EMPLOYMENT TRIBUNALS

Claimant: **Mr A Walker**

Respondent: **Symonds and Sampson LLP**

Heard at: **Southampton** **On: 31/1/2019**

Before: **Employment Judge Wright**

Representation:

Claimant: **Mrs S England - Solicitor**

Respondent: **Mr M Curtis of Counsel**

RESERVED JUDGMENT

It is the judgment of the Tribunal that the claimant's application for permission to amend his claim to include claims under sections 15 and 20 of the Equality Act 2010 succeeds. The claimant's application to extend time to allow the claims to proceed fails and the claims are struck out in their entirety for want of jurisdiction.

REASONS

1. This was a public preliminary hearing listed by EJ Jones QC on 19/7/2018 to determine two matters:

Whether the claimant requires and, if he does, whether he should be given permission to amend his claim to add complaints under sections 15 and 20 of the Equality Act 2010 (EqA); and

Whether time should be extended to allow any of the claims to proceed and if time is not so extended whether the claim should be struck out for want of jurisdiction?

2. Subject to the above, EJ Jones QC recorded that it was agreed the claimant had presented claims for automatic unfair dismissal for having made a protected disclosure (section 103A Employment Rights Act 1996 (ERA)), being subjected to a detriment after having made a protected disclosure (section 47B ERA), a claim for racial harassment (contrary to section 26 EqA), victimisation (contrary to section 27 EqA) and a claim for a failure to properly deal with a flexible working request (contrary to section 80H ERA).

3. The claimant's employment terminated after being given notice on 18/5/2016. The claim form (ET1) was presented on 29/3/2018. He engaged in Acas early conciliation between 12/8/2016 and 12/9/2016.

4. The claimant contends that the allegations and time limits apply as follows:

Claim	Last act complained of	Was it a series of acts?	Time limit	In time prior to Acas EC?
s.103A ERA	18/5/2016 (EDT)	n/a	17/8/2016	Yes
s.47B ERA	18/5/2016	Yes	17/8/2016	Yes
s.26 EqA	December 2015	Yes	March 2016	No
s.27 EqA	18/5/2016	Yes	17/8/2016	Yes
s. 80H ERA	[the claimant did not address this claim]			
s.15 EqA	19/4/2016	Yes	18/7/2016	No
s.20 EqA	18/5/2016	Yes	17/8/2016	Yes

It is noted the question of whether an act was a series of acts is a matter for the Tribunal to decide.

In respect of the same allegations, the respondent says:

s.103A EqA	18/5/2016	17/8/2016	Yes
s.47B ERA	December 2015	March 2016	No
s.26 EqA	December 2015	March 2016	No
s.27 EqA	as above		
s.80H ERA	4/2/2016	3/5/2016	No
s.15 EqA	18/5/2016	11/10/2016	
s.20 EqA	18/5/2016	11/10/2016	

5. The date of 11/10/2016 from the respondent appears to be taken from the effective date of termination (EDT), which gives a primary time limit of 17/8/2016, which is then extended by the period of Acas early conciliation of one month from 12/9/2016; to give a time limit of 11/10/2016.

6. The Tribunal heard evidence from the claimant and from Mr Andrew Carless (Partner) for the respondent. It had before it an agreed bundle of 123-pages. Both parties had provided written skeleton arguments and the Tribunal was taken through them orally in closing submissions.

7. It is accepted the claimant's claim was presented out of time. He makes an application under the legislation to extend the time limits, in order that the Tribunal may hear his claims.

8. It was accepted that the complaints which fall to be determined under the ERA are subject to a time limit of:

> 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 relevant date, 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.

9. Similarly for the claims which fall to be determined under the EqA, the time limit is found in s. 123, which provides:

> (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.
>
> [Emphasis added]

10. The claimant relies upon the same facts under both tests. He says that he was unable to afford to pay the fees (which totalled £1,200) at the time his claim form should have been presented. He says he was unaware of the judgment of the Supreme Court of 26/7/2017 (which abolished fees) until January 2018.

11. In closing submissions for the respondent, Mr Curtis firstly dealt with the time point. He pointed out the different tests which applied to the different claims. He said his arguments applied in relation to all the claims. He also said the Tribunal should not allow the amendment, but that he would proceed hypothetically, as if the amendment had been allowed.

