



EMPLOYMENT TRIBUNALS

Claimant: Mr. S Gillies

Respondent: The Financial Ombudsmen Service

Heard at: East London Hearing Centre

On: Thursday 1 November 2018

Before: Employment Judge Hallen (sitting alone)

Representation

Claimant: In person

Respondent: Mr T Ogg (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that:-

- 1. It was not reasonably practicable for the Claimant's complaint of unfair dismissal to have been lodged by 18 January 2018 (the limitation period).**
- 2. The further period in which it was reasonably practicable for it to have been presented was up to and including 3 August 2018 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/sexual orientation discrimination was to have been brought is up to 3 August 2018 and the complaint was presented in time.**
- 4. Limitation concerning any further discrimination complaints pursued by the Claimant has not been determined.**

REASONS

Background

1. By a Claim Form presented on 3 August 2018 the Claimant brought complaints of disability/sexual orientation discrimination and unfair dismissal. The Claimant asserted his depression rendered him a disabled person at the material time.

2. The Response Form sets out that the Claimant was dismissed from his position of Team Manager by the Respondent on 20 October 2017 with a payment in lieu of notice. The Claimant commenced ACAS conciliation on 23 July 2018 which was concluded on the same date with the issue of the ACAS conciliation certificate. 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 18 January 2018 but in fact did not do so until 3 August 2018 which was 6 months and 15 days after the preliminary limitation period.

3. This hearing was therefore fixed to determine the following issues as set out in a letter sent from the Tribunal Offices on 16 August 2018 to the parties:

“The claim has been presented outside the time limit. In the circumstances there will be a preliminary hearing to consider whether it will be just as equitable to extend time and allow your claims under the Equality Act to proceed...

If you are making a claim for unfair dismissal you will have to show the Tribunal why it was not reasonably practicable for you to present your claim in time.”

4. The Tribunal had before it an agreed bundle of documents and a witness statement prepared by the Claimant. The Claimant gave oral evidence and was subject to cross-examination and questions from the Tribunal. The Respondent did not present any witness testimony.

Facts

5. The Tribunal assessed the Claimant as giving entirely truthful evidence as well as assessing his capacity to bring these proceedings. The Tribunal considered that the Claimant suffered from ongoing mental illness issues characterised as depression and anxiety although he now has capacity to bring these proceedings.

6. The Claimant commenced employment with the Respondent on 4 February 2013 and at the time of his dismissal by reason of capability was a Team Leader. The Respondent is a relatively large employer and employs 2,932 employees. The Respondent provides an Ombudsmen Service for the financial services industry. It was established by Part XVI of the Financial Services and Markets Act 2000. It provides a quick, independent and informal procedure (and alternative to the courts) for the resolving of complaints between complainants and financial service firms. The Respondent appoints a number of Ombudsmen, who have a duty to issue final determinations of complaints made to the Respondent. The Claimant was a Team Manager of case workers. Case workers make up approximately 80% of the Respondents staff.

7. The Claimant's health problems manifested themselves in the Respondent's workplace in 2014 following the Claimant suffering personal bereavements and a persistent prostrate/urinary issue. The Claimant was recorded as being off sick with 'viral infection/stress' from 10-26 January 2014 and from 4 August to 6 October 2014 with 'stress/depression' in relation to the bereavements mentioned above.

8. The Claimant returned to work in October 2014 on a phased return to work. Thereafter, the Claimant's employment history was characterised by periods of intermittent sickness absence with the Respondent commencing capability procedures against the Claimant. The Respondent during these intermittent periods of sickness absence obtained two doctors reports in respect of the Claimant's medical position. The first was from a doctor Louis A. Monaco which was dated 12 August 2016 and updated on 16 September 2016. His medical report was at pages 62-64 of the bundle of documents.

9. The report confirmed that during the Christmas holiday the Claimant was tormented by suicidal thoughts that he did not act upon. It also confirmed that during the course of treatment, the Claimant presented with moments of profoundly low mood and cried several times while discussing his experience of the incidents at his workplace which was reported by the doctor as aggravating his medical condition. The doctor characterised the Claimant's diagnosis as 'adjustment disorder, with mixed anxiety and depression'. This report recommended he continued psychological treatment and referral to a specialist psychiatrist.

