EMPLOYMENT TRIBUNALS

Claimant: Mr K Stormowski

Respondent: Heritage Care Limited

JUDGMENT AT OPEN PRELIMINARY HEARING

Heard at: Nottingham **On:** 11 and 12 July 2018

Before: Employment Judge K Ayre (sitting alone)

Appearances
For the claimant: In person
For the respondent: Ms L Gould, Counsel

Also present : Polish interpreter, Mrs M Savage (on 11 July) and Ms M Johnson (on 12 July)

JUDGMENT

1. The Tribunal does not have jurisdiction to hear the claimant's complaints of unfair dismissal, race discrimination and breach of contract as they are presented out of time.

2. The claimant was not dismissed.

3. In light of the findings above it is not necessary to determine the other preliminary issues

REASONS

Introduction

4. By claim form dated 6 January 2018 the claimant brought complaints of unfair dismissal (ordinary and automatic), race discrimination (including harassment) and breach of contract. The claims were resisted by the respondent. The claimant also ticked the 'other type of claim' box in the claim form, but subsequently informed the Tribunal that he completed this to indicate the

remedies he seeks if he is successful in his discrimination complaint, and that there was no separate monetary claim of any description.

5. The background to this claim is helpfully summarised in the Records of the Closed Preliminary Hearings before Employment Judge Britton on 24 April 2018 and Employment Judge Faulkner on 19 June 2018, and I do not propose to repeat them here.

The issues

6. The case was listed for a two day open preliminary hearing to consider the following issues:-

1. Was the claimant dismissed?;

2. Did the claimant make protected disclosures within the meaning of section 43A of the ERA 1996?;

3. Were the complaints of unfair dismissal and breach of contract presented out of time?;

4. If so, was it reasonably practicable for those complaints to be presented in time? If it wasn't, were they presented within such further period as the Tribunal considers reasonable?

5. Were any or all of the complaints of race discrimination brought after the end of the period of 3 months starting with the date of the act or acts to which the complaints relate?

6. Does the claimant has a reasonably arguable basis for saying that any or all of the complaints constituted conduct extending over a period so as to be treated as done at the end of the period (section 123 Equality Act 2010)?

7. If any or all of the complaints of race discrimination were brought out of time, were they brought within such other period as the Tribunal thinks is just and equitable?

8. Should any of the complaints be struck out on the ground that they have no reasonable prospect of success or should the claimant be required to pay a deposit as a condition of advancing any allegation or argument on the ground that it has little reasonable prospect of success?

The proceedings

7. At the outset of the hearing, and to assist the Tribunal in determining the issue of whether the complaints of race discrimination were in time, the claimant was asked to confirm the dates of the alleged acts of discrimination.

8. The acts of discrimination alleged by the claimant are helpfully set out in paragraphs 17.1 to 17.8 of the Record of the Closed Preliminary Hearing before Employment Judge Faulkner on 19 June 2018 and (using the same numbering as in that Record) the claimant confirmed that the dates of the alleged acts of discrimination were as follows:-

17.1 – last date of alleged discrimination : 4 August 2017

17.2 – last date of alleged discrimination : 4 August 2017

17.3 – last date of alleged discrimination : 4 August 2017

17.4 – last date of alleged discrimination : 4 August 2017

17.5 – last date of alleged discrimination : 22 August 2017

17.6 – last date of alleged discrimination : 9 August 2017

17.7 – last date of alleged discrimination : 13 July 2017

17.8 – last date of alleged discrimination : before 13 July 2017

9. The claimant accepted that his claim was presented out of time, having been issued more than one month after the issue of the Early Conciliation Certificate, and that it should have been presented by 30 December 2017.

10. At the outset of the preliminary hearing, it was agreed that the Tribunal would proceed first to deal with the issues identified at paragraphs 6(1) and 6(3) – 6(7) above and then, if necessary, deal with the remaining preliminary issues.

11. The Tribunal heard oral evidence from the claimant. The respondent did not adduce any oral evidence.

12. The respondent produced a bundle of documents running to 134 pages, to which a further 18 pages of documents were added by consent at the outset of the hearing.

13. Neither party had a copy of the bundle with them, and neither party had brought a copy of the bundle for the witness stand. The hearing was adjourned to allow the respondent's representative time to make sufficient hard copies of the bundle for use at the preliminary hearing.

14. During the course of giving evidence the claimant asked to refer to additional documents which he had brought with him and which had not been included in the respondent's bundle. The claimant was given time to make copies of those documents and to provide them to Ms Gould. Ms Gould did not object to the additional documents being added into evidence.

