EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Sawyer	**v**	**Department for Works and Pensions**

Heard at: Watford **On**: 20 April 2018

Before: Employment Judge George

Appearances

For the Claimant: In person
For the Respondent: Ms J Gray, Counsel

JUDGMENT

1. It was reasonably practicable for the claim of unfair dismissal to be presented by 3 May 2014 (the date by which the claim should have been presented by reason of s.111(2)(a) of the Employment Rights Act 1996).

2. The claim of unfair dismissal was not presented within that initial limitation period nor within a reasonable further period thereafter.

3. The Employment Tribunal does not have jurisdiction to hear the claimant's claim of unfair dismissal and it is struck out.

4. The claim of disability discrimination was not presented within three months of the act complained of, contrary to s.123 of the Equality Act 2010, and it is not just and equitable to extend time for presentation of the claim.

5. The Employment Tribunal does not have jurisdiction to hear the complaints under the Equality Act 2010 against the first respondent, the second respondent or the third respondent and they are struck out.

REASONS

1. At this open preliminary hearing I have had the benefit of the joint bundle of documents which runs to 192 pages, although in the event I was only taken to a very small number of the pages within it. The claimant had prepared a

witness statement. He gave oral evidence in which he adopted that witness statement and was cross-examined upon it. I also had a witness statement from Sara Gallacher, who is presently employed by the respondent in the HR Department having started work there on 29 August. She prepared a witness statement, which she adopted in evidence, and she was cross-examined upon it. I also had the benefit of a skeleton argument prepared by the claimant and one by the respondent, together with a bundle of authorities.

2. The claimant started work for the respondent on 21 January 2002. He has multiple disabilities and during the course of his employment the respondent made a number of adjustments as a consequence of that. Those adjustments culminated in a situation where he was working in his own room with a number of heaters in place in order to maintain an even temperature.

3. The claimant's case is essentially that he reported a number of irregularities in practice and serious breaches on the part of co-workers at the respondent to the then Secretary of State on 5 July 2013 and following that report his adjustments were removed by moving him to an open-plan office, where he suffered from the lack of even temperature and the cold working environment, which led to an exacerbation of his disabilities and the effects of them.

4. On his case, this precipitated an absence from work which started on 28 October 2013 (to judge by the outcome letter from his appeal against dismissal). This absence was managed under the respondent's Attendance Management Policy and eventually the claimant was dismissed for unsatisfactory attendance on 4 February 2014. The appeal was determined by a letter that is dated 19 March 2014.

5. In this short hearing, it has not been relevant to consider the merits of the case, but it is evident that under normal circumstances any claim under the Employment Rights Act 1996 (hereafter the ERA) for unfair dismissal or under the Equality Act 2010 (hereafter the ERA) for discrimination should have been brought by the 3 May 2014.

6. This is because, in relation to a claim of unfair dismissal, s.111(2) of the ERA provides that an employment tribunal shall not consider a claim unless it has been presented before the end of a period of three months beginning with the effective date of termination or within a reasonable further period if the employment tribunal is satisfied that it was not reasonably practicable for the claim to have been presented within the initial limitation period. The applicable time limit for the disability discrimination claim is found in s.123(1) of the EQA which provides that claims should be brought within three months of the act complained of or within such further period as the employment tribunal considers just and equitable.

7. Since May 2014 the requirement to attempt early conciliation may have an effect on time limits. However, at the relevant time for the present case, early conciliation before presentation of a claim had not yet become

compulsory. The Employment Tribunal (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 came into force on 6 April 2014 but the transitional provisions of the Enterprise and Regulatory Reform Act 2013 (specifically reg.4 of Commencement Order No.5 for that Act) had the effect that the early conciliation was only compulsory for those who presented an employment tribunal claim on or after 6 May 2014; it was available to but not compulsory for those presenting claims between 6 April and 5 May 2014 inclusive. Therefore, towards the end of the primary limitation period in the present case early conciliation was available to the claimant but it was not necessary for him to attempt it before presenting a claim.

8. In fact, early conciliation was carried out in the present case on 20 October 2017 (see the early conciliation certificate at page 1), and the claim form was presented on 3 November 2017. It was therefore exactly three and a half years late.

9. By the claim form, the claimant complained of unfair dismissal and made a disability discrimination claim, not only against the Department for Working Pensions, but against the two named respondents. However, he does not explain in the body of the claim exactly how the claim is put against them and it is fair to say that in general terms the claim is somewhat unclear and would require particularisation in order to be fully understood were it to proceed beyond today's preliminary hearing.