10. The Respondent also obtained a report dated 4 September 2017 following a consultation on 30 August 2017. This report was at pages 200-201 of the bundle of documents. This report re-iterated the psychological difficulties that the Claimant was suffering from as outlined by Doctor Monaco in his earlier report. It confirmed that someone with his concerns about his father and also his own depressive symptoms was going to struggle at times in respect of his performance at work and confirmed that it would be advantageous to take this in to account when considering his ongoing output. The report also confirmed that the ongoing anxiety and depression, its length and possibility for it to continue at this time suggested that the Equality Act would be seen to apply in respect of the Claimant's disability.

11. The Respondent prepared an investigation report on 22 September 2017 raising allegations of poor performance and a disciplinary hearing took place on 19 October 2017 following which the Claimant was dismissed as of 27 October 2017 with a payment in lieu of notice.

12. On 16 November 2018, the Claimant appealed against his dismissal. This appeal was at pages 39-45 of the bundle of documents. The Claimant gave evidence to the Tribunal which was accepted that he had assistance in drafting this appeal letter because he was too unwell to draft it himself.

13. After his dismissal, the Claimant gave evidence that his mental health deteriorated and he continued to suffer depression and ill-health sometimes bordering on suicidal thoughts. He said he sometimes had days and weeks during which he could not get out of bed and/or his house. His mental condition deteriorated due to his father's serious illness during November and December 2014 as well as the death of his grandmother on 28 December 2017.

14. During February 2018, the Claimant's mental health was seriously affected by his father's continued ill-health, pressure placed upon him by his landlord to vacate his accommodation in London and a negative assessment of his liver condition which at the time was diagnosed as potential cancer.

15. For the period from May 2018 to the end of July 2018, the Claimant was receiving mental health treatment and therapy from an organisation called 'Greenwich Time To Talk'. The Claimant gave evidence that his treatment finally concluded at the end of July 2018. At this time, he was still pursuing his appeal against dismissal that had not yet concluded. He received legal advice from Plumstead Law that he needed to lodge his Claim Form to the Tribunal as soon as possible as it appeared to be out of time as the primary limitation period appeared to have expired.

16. Upon obtaining this advice, the Claimant having completed his treatment with 'Greenwich Time To Talk' felt able to lodge his claim to the Tribunal which was accepted on 3 August 2018. Prior to lodging his complaint, the Claimant had concluded the ACAS conciliation process in one day on 23 July 2018.

17. Up to the lodgment of the Claim Form, the Claimant was under the erroneous impression that he had to complete his internal appeal process before lodging his claim to the Employment Tribunal. After taking advice from Plumstead Law, the Claimant realised that this was an erroneous misapprehension on his part and feeling better after completing his treatment with 'Greenwich Time To Talk' he felt able to lodge his complaint to the Tribunal for unfair dismissal and disability/sexual orientation discrimination in respect of his dismissal.

18. The Tribunal noted at the hearing that although the Claimant said that he was recovering from his mental health impairment he had difficulty in giving evidence and broke down on a number of occasions in tears for which the Tribunal provided the appropriate adjournment.

The Law

19. Section 111(2) of the Employment Rights Act 1996 (ERA) 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 3 months beginning with the effective date of termination or within such further time 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 2010 provides: -

- “(1) Proceedings on a complaint within section 120 may not to 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.”

21. For the factors to be taken into account in extending time, where claims are otherwise out of time (see *Harvey L (5) (832)*), which reflects 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 to which the 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’.

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

Tribunal's conclusions

23. Firstly, the Tribunal only decides limitation in relation to the three relatively clear complaints, that is discriminatory dismissal either on grounds of disability and/or sexual orientation and an unfair dismissal complaint. Allegations about earlier acts of disability/sexual orientation 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 others, can only properly be assessed at trial on the basis of evidence.