Findings of fact

15. The claimant was employed by the respondent from 19 October 2015 until 4 August 2017. The claimant was employed on a contract headed "Statement of Main Terms and Conditions" and which included a section headed "Policies and Procedures". That section listed a number of policies which were drawn to the claimant's attention and which the claimant was required to comply with. The list included the respondent's disciplinary rules. The disciplinary rules themselves were not produced in evidence before the Tribunal.

16. In July 2017 the respondent began an investigation into allegations of misconduct involving the claimant.

17. On 12th or 13th July 2017 the claimant was suspended.

18. On 18 July the claimant attended an investigation meeting. On the same day he wrote to the respondent responding to the allegations and also raising a number of complaints.

19. On 26 July the claimant sent two further letters to the respondent providing more information in relation to his complaints, and on 28 July he wrote directly to the respondent's Chief Executive raising concerns.

20. On 3 August 2017 the claimant attended a disciplinary hearing. During the course of the investigation most of the allegations against the claimant had been 'dropped' and the disciplinary hearing proceeded to consider just one allegation. That allegation was that on several occasions the claimant had used his own loyalty card when shopping for the respondent's service users, so as to benefit from loyalty points, and that he had ripped the bottom off supermarket receipts to cover this up.

21. The respondent considered this to be financial abuse, and found the allegation proven.

22. On 4 August the respondent telephoned the claimant and informed him that the outcome of the disciplinary hearing was that he was being dismissed with immediate effect.

23. On 9 August the respondent wrote to the claimant confirming its decision, a letter which the claimant did not receive for several days.

24. On 22 August the claimant appealed against the decision to dismiss him and raised a further grievance. The claimant gave evidence to the Tribunal, which the Tribunal accepts, that he took advice from a Citizens' Advice Bureau before writing his letter of appeal.

25. The claimant wrote to the respondent again on 4 September raising another grievance. In that letter he wrote that :"*The Equality Act protects employees from discrimination and harassment because of the characteristic of Race…I believe that I have been discriminated against because of a protected characteristic…I have been discriminated by unfair dismissal…"*

26. On 6 September the claimant started a new job through an agency. The claimant has worked in a number of jobs since leaving the respondent's employment.

27. The claimant sent a further letter to the respondent dated 2 October 2017. In that letter he wrote that: "*Please be aware that I have sought advice and if this grievance cannot be solved between ourselves in the first instance then I have only 3 months minus 1 day from the date of my dismissal to submit my grievance claim to a tribunal. I hope that this situation can be avoided by both sides. I have spoken to ACAS anonymously and they have advised me to inform you that almost two months have already passed…*"

28. In another letter sent to the respondent on the same day the claimant raised a grievance about an "*unlawful deduction of pay*".

29. It is clear to the Tribunal, from the oral evidence of the claimant that he took advice from the CAB prior to 22 August, and from the references to specific pieces of legislation and potential claims, that the claimant was well aware, by early October at the latest, of his employment rights. It is also clear, from the content of the letter dated 2 October, that the claimant was aware of the time limit for bringing a claim in an employment tribunal, and of the need to undergo ACAS Early Conciliation before doing so.

30. The claimant was invited to attend a meeting to discuss his appeal and his grievances. The initial meeting took place on 19th October and a further meeting took place on 31 October.

31. The outcome of the claimant's appeal against the decision to dismiss him was set out in a letter from Dave Chopra, the respondent's HR Manager, dated 31 October 2017, and posted to the claimant on 3 November. That letter contained the following relevant wording:-

"*…the appeal panel have concluded that the original decision to dismiss, has been overturned to a final written warning. This is a formal warning which will remain on your file for a period of 18 months…*

Given that the appeal panel has overturned your dismissal, you are technically no longer dismissed from Heritage Care. This dismissal will now be officially removed from your employment record with us. By this nature you are free to return back to work for Heritage Care. You did explain however at your original appeal that should the outcome be overturned, you had no intention in returning back to Heritage Care.

If you have now changed your mind, and would like to return, then please do contact me on …… to discuss further.

Should you still not wish to return to Heritage Care, then I would like the opportunity to discuss with you at a face to face meeting, the offer of a modest financial settlement…"

32. After receiving this letter, the claimant contacted Dave Chopra to arrange a meeting. The claimant was limited in the times that he could attend such a meeting, as he was working full time elsewhere.

33. A meeting was arranged for 22 November but cancelled by Mr Chopra due to other work commitments. Mr Chopra apologised for having to cancel the meeting and offered the claimant a discussion over the telephone instead. The claimant did not take Mr Chopra up on his offer of a discussion, nor ask to rearrange the meeting for another day.

