# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Singleton

**Respondent:** The Two Counties Trust

**Heard at:** Nottingham

**On:** Wednesday 3 October 2018
RESERVED TO: Tuesday 9 October 2018

**Before:** Employment Judge Blackwell (sitting alone)

**Representation**
**Claimant:** In person
**Respondent:** Mr Ludlow of Counsel

# RESERVED JUDGMENT

1. Mr Singleton's claim of discrimination pursuant to the protected characteristic of disability is dismissed because it was not brought within the time limits set out in section 123 of the Equal Act 2010 (EqA) and further it would not be just and equitable to extend that time limit.

2. The Claimant's claims of detriments suffered pursuant to section 47B of the Employment Rights Act 1996 (ERA) set out in the schedule to this decision are dismissed because the tribunal does not have jurisdiction to hear them in that they were brought outwith the time limits set out in section 48(3) of the ERA.

**Schedule**

1. Between October and December 2016 in a series of emails to other Acting Principals, the Chief Financial Officer, the Chief Executive Officer, HR and possibly others, Acting Principal Katrina Kerry disparaged the Claimant for making criticisms of HR referred to "the Steve problem" (Steve being the Claimant) and accused the Claimant of not following procedures around the appointment of invigilators.

2. Around 8 or 9 December 2016, the Chief Executive Officer came into the Claimant's office with the HR Manager and accused the Claimant of misleading Governors about the levels of work related stress in the organisation; was intimidating and aggressive in his manner; accused the Claimant of not having been ready for a recent OFSTED visit.

3. Later in December 2016, the Chief Financial Officer came into the Claimant's office and said something to the effect that the Claimant was over-remunerated.

4. Around December 2016, the Claimant was told by the HR Manager that Katrina Kerry had been bad mouthing the Claimant to colleagues in an open corridor.

# RESERVED REASONS

1. Mr Singleton represented himself and gave evidence on his own behalf. Mr Ludlow of Counsel represented the Respondent and he relied upon oral submissions. There was an agreed bundle of documents and references are to pages in that bundle.

## Issue

2. Pursuant to EJ Camp's preliminary hearing held by telephone on 18 July 2018 and promulgated on 27 July 2018, the issue for determination is

> "*Were all of the claimant's complaints of discrimination and of detriment for making protected disclosures presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA") and 38(3)(a) & (b) of the Employment Rights Act 1996 ("ERA") and if not should any such complaints should be dismissed on that basis? …*"

## Disability discrimination

3. EJ Camp identified that Mr Singleton's claim was of a failure to make reasonable adjustments having regard to sections 20 and 21 EqA. For the purposes of this hearing, paragraph xiii is relevant and reads as follows:

> "*(xiii) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):*
>
> 1. *An expectation that, between March 2015 and January 2017, the claimant would work long hours (70 plus), including evenings and weekends, especially from January / February 2016?*
>
> 2. *A practice of not ensuring (or endeavouring to ensure) that staff, and the claimant in particular, took regular rest breaks in accordance with the Working Time Regulations 1998?*
>
> 3. *Making work demands of the claimant which made it impracticable for him to take his annual leave entitlement.*"

4. The relevant law is set out at section 123(1) and (2):

> ***123 Time limits***
>
> *(1) Subject to sections 140A and 140B 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.*
>
> *(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*
>
> *(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*"

5. It was agreed that EJ Camp had set out the time limit issue correctly in the following paragraph:

> *"(ii) Given the date the claim form was presented (1 December 2017) and the dates of early conciliation (14 October to 10 November 2017), any complaint about something that happened before 15 July 2017 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.*"

6. Thus, it was common ground that the disability discrimination claim was out of time, given that the last act complained of was in January 2017 again it being common ground that Mr Singleton was unfit for work and did not attend work from 12 January 2017 to the effective date of termination of his employment on 31 August 2017.

7. I should note at this point that in paragraph 29 of the witness statement which Mr Singleton gave to this hearing, there is a reference to a reasonable adjustment in relation to an alleged failure to properly consult on the part of the Respondent. I told Mr Singleton that if he wished to pursue a disability discrimination claim in relation to that allegation, he would need to apply for leave to amend his particulars of claim and I told him that it inevitably would be out of time.

8. Returning then to today's issue, given that it is common ground that Mr Singleton's disability discrimination claim is out of time, would it be just and equitable to extend that time limit pursuant to section 123(1)(b) EqA? Mr Ludlow helpfully provided excerpts from Tolley's Employment Handbook dealing with the "just and equitable" extension of time. Thus, to extend time in these circumstances requires the exercise of judicial discretion. Further, it is normally for the Claimant to convince the tribunal that it is just and equitable to extend

time.

9. As Sedley LJ put it in the case of ***Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327***: "*There is no principle of law which indicates how generously or sparingly the power to enlarge time is to be exercised*".

