



EMPLOYMENT TRIBUNALS PUBLIC PRELIMINARY HEARING

Claimant: Mr M Golden

Respondents: Wm Morrison

Heard at: Leeds **On:** 8 January 2018

Before:
Employment Judge JM Wade

Representation

Claimant: In person with Mrs Golden (mother)

Respondent: Miss Nasey (solicitor)

Note: A summary of the reasons below were provided orally in an extempore Judgment delivered on 8 January 2018, the written record of which was sent to the parties on 11 January 2017. A written request for written reasons was received from the Respondent the same day. The reasons below are now provided in accordance with Rule 62, corrected for error and elegance of expression, and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 8 January 2017 are repeated below:

JUDGMENT

1 It was not reasonably practicable for the claimant's complaint of unfair dismissal to have been brought by 11 November 2017 (the limitation period).

2 The further period in which it was reasonably practicable for it to have been presented was up to and including 14 November 2017 and the complaint was presented in time.

3 The just and equitable limitation period within which the claimant's complaint that his dismissal was an act of disability discrimination was to have been brought is up to and including 14 November 2017 and the complaint was presented in time.

4 Limitation concerning any further disability discrimination complaints pursued has not been determined.

REASONS

Introduction

1 By a claim form presented on 14 November 2017 the claimant brought complaints of disability discrimination and unfair dismissal. The claimant asserts his depression/anxiety rendered him a disabled person at the material times.

2 The response sets out that the claimant was dismissed from his car park attendant post by the respondent on 3 July 2017. The claimant included his date of birth and address in his claim form (he is thirty eight at the date of this hearing), but very little further information aside from ticking the prescribed boxes - unfair dismissal and disability discrimination - and indicating he did not have disability in box 12.

3 The claimant commenced ACAS conciliation on 11 September 2017 with a certificate issued on 11 October 2017. Applying the primary limitation dates for both a discriminatory dismissal and an unfair dismissal the Claimant ought to have presented his complaint by no later than 11 November 2017 (see paragraph 2 of the grounds of resistance).

4 This hearing was therefore fixed to: “consider whether the claimant has presented his claims to the Tribunal out of time and, if so, whether the Tribunal can consider the claims, and to make any further case management orders as appropriate.” This was set out in a Notice of Hearing sent to the parties on 20 December 2017. An hour was allocated to address these matters.

5 The details of the claim were very short and bear repeating in totality as they appear in the details of claim section [sic throughout]: “making me work went i hade a sick note. Not paying me statutory sick pay went off work for depression, anxiety with sick note, telling me they were going to sack me if i did not work, trying to made me work 3 days a week, went contract to 5 days, changing my hours around went i had week the same hours for 10 years.”

6 The response set out a far more detailed chronological chain of events including absence management, and a dismissal on 3 July 2017. The claimant’s employment was said to have started on 28 May 1996.

Evidence

7 For the purposes of this hearing the claimant’s mother (and father) attended and presented a much longer document than the claim form, which contains his parents’ evidence about the relevant chain of events. I swore in the claimant and Mrs Golden, and conducted their evidence in chief by means of questions from me on the relevant matters. I invited the respondent’s solicitor to ask any questions arising out of their evidence, but she restricted questions on the respondent’s behalf to questions only concerning the claimant’s work and nature of his contract working at “Wetherspoons”.

8 I assessed Mrs Golden as giving entirely truthful evidence to the extent she had direct knowledge, and I made a similar assessment of the claimant. I also made some assessment of the claimant’s apparent capacity, accompanied as he was by his parents, and having suffered from mental ill health. I was satisfied that he had capacity to bring proceedings. I do consider, however, that the claimant but was not as able to process the complexities involved in this case or the challenges that life presents generally as many, and was to that extent and for the reasons indicated by his mother, reasonably to be considered as requiring

greater assistance than some litigants in person in exercising the Tribunal's duty to put the parties on an equal footing.

I made the following findings of fact.

Background

9 The claimant has had a long association with the respondent, working for the store for over twenty one years after leaving college. He secured a bakery position full time, but some years ago started to suffer mental health difficulties. That resulted in self harm and moving back home for a period, but he now lives back in his own flat. The respondent was supportive at that time. The claimant has always been single and finds it difficult to make friends. He struggles with changes and likes a stable work routine.

10 He had previously worked a stable bakery rota of early shifts, including weekends, but that became a changing rota. At around the same time from March 2016 there were instances of absence from work.

11 The claimant also had a part time job working on the door at a local pub; he undertook that work through an agency, but again it was flexible and fitted with his hours for the respondent. On some occasions when he was signed unfit to work for the respondent his doctor advised him he could do the door man work, because that got him out.

12 Management by the respondent led to a change in role from the bakery at the store to outdoor work in the car park.

Date of dismissal and events after dismissal

13 The claimant knew he had been dismissed at the end of a meeting on 3 July 2017. A Ms Roberts, a union representative, was with him in that meeting, but he was not a member of the union. As to the right of appeal given to him, he asked Ms Roberts but the claimant told me that "in her view I would not win". Nevertheless Ms Roberts advised him to contact ACAS.

14 The claimant's recollection of these events was not entirely clear. He had his medication increased following dismissal from 20 to 40 mg of citalopram in addition to 20mg of amitriptyline and was not well. By that stage he had been taking medication for some time, initially the amitriptyline had been to assist with sleeping.

