Case No: 2501441/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Grayson**

Respondent: **Technowash Ltd**

Heard at: **North Shields Hearing Centre** **On: 29 October 2018**

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

Representation:

Claimant: **Miss S Firth, Counsel**
Respondent: **Mr C Khan, Counsel**

JUDGMENT

1. The claim of unfair dismissal was presented outside the time limit prescribed for doing so in circumstances where it was reasonably practicable for it to be presented within time. It cannot be considered and is dismissed.

2. The claims of unlawful disability discrimination were presented more than 3 months after the date of the acts complained of in circumstances where it is not just and equitable for time to be extended. Those claims cannot be considered and are dismissed.

REASONS

1. This matter came before me this morning by way of a public preliminary hearing to consider whether the Employment Tribunal has jurisdiction to hear the claimant's complaints of unfair dismissal and unlawful disability discrimination, both of which appear to have been presented out of time. The claimant attended and was represented by Miss Firth of counsel. The respondent was represented by Mr. Khan of counsel.

2. By a claim form presented on 18 July 2018, the claimant brought complaints of unfair dismissal and unlawful disability discrimination. It is common ground that the alleged act of discrimination is the act of dismissal itself. It is accepted that the effective date of termination of the claimant's employment was 18 April 2018.

3. Mr. Khan had prepared a skeleton argument marked R1, together with a chronology marked R2. On behalf of the claimant, Miss Firth had submitted a witness statement marked C1 and a letter from her instructing solicitors, Browne Jacobson, dated 26 October 2018, marked C2. The claimant gave evidence under oath and was cross examined by Mr. Khan, before answering questions from the Tribunal Judge.

4. The relevant chronology is as follows:-

18 April 2018 –	dismissal and effective date of termination and act of alleged discrimination
19 April 2018 –	claimant instructs specialist employment law solicitors
27 April 2018 –	claimant's solicitor writes to the respondent alleging claims arising out of his dismissal
9 July 2018 –	claimant's solicitor sends a detailed 6-page letter of claim setting out a calculated loss in the sum of £251,312.00 and specifically reserving the claimant's right to bring Employment Tribunal proceedings.
17 July 2018 –	expiry of 3 months statutory time limit under the Employment Rights Act 1996 and the Equality Act 2010
18 July 2018 –	claimant commences ACAS early conciliation process and submits claim form ET1.

5. The claimant's evidence to the Tribunal was that he instructed solicitors to represent him immediately after his dismissal. Mr. Grayson confirmed that he had only "held off issuing Employment Tribunal proceedings" in the hope that his dispute with the respondent would be settled by negotiation. Mr Grayson confirmed that he was aware of the 3-month time limit to commence Employment Tribunal proceedings, but had not been specifically informed about that by his solicitor. Mr. Grayson was fully aware of the entire contents of his solicitor`s letter to the respondent dated 9 July headed "letter of claim". He was aware that the letter stated on the final page "all of our client`s rights are reserved without limitation."

6. In paragraph 9 of his witness statement, Mr Grayson states:-

> "We consciously withheld on issuing proceedings against the respondent until it was clear that an out of court settlement could not be achieved. I am also currently in the process of issuing a civil

claim against the respondent for breach of contract and there were discussions of this being resolved via a jointly appointed mediator."

Mr Grayson confirmed that whilst High Court proceedings have been intimated, they have not yet been formally commenced.

7. In paragraph 10 of his witness statement, Mr Grayson states as follows:-

> "I was then contacted by my solicitors on 18 July 2018 to inform me that the date had been missed for the commencement of the ACAS conciliation period and therefore the date for issuing my claims with the Employment Tribunal. I understand that the reasons for the date being missed are due to technical issues with my solicitor`s key dates calendar system. I refer to their letter to the Tribunal, a copy of which is attached to this statement."

8. I have examined a copy of that letter dated 26 October 2018, which is addressed to the Employment Tribunal. The relevant parts are set out below:-

> "We write this letter in support of our client's application to submit his claims for unfair dismissal and disability discrimination out of time. This letter is provided for the purpose of assisting the Tribunal in understanding the reasons for the late submission of the claimant's claims and in reaching a fair conclusion as to our client's application to submit the same out of time. For the avoidance of doubt, it is acknowledged that the claimant was summarily dismissed on the 18 April 2018. The deadline for submitting the claimant's claim was therefore midnight on 17 July 2018 (the claimant not benefitting from any extension due to the ACAS conciliation). The claimant's claim was submitted by this firm on 18 July 2018 after concluding the mandatory ACAS conciliation process.
>
> We can confirm that the responsibility for the late submission of the claimant's claim rests entirely with this firm and we would therefore ask that the Tribunal not penalise the claimant for an error which was entirely beyond his control. We confirm that the claimant provided instructions to us in good time ahead of the deadline for submission of his claim. The failure by this firm to submit the claimant's claims in time were in essence due to a combination of a system error and human error.
>
> We had introduced a new key-dates calendar system to replace the previous system which was linked to the fee earner's Outlook calendars. The new system is a central system which is accessible via the firm's intranet page. As part of that system there are standard reminders set to send an alert the day before the key date is due. Additional customised reminders can be set by fee earners or legal support teams. Unfortunately when this key date was added there was a misunderstanding on the part of the person adding the date; that person understood the system reminders were sent to the relevant fee earner handling the file and so did not add a customised reminder for the fee earner. This was incorrect and the

system reminder was sent only to the fee earner's supervisor, who was engaged in meetings for the majority of the 16 and 17 July. This issue has now been corrected such that alerts are generated to remind the relevant fee earners that deadlines are approaching. The mistake was quickly identified and as such the ACAS mandatory early conciliation process was commenced and concluded the following day and the claim submitted with the Employment Tribunal on that same day (18 July 2018) just one day out of time."

9. I enquired of Miss Firth this morning as to whether there was anyone present from this firm of solicitors who could give evidence as to circumstances surrounding the failure to present the Employment Tribunal claim within the time limit. Miss Firth informed me that no-one was present from the firm of solicitors. I enquired as to whether there was any sworn testimony from anyone within that organisation, and was again told that there was not. I politely informed Miss Firth that this was wholly unsatisfactory.

10. The letter from the solicitors does not state when the new key-dates calendar system was introduced. It does not state to whom the standard reminders are sent, nor does it explain why the alert is only sent the day before the key-date is due. It does not explain when and by whom the claimant's key-date was added nor what was the date for the reminder to be issued. It does not identify the fee earner or his/her supervisor. It does not explain why being engaged in meetings for the majority of 16 and 17 July meant that it was not reasonably practicable for the claim form to have been presented in time.

11. It is unclear from the letter whether the blame for the missed deadline is being placed with the fee earner, the supervisor, someone within the IT department or the IT system itself. There is no explanation as to how the system is supposed to work. There is no explanation as to why the system did not work. There is no information as to whether or not there is a back-up system to cover situations where the computer does not work and if not, why not.

12. Of particular significance is the indication in the letter from the solicitors that the "alert" would be sent "the day before the key-date is due". In the absence of any contradictory information, I must presume that the key-date is the day before the issue of proceedings namely the 17 July 2018. That to me appears to be a particularly unsafe and unsatisfactory means of ensuring that key-dates are met. My recollection of my days in private practice are that dates of such fundamental importance were identified and diarised one month before, one week before and one day before key dates. Those dates would be placed in the fee earner's diary, the diary of the fee earner's secretary and a specific "key-dates" diary kept by the practice manager. That appears to be a simple system that has sufficient checks to ensure that no key dates are ever missed. From the information I had before me it was not the case within the office of the claimant's solicitors.

13. I accept that the claimant was entitled to place his faith and trust in a substantial, experienced and specialised firm of solicitors dealing with

employment law. However, the fact that he did so does not absolve him from all responsibility. He is the claimant and was aware at all times of the existence of the time limit and the deadline by which proceedings had to be issued. I have no meaningful explanation from the claimant as to why he did not chase up his solicitors to ensure that the deadline was met. The claimant is obviously an intelligent, educated and articulate man who was more than capable of recognising that the deadline existed and had to be met.

14. **The Law**

Section 111 of the Employment Rights Act 1996 states:-

> "(1) a complaint may be presented to an Employment Tribunal against an employer by any person that feels unfairly dismissed by the employer.
>
> (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 3 months beginning with the effective date of termination, or
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> (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 period of 3 months."

15. It is accepted that the correct interpretation of that statutory provision is that the claim form was to be presented within the period of 3 months less one day from the effective date of termination of employment. If not, then the Employment Tribunal has a discretion to extend time, but that discretion can only be exercised in circumstances where the Tribunal is first satisfied that it was not reasonably practicable for the complaint to have been presented within the time limit.

16. It is now generally accepted from the decision of the Employment Tribunal in ***Asda Stores Limited -v- Kauser*** **[EAT/0165/07]** that the relevant test is not simply a matter of looking at what was possible but to ask whether, on the fact of the case as found, it was reasonable to expect that which was possible, to have been done.

17. The claimant's case, put with considerable vigour by Miss Firth, was that there had been an unforeseeable glitch in the office of the claimant's solicitors, the effect of which was that the date for issuing proceedings was overlooked and not recognised until the following day. In those circumstances, Miss Firth argued that the facts of this case it was not reasonable to expect that which was possible to have been done.

18. Miss Firth quite properly acknowledged the well-established principle in ***Dedman -v- British Building and Engineering Applicances Ltd*** **[1973] IRLR 379,** namely that where a claimant has consulted skilled advisors, the question of reasonable practicability is to be judged by what he could have done if he had been given such advice as they should reasonably in

all the circumstances have given him. It is acknowledged that there can be exceptions, namely where the advisor`s failure to give the correct advice is itself reasonable. ***Walls Meat Co Ltd -v- Khan*** **[1978] IRLR 499.**

> "The performance of an act, in this case the presentation of the complaint, is not reasonably practicable if there is some impediment which reasonably prevents or interferes with or inhibits such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike, or the impediment may be mental, namely the state of mind of the complainant in the form of ignorance of or mistaken belief with regard to essential matters. Such states of mind can however only be regarded as impediments making it not reasonably practicable to present a complaint within the period of 3 months if the ignorance or mistaken belief is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant or from the fault of his solicitors or other professional advisors in not giving him such information as they should reasonably in all the circumstances have given him."

19. It was further said by the Court of Appeal in ***Riley -v- Tesco Stores Ltd*** **[1980] IRLR 103**;

> "If you have retained a skilled advisor and he does not take steps in time, you cannot hide behind his failure. There may be circumstances of course where there are special reasons why his failure can be explained as being reasonable."

20. In the present case I am not satisfied that the claimant's solicitors have provided a reasonable explanation for their default in missing the deadline. The explanation set out in their letter dated 6 October 2018 is inadequate. Of particular concern is that no-one from that firm of solicitors has taken the trouble to either provide a sworn statement or to attend the Tribunal to give evidence under oath.

21. In those circumstances I am not satisfied it was not reasonably practicable for this claim form to have been presented within the 3 month time limit. The Tribunal does not therefore have jurisdiction to hear the complaint of unfair dismissal and that complaint is dismissed.

22. Turning now to the allegation of unlawful disability discrimination, the relevant statutory provision is set out in Section 123(1)(b) of the Equality Act 2010, which states that a claim may not be brought after the end of the period of 3 months starting with the date to which the complaint relates or such other period as the Employment Tribunal thinks is just and equitable.

23. What factors are relevant on the facts of a particular case is a question for the Employment Tribunal.

24. When considering what is "just and equitable" reference is frequently made to the case of ***British Coal Corporation -v- Keeble and others*** **[1997] IRLR 336** which invites the Tribunal to consider:-

    (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 the request for information

(d) The promptness with which the plaintiff acted when 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.

25. Whilst that checklist may be useful, there is no legal requirement on the Employment Tribunal to go through that list in every case, provided that no significant factor has been left out of account by the Tribunal in exercising its discretion.

26. The first factor (length of and reasons for the delay) tends to be the most important in practice in discrimination cases.

27. In my judgment, the factors to be taken into account in assessing whether it was reasonably practicable for the unfair dismissal claim to be presented in time, equally apply to my consideration as to whether it is just and equitable for time to be extended for the discrimination claim. For the reasons set out above, I am not satisfied that the claimant has provided a satisfactory or reasonable explanation for the delay. I am not satisfied that there was any good reason as to why the claim was not presented within the time limit. The starting point must be that the time limit is to be observed and any extension of time must be the exception rather than the rule. I am not satisfied that the circumstances described by the claimant, through his solicitors, are such that it would be just and equitable in this case for the time limit to be extended so that the discrimination claim could proceed in the Employment Tribunal.

28. I take into account the claimant's evidence that he is still likely to issue proceedings in the County Court or High Court against the respondent relating to the alleged breach of his contract of employment. I take into account the fact that the claimant's solicitors are obliged to have in place professional indemnity insurance, the effect of which is that the claimant is likely to be able to recover any compensation to which he may have been entitled had his claims proceeded and succeeded in the Employment Tribunal.

29. I am not satisfied that in this case is just and equitable for time to be extended so as to enable the discrimination claims to proceed. Those claims are dismissed.

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Employment Judge Johnson

Date_12 November 2018

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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