10. Further, it is as was held in the case of ***British Coal Corporation v Keeble [1997] IRLR 338*** - it is advisable for this tribunal to adopt as a checklist the factors mentioned in section 33 of the Limitation Act 1980. As Mrs Justice Smith put it in paragraph 8 of that decision:

> "*That section provides a broad discretion for the court to extend the limitation period of 3 years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all of the circumstances of the case and in particular inter alia, to –*
>
> *(a) the length and reasons for the delays;*
> *(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 co-operated with any requests for information;*
> *(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
> *(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.*"

11. Firstly, as to the length and reasons for the delay, time began to run as of 13 January 2017. Mr Singleton's written evidence did not address the reasons for the delay, though he did deal with the point in oral evidence principally during cross-examination.

12. The first reason advanced by Mr Singleton was that he wished to pursue an internal grievance procedure so as to enable his grievances to be properly addressed by the Respondent. On the face of it, that is a laudable objective. That grievance began with a letter of 27 February 2017 (pages 129 to 135). It is a lengthy, detailed and well-constructed grievance. It makes reference to failure of the Respondent's duty of care in relation to the Health and Safety at Work Act 1974, the Working Time Regulations 1998 and Management of Health and Safety at Work Regulations 1999. It also refers to a possible breach of the Transfer of Undertakings (Protection of Employment) Regulations.

13. The grievance was acknowledged but no formal meeting was arranged until 27 June 2017 with the outcome not communicated to Mr Singleton until 31 July 2017. I should note that discussions commenced between the parties concerning the termination of Mr Singleton's employment and on 13 March 2017, Mr Singleton presented to the Respondent his proposed terms of settlement.

14. Mr Singleton also raised a second grievance concerning non-payment of wages on 21 April 2017.

15. Mr Singleton instructed solicitors in connection with the settlement agreement. There was contact with the Respondent's solicitors but no agreement was reached. Negotiations appear to have broken down at some point in May 2017.

16. Mr Singleton advances as a second reason for the delay the fact that during the relevant period he was ill and unfit for work. He cites a letter of 19 June 2018 from the nurse practitioner of his general practice at pages 111 and 112, which makes reference to the fact that Mr Singleton was signed off work as of 12 January 2017 with stress and anxiety.

17. He also refers to an occupational health report of 27 June 2017 (pages 139 to 142). The report concluded that Mr Singleton was emotionally unwell and work events over the last couple of years appear to have accumulated to the point where he seems to be encountering a number of stressors which he feels have overcome him. It concluded that the ill health was work related and that it was likely that Mr Singleton was disabled within the meaning of the EqA. A further report at page 143 from a psychological wellbeing practitioner sets out the depression and anxiety scores assessed by that practitioner.

18. Turning now to the cogency of the evidence, Mr Ludlow made no submission on the point and the delay is unlikely to have had any effect.

19. Although Mr Singleton points to the delays in dealing with his grievance and reference to occupational health, it does not seem to me that there were any requests for information that are relevant to the issue before me.

20. Mr Ludlow submits that Mr Singleton although not a practitioner of employment law, having regard to the grievance letter of 27 February and his admission in cross-examination that he line managed the human resources function and consequently had more than a layman's knowledge of employment law, that accordingly Mr Singleton should have known of his right to bring a disability discrimination claim at all times.

21. As to taking advice, Mr Singleton did take solicitors' advice once negotiations began on the terms of a settlement agreement. He accepts that between March and May 2017, he had a number of meetings with his solicitors and in addition communicated by telephone and email. It seems to me likely that Mr Singleton's potential claims must have been identified during that process, if only so that they could be dealt with in any compromise agreement.

22. As to the balance of prejudice if I do not extend time, Mr Singleton will not be able to proceed with his disability claim at all. I note, however (see paragraph 3 of EJ Camp's decision), that Mr Singleton reserves the right to bring the following further claims against the Respondent in the County or High Court:-

> (a) A claim for damages for personal injuries relying on a breach of common law duty of care and/or of the Health and Safety at Work Act 1974 and/or of the Management of Health and Safety at Work Regulations 1999.

(b) A claim under the Working Time Regulations 1998.

23. It seems to me that those potential claims might lead to a similar remedy to that which Mr Singleton would have been entitled had his disability claim proceeded successfully.

24. If I decide in Mr Singleton's favour and extend time, the prejudice to the Respondent is to deal with a series of factual allegations occurring between 2015 and 2017.

25. In conclusion, I find the two reasons advanced for the delay in bringing the disability claim by Mr Singleton to a degree contradictory. That is because despite his undoubted ill health, he was able to put forward a cogent grievance and pursue that grievance. He was able to raise a second grievance and he was able to instruct solicitors to deal with a compromise agreement. It seems to me, therefore, that if Mr Singleton could deal with those matters, he could also perfectly well deal with bringing forward a claim of disability discrimination. I appreciate that he wished to pursue the internal contractual grievance procedure but, given his knowledge of employment law and procedures, he must have done so knowing that time limits were running. It is likely that his solicitors between March and May 2017 advised him in that regard and at no stage did Mr Singleton assert that he was not aware of time limits.

