



EMPLOYMENT TRIBUNALS

Claimant**Respondent**

Mr S Kelly

v

Tesco Stores Limited

Heard at: Cambridge

On: 31 January 2019

Before: Employment Judge Ord

Appearances

For the Claimant: In person

For the Respondent: Mr V Phipps, Counsel

JUDGMENT

The claimant's complaint that he was the victim of unlawful discrimination under the protected characteristic of disability is dismissed. The claim was presented out of time, the tribunal has no jurisdiction to hear it and it is not just and equitable in the circumstances of the case to extend time. The claim is therefore dismissed.

REASONS

1. This matter comes before me today following an order of the tribunal dated 10 September 2018 listing a preliminary hearing to determine whether the tribunal has jurisdiction to consider the claim which, on its face, was admitted to be presented out of time.
2. The claimant's only complaint is that he was the victim of unlawful discrimination on the protected characteristic of his disability.
3. The relevant dates are:
 - 3.1 The last act of discrimination complained of is the claimant's dismissal on 19 January 2018;

- 3.2 The claimant appealed that dismissal on 5 February and received an outcome on 22 February. Although he sought to exercise a second appeal he was advised on 12 March 2018 that he had no right to do so;
- 3.3 On 12 March 2018 the claimant contacted Acas and gave the relevant early conciliation information to the Acas Officer ('Day A') and on 5 April 2018 (Day B) he received his Early Conciliation Certificate. The claimant presented his claim to the Employment Tribunal, with the assistance of his Trade Union, on 22 June 2018.
- 4. In his claim the claimant accepts that he had presented his claim out of time and states that he suffers from depression which makes it *"more difficult for him to prepare a claim on his own"*.
- 5. The claimant accepted and told me that he had Union assistance during the process which led to his dismissal and the rejection of his appeal, and then again from April 2018 onwards. He does not give a date in April when he contacted his Union, but it was after 5 April. He says that thereafter the delay was caused by his Union failing to act.
- 6. The claimant also accepts, however, that he knew, prior to contacting Acas, of applicable time limits and that when he received his Early Conciliation Certificate he also obtained advice from Acas as to what he needed to do next and by when.
- 7. Under section 123 of the Equality Act 2010, a claim must be presented within three months of the date of the act or last act complained of, or within such further period as the Court considers just and equitable.
- 8. The Employment Tribunal Early Conciliation Regulations of 2014, made under the Employment Tribunals Act of 1996, grants an extension of time in relation to the period of early conciliation. The provision is in two parts.
 - 8.1 First, the 'Stop the Clock' provisions state that in calculating whether a claim is presented in time, the period between the day after 'Day A' and the day after 'Day B' should be disregarded. In that case the limitation period would be extended by 24 days in this case.
 - 8.2 Secondly, if the ordinary time limit expires within the period beginning with the date on which Early Conciliation information is presented to the Acas Officer and one month after the date of the Early Conciliation Certificate, the time limit will expire on the day one month after the date of the Early Conciliation Certificate.
- 9. Under the 'Stop the Clock' provisions the claimant's time limit would expire on 12 May, under the 'One Month Extension' provisions, time will expire on 4 May.

