectively requiring the provision of living accommodation, and any term imposing anything in connection with the provision of living accommodation.

The claimant had tied accommodation next to the school which was part of his package of remuneration as the Residential Premises Manager. Having resigned the claimant has lost his home, lost his job, and has returned to the North of England. The claimant describes himself as of no fixed abode; the Yorkshire postal address he has provided is his parents.

There has to be a dedicated 1-day hearing to decide the jurisdictional time-limit. It would be more satisfactory if it took place when the respondent has provided an ET3 response to the claim. Then there will be a formal hearing on jurisdictional time points.

For the present I will not re-list the case but it will be re-listed once the respondent has responded to the re-served ET1 claim. Effectively the case is starting again. I advised Ms Smith that they have an uphill struggle here. They need to do some research and assess the position. I cited the above cases to help get them started.

They were not aware that an Employment Tribunal cannot touch tied accommodation or straight personal injuries claims.

Finally I discussed his knee injury with the claimant, which seemed to be the start of things going wrong for him. He says, whether coincidentally or not, he injured his knee 2 days before an OFSTED inspection in 2012. It was an injury that he sustained twisting his foot. It jarred his knee. He had physiotherapy for some 3 to 4 months. He has substantially recovered from it apart from the odd twinge. Thus it is borderline and may not qualify as a disability. It is hard to see how the disability discrimination case would be put anyway relative to that particular injury. Did he suffer a substantial

> disadvantage in the workplace? He needs a lot of advice for this.
>
> A common misconception is that if adverse treatment by the respondent has caused a mental impairment then it is a disability discrimination claim. It is not; it is a personal injury claim. It is the other way round. If the mental impairment causes the respondent's adverse treatment then it can be a disability discrimination claim. Any alleged detriments or less favourable treatment have to be actually related to that mental impairment or illness i.e. typically with depression, memory impairment or something which might put you at a substantial disadvantage in the workplace. I have not read anything of that nature in this ETI claim form."

21 The Tribunal omitted from these reasons which will be placed on the public record, all reference to the name of the firm of solicitors or indeed the individual solicitor whose conduct the Claimant criticised in support of his application for an extension of time at the previous hearing. The reason for this was that there was no evidence before the Tribunal of correspondence between the Claimant and his solicitors, and the Claimant's solicitors had not had an opportunity to address this issue. It would therefore be grossly unfair for this Tribunal to include in any public document, or indeed to reach, any findings which were adverse to that party.

22 In the premises, given that the time limits had been exceeded by an even greater period than that posited by the Tribunal when the parties discussed this matter in September 2017 and in the absence of any evidential basis for reaching a view that it was not reasonably practicable for the Claimant to have presented the claim in time, the Tribunal dismissed the unfair dismissal, breach of contract (notice pay), whistle-blowing, unlawful deduction of wages and holiday pay claims. The Tribunal notes in passing that there had been no particularisation of the unlawful deduction of wages and holiday pay claims in any event.

23 The remaining claim made by the Claimant was a complaint of disability discrimination. This also had not been particularised. However crucially in the email from the Claimant's sister of 11 January 2018 she appeared to inform the Tribunal that the disability discrimination claim was being withdrawn on the basis that it was misconceived. This was an indication that they accepted the correctness of the direction as to the law given by Employment Judge Prichard in the hearing in September 2017. Having reviewed the terms in which the reservations about the claim were stated on behalf of the Claimant, I considered that that was the appropriate construction of the paragraph addressing this. In short, the Claimant through Ms Nevison-Smith stated:

> "*… we now realise that we were ill-advised …… to bring such a claim and that the adverse effect that the SLT has had on his mental health is the domain of a personal injury claim… So we also now appreciate that the gaps in support he has received do not lend themselves to personal injury claim either*."

24 In the event that the Tribunal was wrong to treat this as an unambiguous withdrawal and to dismiss the claim on that basis for disability discrimination, the Tribunal had regard to whether it would be appropriate to extend time for the disability discrimination claim to be pursued. This claim remained unparticularised. The

Claimant's sister promised in her email of 11 January 2018 sent at 15:23, that a further document would be sent to the Respondent or to the recipients of the first email. It appeared from the document produced by the Respondent that the Claimant and his sister had decided it was not necessary to provide the particularisation identified from the draft list of issues which had been in the possession of the parties since the previous hearing on the basis that the disability discrimination claim was being withdrawn. In the email Ms Nevison-Smith made the comments cited above about the disability discrimination claim being a personal injury claim in her words (with reference to point 9, 10 and 11) of the draft list of issues. Those were the paragraphs which related to disability discrimination.

25 That was further confirmation that the Claimant intended to withdraw the disability discrimination claim. However as set out above, even if the Tribunal were wrong on that, there were no grounds being put forward as to why the Tribunal should find it was just and equitable to extend time. In all the circumstances therefore in the alternative the disability discrimination claim would have been dismissed in any event as being out of time and there being no good reason to extend time.

Documents considered

26 The Respondent prepared a bundle of documents [R3] and in addition during the course of his submissions Mr Williams helpfully handed up to the Tribunal further copies of email correspondence between the Claimant's representative and the Tribunal which were also considered. These were documents which had been part of the Claimant's original application for postponement so it is not necessary to list these separately. In addition the Tribunal considered all the correspondence in the file including in particular emails from the Claimant's representative to the Tribunal and the information contained in and attached to the application to postpone dated 4 January 2018. The Claimant's representative had attached a set of documents and each page was internally paginated. The total bundle including the application for postponement ran to some 13 pages.

27 Mr Williams also prepared for the Tribunal a note for the preliminary hearing [R1] which set out the applicable law and a summary of the background in relation to each of the aspects of the case. The Tribunal is grateful for the assistance provided by Mr Williams who also provided photocopies of the cases referred to in his submission which are as follows:

> *Dedman v British Building & Engineering Appliances Ltd* [1974] 1 WLR 171;
> *Marks & Spencer plc v Williams-Ryan* [2005] ICR 1293;
> *Virdi v Commissioner of Police of the Metropolis & others* [2006] WL 361006 also cited as UKEAT/0373/06;
> *Margarot Forrest Care Management v Kennedy* UKEATS/0023/10 and
> *Ladbrokes Racing Ltd v Traynor* UKEATS/0067/06.

Employment Judge Hyde

29 January 2018