26. Taking all those factors into consideration, I do not think this is a case in which I should exercise my judicial discretion to permit Mr Singleton's disability claim to proceed. Therefore, it follows that the tribunal has no jurisdiction to hear it.

**Detriments for making protected disclosures**

27. EJ Camp identified 9 alleged detriments at paragraph (x) of his decision. It is agreed that those alleged detriments set out in paragraphs 1, 2, 3 and 4 are out of time using the same chronology as above in paragraph 5.

28. As to detriment 5, there is a conflict of evidence as to whether Mr Singleton's email was blocked for the whole of the period, thus that issue will have to be determined by the full hearing.

29. Equally, it is common ground that the alleged detriments set out in paragraphs 6, 7, 8 and 9 were brought within the time limits set out in the relevant statutory provision, which is section 48(3)(a) and (b) of the ERA:

> *"(3) An employment tribunal shall not consider a complaint under this section unless it is presented—*
>
> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
>
> *(b) 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 of three months."*

Having regard to that provision, the test is one of reasonable practicability.

30. As to case law, again Mr Ludlow helpfully has provided the relevant passages from Tolley. It is clear that the onus of proof is on Mr Singleton to show that it was not reasonably practicable for the complaint to be presented before the end of the 3 month period.

31. Most of the relevant authorities concern the bringing of unfair dismissal claims. However, the relevant statutory provisions, namely section 111(2) and 48(3) in my view have a similar effect. Thus, it is a question of fact in each case whether it was reasonably practicable to present a claim in time.

32. Mr Singleton repeats that the two reasons why it was not reasonably practicable to bring his claim in relation to detriments are those advanced above in the context of disability discrimination. There are a number of authorities indicating that the existence of an internal appeal against dismissal did not render it not reasonably practicable to present the complaint within time. I appreciate that I am dealing here with an internal grievance procedure but it seems to me that the two are analogous.

33. As to Mr Singleton's undoubted illness, as I have said above it did not prevent him from pursuing the grievance procedure nor did it prevent him from instructing his solicitors between March and May 2017.

34. The alleged detriments took place between October and December 2016 though it seems that time only began to run at some point in December 2016. Thus, the same principles apply in relation to Mr Singleton's ill health, put shortly if he could deal with the formulation of a grievance procedure, then he could deal with bringing a claim in respect of detriments following a protected disclosure.

35. Therefore, it follows that the tribunal does not have jurisdiction to hear claims relating to the alleged detriments set out in the schedule to this decision.

## Directions

1. The case currently listed between 15 and 19 July 2019 is extended for a further 2 days, namely 22 and 23 July and will be held before a full tribunal at the Nottingham Employment Tribunal Hearing Centre, Carrington Street, Nottingham NG1 7FG. The 15th July will be a reading day for the tribunal and the parties are therefore not to attend until 09:30 on 16 July 2019.

2. For the avoidance of doubt, the complaints to be determined are:-

   2.1 Unfair dismissal brought pursuant to Section 94 of the ERA.
   2.2 The following detriments for making a protected disclosure:-
   (a) From 13 January 2017 following the Claimant going off sick with work related stress, the Respondent blocked the Claimant's

emails allegedly for welfare reasons.

(b) In or around February 2017, the Claimant was put at risk of redundancy. Although the Claimant does not believe the main reason for him being made redundant was him making protected disclosures, he thinks it was a significant factor.

(c) In or around June/July 2017, the Respondent told the Claimant by letter to take his accrued annual leave during his employment, when his preferred option was to receive a payment for accrued annual leave at the end of it.

(d) Around June 2017, the Claimant was told that he would drop to half pay because he had, supposedly, exhausted his entitlement to sick pay. The Claimant complained and his pay did not in fact drop.

(e) Failure/refusal on termination of his employment in August 2017 to pay what the Claimant believes his contractual redundancy entitled to have been and/or (which in practice amounts to the same thing) issuing a redundancy modification order eliminating the Claimant's entitlement to redundancy pay.

3. By not later than 8 November 2018, the Claimant shall set out in writing what remedy the tribunal is being asked to award and the Claimant shall send a copy to the Respondent.

4. Also by not later than 8 November 2018, the Claimant and the Respondent shall send to each other a list of any documents that they wish to refer to at the hearing or which are relevant to the case. They shall send each other a copy of any of these documents if requested to do so.

5. By not later than 6 December 2018, the Respondent shall prepare sufficient copies of the documents for the hearing. The documents shall be fastened together in a file so as to open flat. The file documents shall be indexed and the documents shall be in a logical order. All pages should be numbered consecutively. The Respondent shall provide the other party with a copy of the file. Four copies of the file shall be provided to the tribunal at the hearing, not later than 09:30 on 15 July 2019.

6. By not later than 21 December 2018, the Claimant and the Respondent shall prepare full written statements of the evidence that they and their witnesses intend to give at the hearing and shall exchange those written statements simultaneously. Four copies of each written statement shall be provided for use by the tribunal at the hearing not later than 09:30 on 15 July 2019.

Employment Judge Blackwell
Date; 11 October 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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