10. The respondent defends the claim and put in an ET3 on 13 December 2017. The case has been listed before me to consider whether the Employment Tribunal has jurisdiction to hear the claim, as seen from the notice of preliminary hearing at page 43. Even though the claim has been accepted, the question of jurisdiction can be raised at any time, either by one of the parties or by the tribunal of its own motion.

11. As set out in paragraph 6 above, there are two different tests applicable to the two different kinds of claim brought by this claimant. In relation to the claim of unfair dismissal, it is a two stage test. First I need to consider whether it was reasonably practicable for the claimant to present the claim by 3 May 2014 and secondly, if I am persuaded of that, I need to go on to consider whether the claim was then presented within a reasonable further period. Under the EQA, the question is whether the claim was presented within three months of the act complained of, or within a further period that the tribunal considers just and equitable. This is commonly described as saying that the time limit for presenting the claim should be extended on the basis that it is just and equitable to do so.

12. Section 111(2) should be given a liberal construction in favour of the claimant. However it is for him to show precisely why it was that he did not present the claim in time for it is for him to show that it was not reasonably practicable for him to do so. There is no substitute for looking at the words of the statute themselves, however I remind myself of the wording of para.5.43 of the IDS Handbook on Employment Tribunal Practice and Procedure which cites the following principles from two authorities,

"in Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in Asda Stores Ltd v Kauser EAT 0165/07 explained it in the following words: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'."

13. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT advised that tribunals deciding whether or not to extend the time for presentation of a claim under what is now the EQA should consider in particular the following factors:

(a) the length of and reasons for the delay;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the extent to which the party sued had cooperated with any requests for information;
(d) the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and
(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action.

14. However the factors to be taken into account depend upon the facts of a particular case. Furthermore, one of the most significant factors to be taken into account when deciding whether to extend the time limit is whether a fair trial of the issue is still possible (Director of Public Prosecutions v Marshall [1998] ICR 518). In Baynton v South West Trains Ltd [2005] ICR 1730 EAT, it was observed that a tribunal will err if, when refusing to exercise its discretion to extend time, it fails to recognise the absence of any real prejudice to an employer. This is part of considering the balance of prejudice to the respective parties.

15. Having stated the relevant law, I first make findings about the claimant's reasons for not presenting his claim in time, as he explained them to me in oral and statement evidence. He accepts that, at the time that he was dismissed, he knew of the three-month time limit and he also knew that the fees order was being challenged by Unison through judicial review proceedings. His case is that he was advised by Employment Tribunal staff that, because of the fees order, it would cost him £1,200 or more to bring the claim. His evidence is that he was unable to afford those fees and that that was what effectively prevented him from bringing his claims within the applicable time limits.

16. As a matter of fact, by reason of reg.7 and Sch.2 Table 2 of the Employment Tribunal and Employment Appeal Tribunal Fees Order 2013, it would have cost £250 to start the claim and £950 at the hearing stage. Essentially, he accepted before me that he took a calculated risk that he would be able to claim late if Unison was successful in their challenge to the fees order. He said that he was unable to claim remission at that time because his salary was over the remission limit.

17. On the other hand, he says that his financial circumstances were such that he was unable to afford the £250 initial fee and the prospect of a £950.00 hearing fee, making at least £1,200. However, he did not produce any evidence of his financial circumstances in advance of the hearing and I therefore took oral evidence on this point. The notice pay paid by the respondent at dismissal was not paid in a lump sum, according to the claimant, but instead £1,728 per calendar month was paid for 3 months from 4 February 2014.

18. His oral evidence was that he had no savings at that point in time. He owned his own home without a mortgage and therefore did not have any outgoings on housing costs. However, he said that he had a number of debts towards which he paid about £250 per calendar month and, no doubt, he had regular outgoings such as food, transport and utilities. He also said that he was paying off an overdraft and was repaying family members who had lent him £50,000 in order for him to be able to pay off his mortgage. That means that something over £1,450 is not specifically accounted for, because he has not provided detailed financial information about his outgoings, although some of that would have been paid in food, utility bills and repayment of the overdraft and family members. However, I do not accept that it was not possible for him to save something from that over the course of the first three months in order to pay the £250 initial fee without hardship or sacrifice. Furthermore, he did not apparently ask the family members who had so generously lent him £50,000 to pay off his mortgage whether they could forego repayment of that for a few months to enable him to claim.