12. In respect of the not reasonably practical test, the burden is on the claimant at the first stage and he has to satisfy the Tribunal that is was not reasonably practical to present the claim before the end of the primary time limit. The burden is then neutral in deciding whether the claim was presented within such further period as the Tribunal considers reasonable.

13. Relying upon his skeleton argument, Mr Curtis referred to 'reasonably practicable' being read as the equivalent to 'reasonably feasible' (Palmer and Sanuders v Southend on Sea BC [1084] 1 All ER 945). He also said when considering the second limb of the test, that there is a strong public interest in claims being brought promptly and that should be considered against a background where the primary time limit is three months. Mr Curtis referred to the claims which were out of time before the claimant engaged in Acas Early Conciliation and it was important to note that there was no explanation at all given by the claimant, why the claims were not instituted in time. There is nothing which gets the claimant over the first hurdle in relation to these claims.

14. It was the respondent's submission that it was reasonably practicable to bring the claims in time. There was evidence of the amount of money in the claimant and his wife's bank accounts. Even if the tenant deposits the claimant was holding were taken off, that leaves around £6,000 to £7,000 in the two accounts. The Tribunal was invited to find that it was reasonably practicable to present the claim and to pay the issue fee of £250.

15. There was evidence that more money came in later as the claimant benefitted from funds from a charity in December 2016 and there were the loans his wife had taken out. Even though the claimant is yet to find another role, he has survived financially, thus undermining his argument that he could not afford the fee.

16. Another reasonably practicable step the claimant could have taken would have been to apply for remission. If remission was not available, there was also a residual discretion to grant remission in certain circumstances; no enquiry was made at all.

17. Further to the submission that the claimant fails at the first hurdle, under the second, he is doomed to fail. The closest claim to the limitation period is 16.5 months out of time. Some of the others are up to two years out of time.

18. The claimant is not able to explain how he came to know that fees had been abolished. The Supreme Court's decision in July 2017 was newsworthy at the time. There is nothing which the claimant can point to in January 2018 which prompted him to become aware fees were no longer payable. The claimant was given the opportunity, but was not able to explain what changed from his point of view. The position is the claimant either did know fees had been abolished prior to January 2018 or he should have known if he had made a reasonable enquiry. He says the matter of his employment was on his mind and if that is the case, then he should have known of the Supreme Court/Unison decision before January 2018.

19. Mr Curtis said that if the Tribunal was not with him on that point, he says a delay from January 2018 to when the ET1 was presented, results in it not being presented within such further period as the Tribunal should find reasonable. The claimant's case is that he found out fees had been abolished in January 2018 and he then delayed a further period of time, before presenting his ET1 on 29/3/2018. The claim was already well out of time and the claimant ought to have known the time limits are strict in the Tribunal. There is a significant burden on him to act quickly and he simply did not do that in the period from January to when the claim was presented. The lack of urgency by the claimant means that his claim was not presented within such further period as is reasonable after the primary time limit expired.

20. The Tribunal was therefore invited to refuse to extend time for the claims of unfair dismissal, failure to properly deal with a flexible working request and for detriment for making a protected disclosure.

21. Mr Curtis then turned to deal with the claims falling under the EqA. He referred to the test under s.123 EqA as set out in his skeleton argument. He set out at paragraphs 11-14 the factors to consider and pointed out that extending time is the exception, rather than the rule.

22. In respect of the non-dismissal claims, there is no explanation as to why Acas early conciliation was not started in time and no explanation in respect of the claims under the EqA (rather that the explanation given for the delay in presenting the claim of unfair dismissal).

23. The respondent does not agree that there will be no effect on the evidence. Even if the meetings were minuted, the allegations under the EqA (such as the harassment allegation) will rely solely on witness evidence. In respect of an allegation for failure to make reasonable adjustments, personnel will need to recall why they did or did not do certain things. This recall will be impacted by the incredibly long delay in this case.

24. There is prejudice to the respondent and that prejudice will deprive it of being able to give a proper and full defence to the claims.

25. For those reasons, the Tribunal was invited not to extend time in respect of the EqA claims and to dismiss them.

26. Commenting on the claimant's skeleton argument, Mr Curtis said that the fact the claimant had raised an internal grievance, did not explain why there was a delay in him bringing his claim nor clarify why he had not brought his claims sooner. This was not a case where a grievance was outstanding which then formed an explanation as to why there had been a delay.