10. In the case of Luton Borough Council v Haque EAT 180/17, the correct approach is to apply the 'Stop the Clock' provisions first and only consider the 'One Month Extension' provisions if it is necessary to do so. Under the 'Stop the Clock' provisions the claimant's time had expired on 12 May and that is the date by which his claim should have been presented. It was in fact presented on 22 June, 41 days late.
11. I am reminded by the respondent that there is no presumption in the claimant's favour to extend time, he must persuade me that it is just and equitable to do so in the circumstances of the case (Robertson v Bexley Community Centre [2003] IRLR 434), relevant factors which the tribunal may take into account when considering whether it is just and equitable to extend time appear in section 33(3) of the Limitation Act 1980 (that section being related to the exclusion of time for actions in respect of personal injuries or death), as approved in the case of British Coal Corporation v Keeble [1997] IRLR 336.
12. In Southwark LBC v Afolabi [2003] ICR 800, it was confirmed that this is not, however, a check list to be slavishly followed and in Hall v ADPD Services Ltd. EAT 390/13, it was confirmed that a tribunal should take into account factors canvassed by the parties and not those that might appear on a formulaic check list.
13. The claimant says that he was waiting between April (no date given, but after 5 April) and June for his Union Legal Department to contact him. By the time they did so the claim was out of time, although he does not say the date upon which contact was made.
14. Although he refers to his suffering from a depressive condition, he has produced no evidence in support of that and there is no evidence that he was disadvantaged by that condition. Indeed, on his evidence he was able to ascertain and understand his rights prior to contacting Acas, engage in Early Conciliation and thereafter understand what he had to do next and by when.
15. Other than to say he was waiting thereafter for his Union Legal Department he has offered no other explanation for his delay between 5 April when he obtained his Early Conciliation Certificate and 22 June when the claim was presented.
16. He was aware, on his evidence, of the expiry of the time limit, has not told me that he sought advice or assistance from any other source and has confirmed that he did not go back to Acas to ask what he should do, notwithstanding the looming end of the limitation period.
17. The claimant has not therefore given a satisfactory explanation as to why his claim was presented out of time. It was late by 41 days and he had 37 days between receipt of his Early Conciliation Certificate and the end of the limitation period when nothing appears to have been done by him other than to contact his Union.

18. I am bound to consider, however, relative prejudice that extending time would cause to the claimant and the respondent. A factor in that balancing exercise, a significant factor, is the merits of the case. The claim relates to the claimant being dismissed, summarily, by reason of his breach of an alcohol contract dated 19 January 2018. He had a previous conviction for driving under the influence of alcohol and the parties agreed a support programme. The claimant asked to be placed on an alcohol contract to support his recovery and from 2 June 2017 onwards the claimant was subject to random alcohol testing. He was tested on 16 January 2018 which showed 0.73% and 0.68% alcohol in breath. The claimant was suspended and invited to an investigation meeting, thereafter a disciplinary hearing was held and the claimant was dismissed for gross misconduct due to breach of the claimant's alcohol contract.
19. The claimant does not dispute that he was in breach of that contract, but says he was treated unfavourably because of a disability (the disability being depression); says that he was directly discriminated against because he was put on a 42 week (as opposed to a 13 week) alcohol contract (that act of alleged discrimination occurring on 2 June 2017) and because he was dismissed because of an offence amounting to misconduct rather than gross misconduct (the respondent confirming that breach of the alcohol contract which was a 'zero alcohol' contract amounts to potentially gross misconduct). The claimant says that his consumption of alcohol rose as a consequence of his disability and that the respondent should have considered reasonable adjustments by giving him a shorter alcohol contract, treating his breach as misconduct, give more consideration to his circumstances (undefined) and provide *"further support"*.
20. I have to consider whether those claims have a reasonable prospect of success and given that the claimant was on his own case, subject to a 12 month no-alcohol contract, which he was in breach of, I consider that those claims have little, if any, reasonable prospect of success. That is a factor to be born into account when weighing up the balance of prejudice because the respondent would, if this claim proceeded, face a claim with little or no reasonable prospect of success.
21. Further, any complaint about the length of the no-alcohol contract is very substantially out of time as the cause of action, if there were one, would have arisen on the date the contract was issued (2 June 2017). The claimant's complaint, in any event, is that it was alleged illness, and not the contract length, which caused him to resume drinking.
22. In all the circumstances of the case the claimant has not persuaded me that it is just and equitable to extend time. I have taken into account the balance of prejudice, the reason for the delay, the length of the delay and whether or not the claimant acted promptly once he knew of his rights, as well as the balance of prejudice between the parties.

23. The claim was presented out of time and it is not just and equitable to extend time to allow the claim to proceed. The claim is therefore dismissed.

Employment Judge Ord

Date: 18 March 2019

Sent to the parties on: 21 March 2019

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For the Tribunal Office