34. The claimant suggested in his evidence that he wanted to return to work for the respondent and thought that the purpose of this meeting was to discuss his return. The Tribunal does not accept that evidence, which is not supported by the documentary evidence, and finds that the claimant did not want to return to work for the respondent. The claimant knew that the purpose of that meeting was to discuss a possible settlement, as evidenced by an email that the claimant sent to the ACAS conciliator on 15 November in which he referred to "*the next meeting that I have with Dave Chopra to discuss a modest financial settlement*."

35. On 30 October the claimant commenced ACAS Early Conciliation. Early Conciliation concluded and the Certificate was issued by ACAS on 30 November 2017.

36. On 3 January the claimant received a telephone call from the ACAS conciliator informing him that he was now out of time for bringing a claim, but that ACAS would keep their file open for another week.

37. The claimant issued his claim on 6 January 2018.

38. The claimant accepted in cross examination that it would have been possible for him to issue the claim in time.

The law

Time bar

39. In relation to the unfair dismissal complaints, the relevant law is set out in section 111 of the Employment rights Act 1996 which provides that:-

"(*2) …an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal –*

(a) before the end of the period of three months beginning with the effective date of termination, 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*"

40. In relation to the breach of contract complaint, the relevant provision is Article 7 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994, namely:-

"*…an [employment tribunal] shall not entertain a complaint in respect of an employee's contract claim unless it is presented-*

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or…..

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked int eh employment which has terminated, or…

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable."

41. The time limits for presenting discrimination claims are set out in section 123 of the Equality Act 2010 which provides that:-

"…Proceedings on a complaint…may not be brought after the end of-

(a) the period of 3 months starting with the date of ths act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."

42. Employment tribunals have a wide discretion when it comes to deciding whether to extend time in discrimination claims.

43. The leading case on just and equitable extensions under the Equality Act are ***Robertson v Bexley Community Centre [2003] IRLR 434*** in which the Court of Appeal held that there was no presumption that tribunals should extend time unless they can justify a failure to exercise their discretion to do so, but rather a tribunal cannot hear a complaint unless the claimant persuades the tribunal that it is just and equitable to extend time. The exercise of the discretion should be the exception rather than the rule.

44. In ***British Coal Corporation v Keeble and others [1997] IRLR 336*** the EAT suggested that tribunals, when deciding whether to exercise their discretion, should take account of the factors listed in section 33 of the Limitation Act 1980. More recent decisions however, including the Court of Appeal judgment in ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640*** have held that there is no requirement on tribunals to slavishy consider a list of factors when deciding whether to extend time under section 123 of the Equality Act, as their discretion is very wide. The Court of Appeal did

however state that the length of and reasons for the delay would almost always be relevant, as would prejudice to the respondent.

45. The ACAS Early Conciliation process serves to extend time limits. Section 207B(4) of the ERA 1996 is the relevant provision in this case, and provides that:-

> "*If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*"

46. Where a claim is, on the face of it, out of time, the burden of proof lies with the claimant to persuade the tribunal that the claim was in fact in time, or that the relevant time limits should be extended.

Was the claimant dismissed?

47. A claimant can only bring a complaint of unfair dismissal (be that 'ordinary' or 'automatic' unfair dismissal) to an Employment Tribunal if he has been dismissed. The definition of dismissal for these purposes is set out in section 95(1) of the ERA:-

"*For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)…only if)-*

(a) the contract under which he is employed is terminated by the employer (whether with or without notice)…

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct…"

48. Where an employee has been dismissed and the dismissal is overturned on appeal, then the dismissal 'vanishes' and the contract of employment is revived. In ***Roberts v West Coast Trains Ltd [2004] IRLR 788*** the Court of Appeal held that where an initial sanction of dismissal was reduced on internal appeal to demotion to a lower grade, the employee had not been dismissed. The effect of the appeal decision was to

"*revive retrospectively the contract of employment terminated by the earlier decision to dismiss*" [Lord Justice Mummery, para 26]

so as to treat the employee as if he had never been dismissed.'

49. In ***McMaster v Antrim Borough Council [2011] IRLR 235*** the Northern Ireland Court of Appeal held that the automatic reinstatement principle applied whether or not the employer has taken active steps to take the employee back, and without the need for there to be a formal offer and acceptance.