27. It was submitted that the claimant's reliance upon statistics was flawed.

28. Where the claimant seeks to rely upon his mental health making it difficult for him to present his claim, that was not a stance which the claimant had advanced in his witness statement. In terms, the claimant's case is that he did not present his claim in time was due to lack of funds.

29. Mr Curtis then turned to deal with the amendment point. He said the general discretion to allow an amendment was significantly different depending upon whether it was a relabelling exercise of facts already pleaded, or, whether the claimant was pleading new facts or new claims.

30. In this situation, the claimant was relying upon new facts/cause of action and the divisive fact is whether or not the claim are in time? Here they are obviously not. Another factor for the ET to consider is the extent to which the amendment extends the issues and the evidence.

31. In the original claim form, the claimant had ticked box 8.1 to indicate he was claiming unfair dismissal. He did not tick the boxes relating to discrimination and neither can such a claim be read into the particulars which were attached. It is difficult to get a box ticking exercise wrong if those claims were on the claimant's mind at the time he submitted the ET1. The claimant had ticked the box on the ET1 to state that he was not disabled. These are new facts and new claims which are pleaded and they are so far out of time, that any application to amend should be refused.

32. For the claimant, Mrs England also relied upon her skeleton argument. In expanding her submission, she said that under s.48(3) ERA in respect of detriments short of dismissal, time starts to run from the last detriment or the last if there is a series of detriments.

33. She made the point that looking at the chronology, there was no more than a gap of three months between each detriment. She therefore submitted that resulted in there being no time issue as the last in the series of detriments was in time when the Acas certificate was issued.

34. Mrs England submitted that it was still possible to have a fair trial, despite the passage of time. She relied upon the fact that the limitation period in a civil claim under the Protection of Harassment Act 1997 in the County Court is six years. A claim could be brought towards the very end of that time limit and therefore, it cannot be right in this case to say a two year delay is significant, when the County Court allows a limitation period of six years.

35. In respect of the statistics, it was submitted that they show a steady increase in claims and it is disputed that the abolition of fees was widely publicised. Mrs England claims it took time for the public to become aware that fees had been abolished.

36. The respondent takes issue with the claimant's ability to pay the £250 issue fee, but the figure in the claimant's mind, was the total fee of £1,200. The fact it would be paid in two instalments was irrelevant. The total fee of £1,200 weighed heavily on his mind and it was not reasonably practical for him to pay those fees.

37. Mrs England referred to the question of what is reasonably practical is a factual issue and is not a legal concept. The claimant's position on 12/10/2016 was that he was without work, his wife was on maternity leave and they had a toddler and a new born baby. The claimant was unfit for work and he did not know how he would be able to provide for his family.

38. The Tribunal heard about the food hamper the claimant received from a charity to ensure he had food at Christmas. The reason the Supreme Court ruled fees to be unlawful was that they were deemed as unaffordable, unless sacrifices were made. If one has to sacrifice a reasonable standard of living, then the fees were not considered affordable. The Tribunal heard how this claimant's priority was food etc., for his family. It was not therefore reasonably practical for him to bring his claim at that time.

39. The issue is whether or not it was reasonably practical for the claimant to bring his claim in time. The respondent went through the claimant's financial records. The issue is not what the claimant could afford, or even whether the claimant and his wife jointly could afford the fee. There was no joint bank account, they kept their finances separate and for that reason, the Tribunal should only take into account the claimant's financial position.

40. In relation to the application to amend, it was submitted that it is a relabelling exercise. The facts pleaded in the original claim form do give rise to a harassment claim. The claimant referred to mental torture and to racial comments made. That could potentially amount to conduct on the prohibited ground of race. To conclude, it was submitted the amendment amounts to no more than a relabelling exercise and for that reason, should be allowed.

41. Taking first then the issue of the amendment, the claimant contends that the original claim form included claims which could fall under sections 15 and 20 of the EqA; the 'relabelling' view. The alternative is that the claims which were not referenced and therefore, need to be the subject of an application to amend; which the respondent resists in the main, due to the fact the extant claims are significantly out of time and therefore, any new additional claims are further out of time.