19. I therefore have concluded that, based upon what he has told me about his financial circumstances, he was not one of those individuals who had to make difficult choices about what to spend their money on. In the words of Lord Reed someone who was only able to save sufficient money to pay Tribunal fees, "by sacrificing ordinary and reasonable expenditure for substantial periods of time" (R (Unison) v Lord Chancellor [2017] IRLR 911 UKSC at para 94). That is not to say that it would, in every case, be not reasonably practicable for such a person to afford to pay tribunal fees. Much would depend upon the facts of the individual case. However the claimant's evidence about his income and outgoings falls far short of evidence about what it would have meant for him to have to the initial fee of £250 before 4 May 2014 and to face paying the hearing fee. Without that, there is, in my view, inadequate evidence from which to find that it was not reasonably practicable to pay the employment tribunal fees.

20. More than that, the claimant was paid £27,248.07 by way of compensation for loss of office under a scheme that applied to his employment with the respondent. According to the respondent this was on 17 April 2104, according to the claimant it was on 10 May 2014. I have not seen any documentary evidence from either party as to when the payment was made and therefore accept in the claimant's favour that it was paid on 10 May, shortly after the expiry of the ordinary limitation period. Nonetheless he still made no attempt to present a claim at that time.

21. He contacted ACAS and I see that there is an email from them dated 15 April 2014. However that refers to him expressing interest in undergoing pre-claim conciliation as a potential alternative to a tribunal claim, rather than early conciliation as a precursor to a tribunal claim – as he would have been able to do at that point. There is no documentary evidence that he contacted ACAS again, as they invite him to in that email and there is no documentary evidence that ACAS contacted the respondent. The claimant asserts that he telephoned ACAS and that they contacted the respondent who said they were unwilling to consider pre-claim conciliation. Even if that is so, even if the respondent was contacted at that time and refused to participate, the fact that no claim ensued means that they were entitled to conclude that there would be no litigation.

22. The claimant says that he watched for an outcome of the Unison claim and that came on 26 July 2017, when the Supreme Court set aside the fees order. His evidence is that he contacted the Employment Tribunal every week from then and up until November 2017 and they gave him the same response, which was essentially that he needed to wait and keep calling back until they said that it was appropriate for him to present a claim.

23. It is quite possible that in the weeks immediately post 26 July 2017 the Employment Tribunal response to enquiries by somebody such as a claimant might have been vague if, as the claimant says he did, he made clear in his telephone enquiries that he had not yet made a claim of any kind. However, I consider that it was highly unlikely that following the Presidents' 2nd case management order of 18 August 2017 (tab 3 in the authorities bundle), the tribunal staff would have positively advised him to wait to make the claim. I say that because that case management order that came from the President of Employment Tribunal stated, at paragraph 5, that all other claims or applications brought to the Employment Tribunal in reliance upon the Unison decision should proceed to be considered judicially in accordance with the appropriate legal and procedural principles in the usual way. That is in accordance with my recollection of how things were dealt with at that point. It seems to me, based upon that case management order, that it is more likely than not that tribunal staff would thereafter have been giving advice in accordance with it.

24. I therefore reject the claimant's evidence that he was given positive information by the tribunal the he relied on that cause him to further delay making his claim after 18 August 2017. More to the point, it is not the job of the Employment Tribunal staff to give advice. The claimant accepted that he is an educated man, he has a law degree, he had previously contacted ACAS and Unison. He said that he did so at about the time of the Supreme Court's ruling in July 2017 as well as before. It was a well-publicised victory.

25. He alleges that, when he contacted Unison to find out information while the judicial review challenge was still ongoing, he was positively told that he would be able to claim if Unison won their case. I'm sorry to say that I do not find that assertion to be credible. I consider that his failure to provide

documentary evidence of matters which one might reasonably expect to have been evident, such as his financial circumstances also damages his credibility. I likewise reject his evidence both that the Employment staff made the positive representations which they are alleged to have made and that his conversations with ACAS also included positive representations that he would be able to claim out of time, were Unison to be successful in their challenge. In reaching that conclusion, I take into account that their 2014 email to him says that it was his responsibility to ensure that his claim was made.

26. I have therefore concluded that the claimant has not put forward a good reason why he could not claim sooner than 3 November 2017, following the decision in the Unison case on 26 July 2017. I also reject his explanation for not presenting his claim within three months of the dismissal.

