



EMPLOYMENT TRIBUNALS

Claimant: Mr P Higham

Respondent: Salford City Council

Heard at: Manchester

On: 14 February 2019

Before: Employment Judge Sherratt

REPRESENTATION:

Claimant: In person

Respondent: Miss J Williams, Solicitor

JUDGMENT having been sent to the parties on 21 February 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a preliminary hearing to consider whether the claimant's claims brought under the Employment Rights Act 1996 and the Equality Act 2010 were brought in time and if not whether they should be allowed to proceed.

2. The relevant law for the unfair dismissal claim is to be found in section 111 of the Employment Rights Act 1996:

“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.”

3. The Equality Act 2010 claim has the time limit set out in section 123 of that Act:

“Proceedings on a complaint may not be brought after the end of:

- (a) the period of three 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.”

4. In this case it is apparent that the claims were brought some four years out of time.

The Facts

5. The claimant was employed by Salford City Council in the Finance Department. On 27 February 2014, when aged approximately 56, the claimant made an application for voluntary early retirement (VER) under the respondent Council’s published scheme entitled “Creating capacity”. Applicants were told that they could not withdraw their applications and that they should only apply if they were serious about taking a voluntary option and to treat it with the importance of a resignation.

6. On 12 March 2014 the claimant was informed that his application for VER was refused but from an email sent on 19 March it was apparent that that the claimant made it known to the respondent that he was still willing to leave.

7. On 28 May 2014 the claimant was admitted to hospital. He had an operation on or around 2 June 2014 involving the removal of a toe, and this was apparently connected with the claimant having been diagnosed with diabetes.

8. Whilst the claimant was in hospital on 19 June 2014 the respondent sent a letter to his home address saying that his application for VER had been approved and that his last day of employment would be 30 June 2014.

9. The claimant by this time was having second thoughts because if he was seriously unwell with the possibility of death then his view was that he would rather be a member of the pension scheme still wanting to claim benefits under it, presumably in respect of death in service and a widow’s pension, rather than being a pensioner under the pension scheme receiving a modest pension.

10. The claimant made a phone call to the respondent’s Ms Summerfield seek to withdraw his application but the respondent would not allow him to do so.

11. On 23 June 2014 the claimant came out of hospital. On 30 June 2014 he signed to accept the offered terms of early retirement, and this was the effective date of termination.

12. On 15 July 2014 the first pension payment was paid to the claimant.

13. On 31 July 2014 the claimant wrote to the respondent’s Assistant Director of Human Resources setting out what had recently happened with his health and asking if the decision to allow him VER could be rescinded. On 15 August 2014 a lengthy letter was sent to the claimant setting out why the respondent would not vary the decision made. It noted that the claimant’s decision to seek VER did not seem to have been rushed or taken without advice and support. It reminded the claimant of

the terms of the application and that his employment would end if VER was granted. It told the claimant that as a result of him stating that awaiting a decision regarding VER was causing him additional stress and was impacting on his medical condition the Chief Finance Officer made the decision to approve the VER application by deleting the claimant's post and creating a 36 hour accountancy apprentice post which made the required budget saving necessary to facilitate the VER and that the accountancy apprentice post had been filled.

14. Sometime after 19 June 2014 the claimant spoke to his trade union to ask for advice, he spoke to the CAB to ask for advice and he spoke to solicitors to ask for advice. The question he asked may well have been as to rescission of the voluntary early retirement decision. According to the claimant no-one told him of the possibility of a claim for disability discrimination so he was unaware of it.

15. In the claimant's written submission prepared for this hearing, after referring to the steps he made to try to secure a rescission of his VER application and the steps that he took to obtain advice as set out above, he wrote "With all this in mind, and to finish, I came to the conclusion that I had no chance of success so hence why the three months less one day rule date elapsed".

16. The claimant has produced a letter dated 27 January 2015 from Mr D Sprott his Orthopaedic Consultant. The claimant had written to Mr Sprott on 10 December 2014 to ask the consultant whether he could substantiate that the claimant may not have been in a fit state of mind to make the important decision to apply for early retirement which he did in February 2014. The response from Mr Sprott was that during the time of the claimant's hospitalisation he would have been under significant stress as well as being preoccupied by his health matters, and therefore all other decisions may not have gained the necessary attention and thought about decisions being made. Mr Sprott did not offer any opinion on the claimant's state of mind when he applied for early retirement on 27 February 2014, nor did he offer any opinion as to whether or not there was any continuing mental health issue with the claimant's state of mind following the operation and his return home from hospital. The claimant has not provided any other medical evidence confirming anything that his state of mind was anything other than normal throughout the period of time that we are here concerned with.

17. From his written submission it is apparent that the reason the claimant submitted his claim in 2018 was that by chance he met with a neighbour who turned out to be a solicitor with some knowledge of employment law. The claimant put what he considered to be the basic facts of his case to that person who suggested to him in October 2018 that he may have grounds on disability discrimination and he encouraged the claimant to apply to ACAS and suggested that he may be successful due to exceptional circumstances.

18. In cross examination the claimant said that he was aware of the three month time limit but he was dealing with a life or death situation and wasn't up to it at the time. He read up about it at the time but missed the date. Everyone said it was not going to do him any good to worry about things. He had never been made aware of the disability angle until talking to his neighbour. Previously he did not know that he had a chance to put a case forward. He had access to the internet at all material times.

Submissions

19. The respondent submits that it was reasonably practicable for the claimant to have claimed in time. The claimant was aware of his rights. The respondent submits that it was reasonably practicable for the unfair dismissal claim to have been made in time.

20. The respondent accepts that the claimant was not aware of his potential disability claim until prompted by the advice he received from his neighbour and that thereafter he acted promptly. It would not however be just and equitable to allow the claim to proceed. The delay was not due to discovering evidence but to receiving new advice. To allow the claim to continue would substantially prejudice the respondent. Evidence of comparators may not be available. Documents may not be available. Potential witnesses no longer work for the council and may not be willing to give evidence. There is little merit in the claim.

21. The claimant submitted that he was not aware of the three month rule and that he was in a bad place mentally. He was advised not to proceed. He was in the three months preoccupied with his health. The respondent's IT system would have the relevant data. He had proved his mental condition or state and he wanted to get his case heard.

The Relevant Law

22. The question of reasonable practicability for the unfair dismissal claim is a question of fact applying practical common sense. Was it reasonable to expect that which was possible to have been done?

23. In respect of the Equality Act claim In **Robertson v Bexley Community Centre [2003] IRLR 434 CA** it was held that when employment tribunals consider exercising the discretion given by section 123 of the Equality Act there is no presumption that they should do so unless they can justify failure to exercise the discretion. A tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend the time limit.

24. Again, in relation to the Equality Act claim in **British Coal Corporation v Keeble [1997] IRLR 336 EAT** it was suggested that tribunals would be assisted by looking at section 33 of the Limitation Act 1980 which requires a court to consider the prejudice which each party would suffer because of the decision reached. All circumstances of the case should be considered in particular the length of and reasons for delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with requests for information, the promptness of the claimant once aware of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

25. Where someone is ignorant of their rights this will only assist a claimant where their ignorance is reasonable.

Conclusions

26. We have an effective date of termination of employment of 30 June 2014. We have arguably confirmation of the refusal to vary the VER decision, which is arguably the act of discrimination, on 15 August 2014. To be in time claims arising out of those matters would normally have been brought by October or December 2014 respectively after allowing for early conciliation which started in May 2014. In fact the claimant submitted a claim at the end of October 2018 and when that was rejected for lack of an early conciliation certificate it was resubmitted on 5 November 2018 approximately four years out of time.

27. Looking at the claimant's written submission it is apparent that shortly after his employment ended he sought advice as to the possibility of bringing an unfair dismissal claim and following that advice he concluded that there was no chance of success "hence why the three months less one day rule date elapsed".

28. From this statement made by the claimant I take it that he made a conscious decision not to proceed with an unfair dismissal claim within the time limit. This decision having been taken by him I find that for the purposes of section 111 of the Employment Rights Act 1996 it was reasonably practicable for the unfair dismissal claim to have been presented before the end of that period of three months beginning with the effective date of termination. The complaint of unfair dismissal therefore shall not be considered by an employment tribunal and it is dismissed.

29. Before considering the just and equitable question I find that the claimant was employed in local government working in the finance department. He is not an unintelligent man as is apparent from his written and oral submissions made to the Tribunal. He has confirmed to me that he had internet access and that he has not worked since taking VER and the pension benefits that had accrued to him. He has produced no medical evidence of any mental health issues that might have affected him when he applied for VER or which prevented him from dealing with his own affairs when he came out of hospital. He reached a conclusion not to make the unfair dismissal claim within three months.

30. It is for the claimant to convince me that it is just and equitable to extend time. There is no presumption in the claimant's favour.

31. The claimant tells me, and the respondent does not contest, that he was unaware of his right to bring an Equality Act claim until October 2018. Given this lack of awareness was it reasonable for the claimant not to have been aware of the right to bring a claim? Given his level of intelligence, the time and the internet facilities available to him to consider his position and that the facts were not concealed I do not find his lack of awareness reasonable.

32. Looking at section 33 of the Limitation Act I start by finding that there was a delay of some four years in commencing the proceedings due to the professed ignorance of the claimant.

33. I am not aware of how the delay will affect the claimant's evidence. I note the respondent's submissions in this regard but I was provided with copies of relevant contemporaneous documents and correspondence in the bundle.

34. I am not aware of any conduct by the respondent between the time of the VER and the proceedings being commenced. I accept that the claimant acted promptly in issuing his claim following his discussion with his legally qualified neighbour.

35. If the claim is allowed to proceed the claimant will have the opportunity to seek to satisfy the Tribunal that the respondent's refusal to rescind the VER was discriminatory. The respondent which granted the claimant's request for VER, deleted his post, took on an apprentice and paid the claimant's VER benefits would have to defend the claim.

36. Taking into account all of these factors including the lack of any medical evidence of mental impairment and my finding that the claimant's lack of awareness of his right to bring a claim under the Equality Act was not reasonable I conclude that it is not just and equitable to allow the claimant's Equality Act claim to proceed out of time and it is dismissed.

Employment Judge Sherratt

6 March 2019

REASONS SENT TO THE PARTIES ON

11 March 2019

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FOR THE TRIBUNAL OFFICE

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