42. Irrespective of the fact the claimant had originally only said in box 8.1 that his claim was for unfair dismissal; he had referenced conditions which could potentially amount to the protected characteristic of disability (sever eye strain and sciatica) in his ET1. He referred to physical suffering and to objections about the manner in which the respondent was conducting its redundancy process. He refers to oppressive management and to taking time off work due to his anxiety, work related stress and

sciatica. He says his GP's recommendation for a phased return to work was ignored. Finally, the claimant says his request for flexible working as a result of his sciatica was ignored.

43. The Tribunal therefore finds that the claimant did sufficiently reference claims under sections 15 and 20 of the EqA in his original ET1. As with many EqA claims, they would have needed further particulars by reference to the legislation, however; the Tribunal is persuaded that this was a relabelling exercise and not an application to amend to add in completely new heads of claim. For those reasons, the application to amend is allowed.

44. Turning then to the out of time point, here, the claimant has a more difficult task in persuading the Tribunal.

45. As per Mr Curtis' submission, the reason the claimant says he did not present his claim in October 2016, was simply that he could not afford the fees. He does not rely upon his health issues in his evidence in chief. Furthermore, the Tribunal was not provided with any evidence in respect of those issues.

46. The claimant's evidence is troubling. The claimant said that he engaged in Acas early conciliation, but did not realise then that he would have to pay a fee. He said that he did some research after his parents-in-law had left on 4/10/2016 and he then accepted he could not afford to pay the fee. He said he was not aware of the possibility of remission. He said in evidence that his employment situation was on his mind from October 2016 to January 2018 and he was annoyed that due to the fees, he could not do anything about it. The claimant could not explain how it came to his attention in January 2018 that the fee scheme had been declared unlawful (some six months earlier); when or how he became aware of that information. This evidence is contradictory and the lack of detail regarding January 2018 is a concern. The claimant says he was prevented from presenting his claim due to the fees, whereas in fact, the claim could have been presented without paying the fees, so it was not a case where he had to lay out money there and then (the claim would have eventually been rejected for the non-payment of a fee but it could have been presented without paying a fee). If his employment situation was on his mind and if the reason why the claim had not been pursued was due to the affordability of the fee, then it is not accepted that the claimant did not know about the unlawfulness of the fees until January 2018. Furthermore, the claimant did not act promptly once he says he became aware fees were unlawful. He waited a further nine-or-so weeks before presenting his claim to the ET.

47. For those reasons, the claim was not presented within such reasonable further period.

48. It is also not just and equitable to extend the time limit for the purposes of the EqA claims. As Mr Curtis submitted, the time limits are strict and should not readily been extended. The acts complained of are significantly out of time. If the claimant cannot

now recall such an important issue as to how he became aware in January 2018 that fees had been abolished, how can he remember events going back to February 2016? The short time limits which apply in the ET are for many reasons, but include staff moving on and leaving the organisation, memories fading and there should be a finality to litigation.

49. It is accepted there would be prejudice to the respondent if it had to defend claims which relied upon memory recall of the decision maker.

50. Mrs England's point about the more generous time limits in the County Court at first glance looks an attractive one. That argument however could be used to undermine every single much shorter time limit which applies in the ET. The same can be said for the point she made that there was no more than a gap of three months between all of the detriments - the gap between any detriments is not the test for extending time.

51. For the sake of completeness, the claimant's argument that he presented his ERA claims within such further period as was considered reasonable is also rejected. The claimant relies upon delay in seeking advice. Yet in 2016 the claimant had already negotiated Acas Early Conciliation and he says he had researched presenting a claim (without it seems any assistance); and it was only the payment of the fee which prevented him from doing so. There would have been nothing to prevent him taking the same steps and presenting his claim, within a very short further period, once he because aware of the fact fees had been abolished, he says, in January 2018.

52. For those reasons, all of the claims which the claimant presented on 29/3/2018 are out of time. It was reasonably practical for the claims to have been presented within time, or within a further reasonable period for the claims brought under the ERA. It was also not just and equitable to extend the time limit for the claims brought under the EqA; those claims are significantly out of time and for the reasons set out above, the claimant has not persuaded the Tribunal to exercise its discretion in his favour.

53. For those reasons, the claims are dismissed.

Employment Judge Wright

Date: 14th February 2019