27. Therefore, considering the first stage in the test for whether the unfair dismissal claim has been presented in time, I have concluded that it was reasonably practicable for him to bring it within three months of his dismissal, the claimant has not shown that it was not reasonably practicable for reasons of financial impecuniosity for him to bring the claim. He has provided no documentary evidence of means but appears on his oral account to have had a reasonable disposable monthly income. If I am wrong about that, then he did not bring his claim within a reasonable further period. Impecuniosity certainly did not apply after 10 May 2014 when, even on his own case, he received a large lump sum. Even if a claim for unfair dismissal had been struck out in 2014, it is possible that a claim under the Equality Act would have been treated differently if he could prove impecuniosity. Furthermore, the respondent would have been aware of the claim. The claimant would have also, although this is said, to some extent, with the benefit of hindsight, been in a better position to seek reinstatement of his claim once the Unison judgment came out had he brought it in 2014 within a week or two late even had it then been struck out on the grounds that the tribunal lacked jurisdiction. I also consider that he could have brought the claim for unfair dismissal much sooner after 26 July 2017 and certainly before 3 November.

28. So far as the EQA claim is concerned, I consider the relevant factors set out in BCC v Keeble. Three years is a long delay and there is, in my view, an inadequate explanation of the reason for delay. The respondent claims to have destroyed all but a very limited number of documents relevant to the claimant's employment and dismissal for capability and the named respondents are no longer in the first respondent's employment, although they have been located after an exhaustive search. These incidents took place more than four years ago. Ms Gallagher gave evidence about the searches which she has undertaken to seek more information about the decisions taken in relation to the claimant's employment. The only document which she has been able to locate is the appeal outcome letter, a copy of which had been retained by the appeal officer.

29. The claimant argues that the documents should have been retained under the applicable policy on retention of documents and cross-examined Ms

Gallagher about whether the documents really are missing and whether the correct policy was applied. Page 94 of the bundle is from one of the policies to which he refers. There it says that, and I paraphrase, if documents need to be retained for litigation then they should be kept for six years. The evidence before me is that, prior to the 2017 early conciliation, the most that the respondent knew was that the claimant had asked, through ACAS, whether they were interested in pre-claim conciliation as an alternative to an employment tribunal. According to the claimant, the respondent declined and there is no evidence that he made any other approach to them. In those circumstances, quite reasonably, the respondent did not consider that there would be litigation in this case and therefore that paragraph did not apply.

30. The claimant also relies upon page 69 of the document retention policy. That says that if an employee is dismissed for a disciplinary offence, then relevant documentation should be retained for between 12 years following retirement or the age of 72 years. This claimant was clearly dismissed under the Attendance Management Plan. He does not contend otherwise.

31. Therefore, I accept Ms Gallagher's evidence that the section of the policy which applies is that at page 67. This clearly states that documents of the kind that would be necessary for the respondent to defend this claim would only be retained for three years, unless Attendance Management issues are still current, which would apply to people who were still in employment. I also accept her evidence that, probably as a consequence of this policy being followed, the respondents have not retained the documents to which witnesses would need to refer in order to refresh their minds about the reasons for their actions.

32. This absence of documentation causes clear prejudice to the respondent. The claimant says that ACAS did contact the respondent, but my view on that is that it was at the time stated as an alternative to litigation. The claimant could have claimed after he received the lump sum and then the respondent would have least have had some warning that litigation was likely to happen.

33. I do not consider the merits of the case at this stage, but go on to consider the balance of prejudice. However, merits do to some extent come into that because there is prejudice to the claimant in being unable to bring his claim and have it decided upon its merits. Discrimination is a very serious matter, it is scourge of society generally and it is extremely important that there should be a way for employees who have been affected by it to enforce their rights.

34. However, there is clear prejudice to the respondents in having to respond to a claim long after the events when they did not previously have notice of it. That prejudice is not merely hypothetical, but demonstrable by the lack of documentation. Memories fade and witnesses are even more dependent on documents after the passage of time. There is prejudice to the claimant if he is unable to bring the claim, but my view is that he has not shown a sufficient reason for not bringing the claims sooner, in particular once he

had received the lump sum compensation for loss of office. That was, even on his case, back in May 2014 and he did not present the claim until November 2017. The incidents that he relies on are already some four years old and will be much older by the time of any hearing.

35. Taking all of those matters into account, I concluded that it is not just and equitable to extend time for the claims under the Equality Act.

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Employment Judge George

Date: …24 May 2018 ……..

Sent to the parties on: .....

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For the Tribunal Office