24. Applying the Limitation Act factors to the complaints as mentioned, the Tribunal noted that the limitation breach is some 6 months plus. The Respondent cited a particular prejudice in that one of the relevant officers has now left the Respondent's employment. However, the Tribunal noted that the Respondent is a relatively large employer and has other witnesses that can give relevant evidence. With regard to the employee that has left the Respondent's employment, efforts can be made to obtain a witness statement from this employee and/or obtain a witness order. The delay of 6 months in presentation of this claim does not, in the Tribunal's mind, cause undue prejudice to the Respondent balanced against the prejudice to the Claimant in this matter being struck out and not determined.

25. As to potential remedies for the Claimant, if prevented by limitation from pursuing unfair dismissal, there is no other means by which he can assess access the possibility of reinstatement or reengagement, the primary remedy for unfair dismissal which for this Claimant who has been unable to find stable employment may deliver a real remedy if his complaint were to succeed. The Respondent cited a potential personal injury claim albeit the Tribunal saw no evidence in the bundle in respect of commencement of such a claim.

26. Furthermore, personal injury damage is not available in unfair dismissal complaints and on the complainant's case, his dismissal worsened his pre-existing psychiatric condition. The Equality Act complaint cannot deliver the unique remedy of injury to feelings compensation and recommendations, the latter which again, could deliver a real remedy if the complaint succeeds.

27. As to the conduct of the parties, there was no reprehensible or other relevant conduct alleged on either side albeit, the Tribunal did note that there was nearly a year's delay in the Respondent dealing with the Claimant's appeal against dismissal. Some of this delay was due to the Claimant's serious and intermittent ill-health since his dismissal and some was due to the Respondent's failure to deal with the appeal in a timely fashion.

28. Critically the Tribunal considered that the Claimant's mental health at the time effected his ability to seriously consider his legal rights and how he should proceed with the matter. The Respondent was aware from a relatively early period that the Claimant had serious mental health issues. It obtained two medical reports referred to in the facts section of this judgment which confirmed the nature and prognosis of the Claimant's illness. These reports were obtained on 16 September 2016 and on 30 August 2017.

29. The Claimant's mental health issues continued and were exacerbated after his dismissal during which he had periods of time where he had suicidal thoughts and could not leave the home for weeks and/or days at a time.

30. The Tribunal heard the Claimant's evidence and noted that even during the course of the Tribunal hearing the Claimant became tearful and upset. The Tribunal concluded that the Claimant was suffering from serious mental health issues during the relevant time and this affected his ability to think clearly. The Tribunal accepted his evidence that he believed erroneously that he had to conclude the appeal process before instituting Tribunal proceedings. This he discovered after his therapy was concluded with 'Greenwich Time To Talk' was incorrect and upon taking advice from Plumstead Law he completed the ACAS conciliation process in one day on 23 July and there after instituted and lodged his Claim Form at the Tribunal on 3 August 2018.

31. The test for the Tribunal for unfair dismissal complaints to proceed is whether it was reasonably practicable for the Claimant to have presented his complaint in time. The Tribunal concluded it was not due to his serious mental health issues and his assumption that he had to complete his appeal before instituting proceedings. Once he obtained sensible and correct legal advice from the Plumstead Law, he lodged his complaint within a reasonable period of time following that advice in July and upon his completion of his therapy with 'Greenwich Time To Talk'.

32. For the same reasons and taking into account the Limitation Act factors and exceptional nature of the Claimant's circumstances that have been mentioned above, the Tribunal exercised its discretion to extend to 3 August 2018, the date when he could reasonably have presented the complaint. For the same reasons, the Tribunal considered, exceptionally, that the just and equitable period of which he should be permitted to bring his complaint of discriminatory dismissal was until 3 August 2018.

33. For these reasons the Tribunal has decided that the unfair dismissal complaint and the disability and sexual orientation complaints can proceed to be heard on their merits. The Respondent is given liberty to request further and better particulars of the Claimant's complaint of unfair dismissal, disability discrimination and sexual orientation discrimination as set out in his Claim Form and to do so within 21 days of the date of this judgment being sent to the parties.

34. Depending on the outcome of this request of further and better particulars, the Respondent is given liberty to amend its defense to the Claim Form as set out in its grounds of resistance and to do so within 21 days thereafter. At the same time, the Respondent should apply for a further preliminary hearing so that further case management orders can be made.

Employment Judge Hallen

26 November 2018