15 His parents were away in Australia at some point in 2017, and he was living by himself. He did not claim benefits after his dismissal, but visited his GP, who knew he had been dismissed. He also spoke to someone who used to be a union representative who advised him to submit a Tribunal claim on line. He then did contacted ACAS on 11 September.

16 The claimant did not think he took in the information from ACAS about time limits, but was told that there was a three month time limit. He did not understand whether that was from dismissal or the point that he contacted ACAS on 11 September 2017 or from when he started looking into things after 11 October 2017 .

17 The claimant attempted to complete the form, but had one initial failed attempt; and it was eventually submitted by him acting alone on 14 November 2017, some three days out of date, with, as I have said very little information within it. The degree to which the claimant could articulate his complaint in the claim form appears reflective of his functioning at the time and was consistent with my assessment of his understanding of matters generally.

18 The claimant did continue working at Wetherspoons in a limited way during this period and even applied for a job “on the trains”, but he was not kept on after a probationary period in that post, which lasted about seven weeks and ended before Christmas.

The Law

19 Section 111 (2) of the Employment Rights Act 1996 relevantly provides that an Employment Tribunal shall not consider a complaint under this section 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 of that period.

20 Section 123 of the Equality Act provides:

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 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.

21 Conduct extending over a period is for the claimant to establish, either by direct evidence, primary facts or inference: the alleged incidents of discrimination must be linked to one another and there must be evidence of a continuing discriminatory state of affairs covered by the concept of “[conduct] extending over a period” (see **Hendricks v NPC [2003] IRLR 96.**)

22 For the factors to be taken into account in extending time, where claims are otherwise out of time, (see **Harvey L (5) [832]**, which reflect the general Limitation Act provisions). These are as follows: “- the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings); the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed; the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application; the conduct of the claimant over the same period; the length of time for which the application is out of time; the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim; the extent to which professional advice for making a claim was sought and if it was sought, the content of any advice given”.

23 The exercise of discretion in extending time limits is the exception rather than the rule – see **Robertson v Bexley Community Centre [2003] IRLR 434,**

per Auld LJ.

Discussion and Conclusions

24 Firstly, I can only decide limitation in relation to the two relatively clear complaints, that is a discriminatory dismissal and an unfair dismissal. Allegations about earlier acts of disability discrimination are insufficiently clear as to their dates as to apply the Limitation Act and other required principles to them. In any event, allegations about a chain of events which may be alleged to be continuing discrimination, in this case, as with many, can only properly be assessed at trial on the basis of evidence. Given the light shed by the additional document today, it is simply not just for me to decide whether any other disability discrimination complaints have been presented in time. This will be a matter for later determination.

25 Applying the Limitation Act factors to the two complaints for which I can determine limitation, the length of the limitation breach is short (three days). No particular prejudice was relied upon by the respondent: the response is full and clear as to the chain of events and any evidence at trial will not be stale.

26 As to potential remedies for the claimant, if prevented by limitation from pursuing unfair dismissal there is no other means by which he can access the possibility of reinstatement or re-engagement, the primary remedy for unfair dismissal, which for this claimant, who has not yet been able to find stable employment, may deliver a real remedy (if his complaint were to succeed). That is of particular prejudice to the claimant because of his stable employment and lengthy record previously, his limited career experience beyond the respondent and also because of his mental ill health, which may or may not be found to be a disability if the Equality Act complaint proceeds.

27 Furthermore, personal injury damages are not available in unfair dismissal complaints, and on the claimant's case, his dismissal worsened a pre-existing psychiatric condition. The Equality Act complaint can also deliver the unique remedy of injury to feelings compensation and recommendations, the latter of which again, could deliver a real remedy if the complaint(s) succeed.

28 As to conduct of the parties, there is no reprehensible or other relevant conduct alleged on either side, although, I do bear in mind as material to the exercise of my discretion that a union representative appears to have advised the claimant there was little point in an appeal. That advice, in view of the claimant's circumstances, and his likely difficulties in obtaining new employment, may well have contributed to delay and his state of mind.

29 Critically I do consider that the claimant's mental ill health at the time affected his ability to "take things in". I cannot conclude that he had understanding, other than in the vague way he explained, of the time limits, which for all the reasons we know require greater thought and calculation than they once did. I have also concluded that his lack of understanding, given his circumstances, cannot be said to be unreasonable, and that with his vague understanding he acted as expediently as he could, given his ill health.

30 The test for me for the unfair dismissal complaint, is whether it was reasonably practicable for the claimant to have presented his complaint in time; I

have concluded it was not due to his reasonable lack of understanding of the nuanced and ACAS related time limit. It adds nothing to this analysis to say the claimant was able to apply for and secure an opportunity to work “on the trains”, in the same period, because I have no knowledge, and no questions were asked, about whether that involved timeliness or was done alone or with support.

31 For the same reason of lack of understanding and taking into account the Limitation Act factors, and the exceptional nature of the claimant’s circumstances that I indicate above, I exercise my discretion, to extend to 14 November 2017 the date when he could reasonably have presented the complaint. For the same reasons, I also consider, exceptionally, that the just and equitable period in which he should be permitted to bring his complaint of a discriminatory dismissal is until 14 November 2017.

32 For these reasons I have decided that the unfair dismissal complaint and disability discrimination complaint (dismissal) can proceed to be heard on their merits.

Employment Judge JM Wade

Dated: 25 January 2018