50. The Tribunal was referred also to the case of ***Folkstone Nursing Home Limited v Patel EAT/0348/15/DM*** as authority for the proposition that there is no need for the disciplinary procedure to specify that reinstatement would be the result of a successful appeal as that is "*inherent in the provision of the appeal*" [His Honour Judge Richardson, paragraph 35] . His Honour Judge Richardson in ***Folkstone*** also referred to paragraph 36 of the judgment of Mr Justice Lanstaff, President of the EAT in ***Salmon v Castlebeck Care (Teesside) [2015] IRLR 189:-***

"*I see no reason in principle why in any event it would be necessary for there to be an express revival or reinstatement. It must be implicit in any system of appeal, unless otherwise stated, that the appeal panel has the right to reverse or vary the decision made below. Where a decision is to dismiss, being the most draconian of sanctions, any success on appeal means that the decision is one in which dismissal does not take effect, thought some lesser sanction might."*

Conclusions

Time bar

Unfair dismissal and breach of contract complaints

51. The claimant accepted that his claims should have been presented to the Tribunal by 30 December 2017. Time started running on those claims on 4 August 2017 at the latest. Primary limitation expired on 3 November, but was extended to 30 December (one month after Day B) by section 207B(4) of the ERA.

52. The claimant gave evidence to the Tribunal that it would have been possible for him to submit his claim to the Employment Tribunal in time. The Tribunal finds that the claimant was aware of the relevant time limits, of his employment rights, and of his right to make a complaint to an Employment Tribunal, by the 2nd October 2017 at the latest. He first took advice from the Citizens' Advice Bureau in August, prior to appealing against the decision to dismiss him.

53. The claimant did not present any evidence to the Tribunal as to why it would not have been reasonably practicable for him to submit his claim in time. When asked why he had not done so he referred in general terms to delays by the respondent and by ACAS, but without being specific. He also referred to a telephone conversation he had with the ACAS conciliator on 3 January 2018. That conversation took place after the time limit had expired, and was not relevant to the question of why the claimant did not submit his claim by 30 December.

54. In these circumstances, and in light of the claimant's evidence, the Tribunal has no hesitation in finding that it would have been reasonably practicable for the claimant to submit his complaints of unfair dismissal and breach of contract on

time. As he failed to do so, the complaints are out of time and the Tribunal does not have jurisdiction to hear them.

Discrimination claims

55. Those claims were also submitted out of time, as the claimant recognised. The last of the alleged acts of discrimination was an incident on 22nd August 2017. Primary limitation for that act expired on 21 November 2017 but was extended by virtue of the Early Conciliation provisions referred to above to 30 December 2017.

56. The Tribunal has considered carefully whether to exercise its discretion to extend time. In reaching its decision it has considered the following:-

(a) The length of and reasons for the delay. The period of the delay in this case is just 7 days. Balanced against that however are the reasons for the delay. No good reason has in the Tribunal's view been advanced. The claimant was aware of his legal rights (he referred to the Equality Act in a letter to the respondent dated 4 September) and of the time limits for bringing employment tribunal claims. There was no suggestion that the claimant was too unwell to present his claim earlier, and indeed he was at work with another employer from 6 September onwards.

(b) The relative prejudice to the parties. The claimant admitted that he could have presented his claim on time. In these circumstances, the prejudice to the respondent of allowing this claim to proceed outweighs the prejudice to the claimant of not allowing it to do so.

(c) The promptness with which the claimant acted when he knew of the facts giving rise to his claim. In this case the claimant delayed from 22 August (at the latest) until 6 January – despite having taken advice and been made aware of his rights in August.

57. For those reasons, the Tribunal finds that it would not be just and equitable to extend the time limit. The discrimination complaints are therefore out of time and the Tribunal does not have jurisdiction to hear them.

Was the claimant dismissed?

58. In light of the findings above, it is not strictly necessary for the Tribunal to make a finding on this issue. For completeness however, and as this was an issue which it was agreed at the outset of the preliminary hearing would be considered, the Tribunal does make a finding.

59. The Tribunal is satisfied, on the evidence before it, that this is a case which falls within the **Roberts v West Coast Trains** principle. The appeal outcome letter makes clear that the decision to dismiss the claimant was being overturned on appeal and that the claimant was no longer dismissed. The fact that the claimant chose not to return to work is a matter for him and does not affect the Tribunal's decision on this issue. The claimant has not advanced a constructive

dismissal argument, but relies purely on the proposition that he was dismissed by his employer.

60. The Tribunal finds that the claimant was not so dismissed.

12 July 2018

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Employment Judge Ayre

Sent to the parties on:

17 July 2018

For the Tribunal: