EMPLOYMENT TRIBUNALS

Claimant: **Mr A White**

Respondent: **Primark Stores Ltd**

Heard at: **Bristol** **On:** **16 January 2019**

Before: **Employment Judge Livesey**

Representation:
Claimant: In person
Respondent: Miss Kight, pupil barrister

JUDGMENT

The Claimant's claims of unfair dismissal and discrimination on the grounds of both age and disability are dismissed. They were presented outside the relevant time limits and it was not appropriate to extend time in either case to enable them to proceed.

REASONS

The claim

1. By a claim form presented on 30 July 2018, the Claimant brought complaints of unfair dismissal, discrimination on the grounds of age and disability and claims for unspecified 'other payments', all of which the Respondent defended.

Background

2. The hearing had been convened to address a number of issues which had been set out in the Notice of 28 November 2018, the first of which concerned 'time limits/jurisdiction'.

3. On that issue, I heard oral evidence from the Claimant and the following documents were produced;

C1 the Claimant's letter of 5 October 2016;

C2 an extract of an investigatory interview with the Claimant (undated);

C3 an extract from another interview with the Claimant (undated);

C4 the last page of a letter written by Leticia Smith which contained a written warning issued to the Claimant;

R1 a bundle of documents produced by the Respondent;

R2 a further small bundle of additional documents produced by the Respondent.

4. During the Claimant's evidence, the following facts were established;

4.1 His employment with the Respondent started in July or August 2009. He had previously been employed by 3 different firms of printers in Bristol, one of which he had been with for 27 years;

4.2 On 20 June 2015, he raised a grievance in relation to the manner in which he was being treated by his Supervisor, Mr Lear. He was then working on the first floor of the Bristol premises. In particular, he alleged that he was being required to work longer than his rostered shift. The matter was investigated and, on 7 October, the grievance was dismissed. A mediation session was recommended which eventually took place in early November. The Claimant appealed against the grievance outcome decision and, following the hearing on 4 December, the appeal was partially upheld. He was given the opportunity to move to a different department, which he took; he moved to the 1st floor and worked under a new Supervisor called 'Jane'. He had no difficulties with her 'whatsoever';

4.3 The Claimant raised a further grievance in January 2016 which the Respondent alleged contained the same subject matter as the earlier one. It was rejected on that basis;

4.4 Meanwhile, on 30 October 2015, an incident had occurred which caused the Respondent to invoke its Disciplinary Procedure against the Claimant. It was alleged that he had allowed a customer to leave a till at which he was working without having paid for her purchases. The disciplinary hearing took place on 10 November 2015 during which the CCTV footage of the incident was viewed. A written warning was issued. The Claimant appealed, a process which was delayed due to his illness absence. Mr Fairfield heard the appeal on 3 May 2016 and dismissed it. The Claimant alleged that the whole process was a 'stitch up';

4.5 The Claimant had periods of illness absence due to stress and depression between 17 of 31 December 2015. He returned to work in January under his new Supervisor on the 1st floor but was then absent from 21 January 2016 onwards. He never returned to work. At a meeting which took place on 12 April 2016, he advised his employer that he was unable to return to work. The OH report which was then obtained confirmed that that was the case (that report was attached to the Claim Form). The Claimant was then

subjected to the capability procedure during which he indicated that he could not return to work if his previous Supervisor, Mr Lear, and another manager, 'Patricia', were still working at the store. The Respondent alleged that he went further and said that he would not return unless they 'got rid of' his Supervisor and 3 other managers. On 13 September 2016, the Respondent confirmed its decision to dismiss him;

4.6 After the Claimant's dismissal, he wrote to the Respondent at its Dublin and Reading head offices (the text of the letters was document C1). He received no response. He said that he also wrote to Mr Weston and Mr Marchant who I understood were senior officers. Again, he said that he had no response;

4.7 The Claimant had spoken to a 'couple of solicitors' before he had been dismissed. He said that they had not been interested or had asked for money before advising. He also spoke to Mr Stone at the Avon and Bristol Law Centre in August 2016 before his dismissal. He was told that there was not a lot that he could do about his position, but he was advised not to 'sign any papers'. After his dismissal, he spoke to some more solicitors but he found the same problem; they were either not interested or they wanted money, which he did not have. He thought about consulting the CAB but had had a previous bad experience with them and his nearest office was 7 miles away. He also considered returning for advice from Mr Stone;

4.8 The trigger for him issuing a claim was that Mr Law from the Respondent contacted him in May 2018 'out of the blue'. The precipitant appears to have been the fact that the Claimant had himself contacted the Parliamentary Ombudsman about a different matter which concerned both the government and the Respondent. There then followed an exchange of correspondence between the Claimant and Mr Law which he felt got him nowhere. He then went to the .gov.uk website and discovered how to issue a claim, which he then did in July;

4.9 The Claimant has suffered from long-term problems with his back and his mental health. Section 12 of the Claim Form indicated that he relied upon claimed disabilities relating to his back, knees, lungs and mental impairments relating to depression and anxiety. Most recently, Dr Greenway's letter of 18 December 2018 had attempted to set out his problems. He said the following in respect of his mental health;

> "*He also suffered from long-term depression. He has been on antidepressant medication since 2011 initially low dose Amitriptyline and then Fluoxetine latterly Duloxetine which he remains on.*"

5. The Claimant's complaints chiefly were focused on his time under Mr Lear. He said that the dismissal was not so much of an issue, but the bullying and the issuing of the warning had been. His move from the 2nd floor had taken effect in December 2015 or January 2016. He had had no problems thereafter.

Jurisdiction (time); relevant principles

6. The Claimant had brought complaints of unfair dismissal and discrimination. The tests relating to time were different.

7. A complaint to a tribunal of unfair dismissal had to be presented in accordance with s. 111 of the Act;

> "*Subject to the following provisions of this section, 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 a further period as the tribunal considers reasonable in a case where it is satisfied that he was not reasonably practicable for the complaint to be presented before the end of that period of three months.*"

8. The legal test was therefore a hard one to meet on the face of the wording of the Act. It required me to consider whether it was reasonably feasible for the claim to have been issued in time. I was entitled to take a liberal approach (*Marks & Spencer-v-Williams-Ryan* [2005] EWCA Civ 470 and *Northamptonshire County Council-v-Entwhistle* [2010] IRLR 740), but I nevertheless had to apply the wording of the statute to the facts.

9. The question of what was or was not reasonably practicable was essentially one of fact for the employment tribunal to decide. The leading authority was the decision of the Court of Appeal in *Palmer and Saunders-v-Southend-on-Sea Borough Council* [1984] 1 All ER 945, [1984] IRLR 119, [1984] ICR 372, CA. May LJ undertook a comprehensive review of the authorities, and proposed was a test of '*reasonable feasibility*'.

> *"[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done…… Perhaps to read the word "practicable" as the equivalent of "feasible"…… and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?" - is the best approach to the correct application of the relevant subsection."*

10. The possible factors were many and various and, as May LJ stated, could not have been exhaustively described, because they depended upon the circumstances of each case. The Judge nevertheless listed a number of considerations which might be investigated (at [1984] IRLR at 125 and [1984] ICR at 385). These included the manner of, and reason for, the dismissal; whether the employer's conciliatory appeals machinery had been used; the substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

11. When considering whether or not a particular step was reasonably practicable or feasible, it was necessary for the tribunal, (as the Court of Appeal said in

Schultz-v-Esso Petroleum Ltd [1999] 3 All ER 338, [1999] IRLR 488) to answer the question 'against the background of the surrounding circumstances and the aim to be achieved'. This was what the 'injection of the qualification of reasonableness requires'. The issue in *Schultz* was whether it was reasonably practicable for the claimant to have presented his claim in time in circumstances where (a) he had tried in the early stages of the limitation period to appeal internally against his dismissal, and (b) although he was physically capable of giving instructions to his solicitor for the first seven weeks of the three-month period, he was too ill to do so for the last six weeks. The tribunal and the EAT both held that it was reasonably practicable, but the Court of Appeal disagreed and overturned the decision. According to Potter LJ, the tribunal, by relying on what was physically possible during the first seven weeks, failed to have regard to the comments of May LJ about reasonable feasibility in *Palmer and Saunders*. Moreover, the tribunal failed to consider the surrounding circumstances.

12. It would not have been reasonably practicable for a claimant to have issued a claim until they were aware of the facts giving him or her grounds to apply. It was not usually an excuse, however, for a claimant to argue that they were not aware of their right to bring a claim. The reasonableness of their state of knowledge would have to be considered. There was an obligation to take reasonable steps to seek information and advice about the enforcement of rights.

13. The complaints of discrimination under section 123 of the Equality Act 2010 should have been brought before the end of the period of three months starting with the date of the acts to which the complaints related (s. 123 (1)(a)). Conduct extending over a period was to have been treated as having been done at the end of the period (s. 123 (3)(a)) and the provision covered the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

14. Whatever the analysis of the acts during the course of the Claimant's employment, there was no doubt that it ended in August or September 2016, in which case all claims were over 18 months out of time. The ACAS certificate was issued on 26 July, the day after the Claimant made contact with ACAS. Arguably in fact, the complaints ended in December 2015 January 2016 when the Claimant moved away from the 2nd floor and the management of Mr Lear.

15. Should a claim have been brought outside the three month period, it was nevertheless possible for a claimant to pursue it if the tribunal considered that it was just and equitable to extend time (s. 123 (1)(b)). There was no presumption in favour of an extension. The onus remained on a claimant to prove that it was just and equitable to extend time. Time limits were not just targets, they were 'limits'.

16. Tribunals were encouraged to consider the factors listed within s. 33 of the Limitation Act 1980, although it was not mandatory to do so. The length of and reasons for the delay, the extent to which the Claimant had sought professional help, the extent to which information, which he said that he needed, was not known by him until much later and the degree to which the Respondent should have been blamed for any late disclosure were such such factors. I also had to consider whether the Claimant had dragged his feet

once he knew all of the relevant information. The touchstone, however, was the issue of prejudice and, critically, I had to consider whether and to what extent the delay has caused prejudice to either side.

17. There was no reason why a tribunal could not deal with a jurisdictional issue at a preliminary hearing in this way, although I was conscious that it was rare for claims of discrimination to be struck out on a time point so early. Nevertheless, where the issue was merely whether it was just and equitable to extend time in a case which was wholly out of time, there was no reason why that could not take place.

Jurisdiction (time); conclusions

18. The claims were not just out of time by a few days or weeks. The second anniversary of the end of the Claimant's employment had already been passed and it was likely that a final hearing would not be held until well after the third anniversary.

19. The precise nature of the ill-treatment was not clear from the Claim Form. Even so, there was no suggestion that much, if any, of it was corroborated in documentary form. Requiring witnesses to answer questions about the events of 2015 and 2016 4 or 5 years later was demanding a great deal of them. Most tellingly, the Claimant himself could not remember the date upon which certain events occurred when he was asked to give evidence about them. Further, although I was told that Mr Lear and 'Patricia' both still worked for the Respondent, the CCTV footage which supported the disciplinary process had been disposed of, yet the grounds for the warning were very much at the heart of the Claimant's complaints.

20. The precise nature of the legal complaints was not clear. As a litigant in person, it could have been readily understood why it might have been difficult for him to have formulated his claim in a manner which would have been expected from a lawyer but, nevertheless, the lack of precision meant that a good deal more work was required, both by the Claimant and the Tribunal, to understand precisely what it was about which he complained.

21. As to the Claimant's illness, although Dr Greenway considered that his mental impairment met the test of disability under the Equality Act, his analysis of the relevant test was not clearly set out. Even if that was the case, the Claimant had clearly written a number of letters to the Respondent at or around the time of his dismissal. One letter that was produced (C1) was lucid and clear. Other letters which were attached to the Claim Form were clear and lengthy.

22. The Claimant had been able to contact solicitors and the Avon and Bristol Law Centre around the time of his dismissal. He was able to use the internet and was shown to have searched the .gov.uk website as far back as 2011 (pages 37-8 of R1). He said that he had previously believed that tribunals existed to assist people with benefits claims until approximately May 2018. He returned to the .gov.uk website, however, in May 2018 and then discovered how to issue a claim.

23. The claims could not proceed. It had been feasible for the Claimant to have issued his complaint of unfair dismissal sooner. There was information readily

available to him which he reasonably ought to have gained access to in order to discover how to commence his claim. He had decided against pursuing the support of the CAB and/or further assistance from ABLS. Given the manner in which he discovered his ability to bring a claim in May 2018, it had been practicable for him to have come by that knowledge much sooner.

24. It was also not just and equitable to extend time to allow the complaints of discrimination to proceed, whatever they were. There was significant evidential prejudice already apparent, both from the quality of the evidence given by the Claimant, but also in respect of the Respondent's loss of certain key information (CCTV footage). All the matters set out in paragraphs 18-23 above weighed heavily in the Respondent's favour in my judgment.

25. Accordingly, both claims were dismissed.

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Employment Judge Livesey

Date 16 January 2019