EMPLOYMENT TRIBUNALS

Claimant: Mr S J Burgess

Respondent: Horton Establishments Ltd

HELD AT: **Leeds** **ON:** **13 March 2019**

BEFORE: **Employment Judge Wade**

REPRESENTATION:

Claimant: In person
Respondent: Mr McDevitt (counsel)

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 13 March 2019, the written record of which was sent to the parties on 15 March 2019. A written request for written reasons was received from the claimant on 19 March 2019. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 13 March 2019 are repeated below:

JUDGMENT

The claimant's complaints are dismissed, having been presented outside the time limits prescribed by the Employment Rights Act 1996 in circumstances when it was reasonably practicable for them to have been presented in time.

REASONS

Introduction

1. This hearing was arranged by Employment Judge Rogerson because it was clear from the chronology of ACAS conciliation and presentation in this case that the complaints which appeared to be set out in the claim form might have been presented late. There was also a need for the protected disclosure part of the claim to be clarified and she ordered clarification of that.

The complaints in the claim form

2. The claimant, a teacher, had ticked the boxes in the claim form in relation to unfair dismissal, also saying payments are owed in respect of notice pay, holiday and other payments. He seeks damages for wrongful dismissal. The unfair dismissal complaint is said to be by reason of protected disclosure. He asserted what appeared to be detriment on grounds of protected disclosure: lack of support during suspension, and investigation following an allegation made against him. He then seeks remedy in the form of damages for the alleged wrongful dismissal, and compensation in relation to those allegations of detriment during his employment for whistle blowing and dismissal for whistle blowing; he seeks his holiday pay entitlement at the end of his employment. There is also a claim for a police administration fee and unpaid expenses. They might properly be understood as remedy issues should any of the above complaints succeed.

The broad chronology

3. From the evidence of Mr Burgess today I find that he started work in February of 2017, through a supply agency, for the respondent, which operates special schools and other facilities. That initial engagement was then converted into employment from July 2017. On or around 17 November 2017 there was an incident which he reported to the police. It had concerned physical contact with a pupil or pupils. His complaint then is that it was suggested to him that he might be made redundant in March 2018. I have seen documents to this effect. He was then subject to a termination of his employment on the basis that he had not succeeded in his probationary period, and he was also subject to a suspension for some many months prior to dismissal.

4. There was then (I put it in neutral terms) a review or appeal by him in relation to these matters. For the purpose of today I have approached matters on the claimant's case at its highest (that is, the latest date of dismissal or other allegations, 31 July 2018). He sets that out in a very helpful chronology which refers to him being paid to the end of July 2018, receiving a full month's salary, and having an outcome to a grievance on 25 July.

5. All his pleaded complaints relate to conduct by the respondent up to and including 31 July 2018 and that includes the allegations of detriment. The only material occurrence after that, to which he refers in his chronology, as amended this morning, is that he was invited to a meeting to discuss the November 2017 incident, after his employment had ended, initially in July 2018, but then postponed by him until 11 December 2018.

6. The other material part of the chronology is that during July the claimant was in contact with the supply agency where he had previously been registered and was

able to meet the leader of the science department at a school in Bradford. As a result he secured a placement as a teacher there, through the agency, starting at the beginning of September 2018. Securing a new post was his focus at that time because he knew by this stage that he was not going to be paid over the summer, which of course for a teacher is highly problematic. He had advice to put these very difficult events behind him during August.

7. In September his energies were directed to his new post, but in September he had also decided that he would like to pursue a complaint against the respondent in the employment tribunal. His motivation for so doing so was to clear his name and record, having been subjected to what he considered to be victimisation, having whistle blown, on his case, about violence in the respondent's school.

8. Having resolved that he did want to make a complaint, he quite properly contacted ACAS. By this stage and indeed in the summer and through these events he had been supported by a union (NASWT) representative. She approved the advice that he just put his complaint about the respondent to one side for the summer holiday. The claimant knew that there was a three month time limit which applied to his complaints. That explains why the claimant commenced ACAS conciliation on 1 October 2018, which was right at the end of the three month time limit, were it to be decided that his employment ended on 2 July 2018, which was a date when he did receive notification of dismissal, even on his own chronology.

9. The extension of time provided by conciliation was such that from the date of issue of the ACAS certificate on 1 November 2018, he had a month, until 30 November 2018 to present his complaints. The "stop the clock" provisions do not take us any further.

10. On or around 28 November 2018 the claimant was in touch with ACAS, who advised that the respondent was not interested in conciliation at that stage, he was told. The claimant may not have opened the email that was sent to him confirming these things until early December, but he had email access on his telephone. By this the time limit had expired.

11. The claimant then had in his mind that the respondent had arranged with him a meeting delayed until 11 December 2018, because he had been engaged in other things until then. The purpose of the meeting was to discuss the physical contact incident on 13 November 2017. The claimant's feeling at that time was that material might come out of that meeting, which might assist his case, or at least clarify matters in his case, but also in his mind was the fact that he could not know the outcome. He could not know whether the outcome would be favourable for his career or unfavourable. He felt comfortable attending, knowing that a former colleague that he trusted would be taking notes.

12. The claimant then went into the Christmas period and did not want to issue a complaint to the Tribunal, without the extra information or knowledge that might come from the outcome of the meeting on 11 December 2018. He was then in contact with ACAS again, who gave him the advice, unsurprisingly, that the complaint "had to go in", because of course by this time it was known that it was out of time. The claimant understood that it might be a matter of discretion as to whether the case would be permitted to go ahead. The claim was presented on 15 January 2019.

13. To finish the chronology, on 29 January 2019 he received a communication from the respondent school that the investigation into the November 2017 incident had concluded, and that if he had still been employed by the school, then no further action would have been taken. In broad terms that was the outcome that he desired, and of course was expecting, because his position was that he had done nothing wrong in November 2017.

Submissions

14. As to what the parties say about that course of events, and the limitation issue, it is said by Mr McDevitt on behalf of the respondent that the claimant's conduct in delaying presenting the complaint is twofold: firstly by not presenting it earlier in November in time; and then, even after the expiry of the time limit, not presenting it until the middle of January. This was said to be a question of prioritisation by the claimant. In the early phase he was prioritising his new work, quite understandably; when the time limit approached and afterwards, he was prioritising the outcome of the school's investigation and other matters over presenting his complaint. The respondent says all the complaints listed by Employment Judge Rogerson are plainly out of time. Mr McDevitt says it was doable for the complaints to be presented earlier. The claimant had internet access. He had access to the union, to friends, family, ACAS and the like. Of fundamental importance, he says, the claimant knew of the relevant time limit.

15. The claimant says, and I accept his as evidence, albeit said as a submission, that whilst he was prioritising holding down his new teaching job, he was not in the best frame of mind mentally to broach the unhappy experience with the respondent, in order to present the complaint in the detail in which he wanted to present it. I find that the claimant wanted to do a good and thorough job of presenting that complaint in the detail in which it was presented; to have the chronology clear and so forth. At the time that he was doing that (he was not a lawyer) he was also undertaking a full time teaching post as a science teacher.

The Law

16. The law that I have to apply, I have explained to the parties, is contained in the Employment Rights Act 1996 and the Extension of Jurisdiction Order 1994. It is not, as perhaps the claimant has perceived or understood, a question of a general discretion to extend time limits for the presentation of claims, such as some would say is contained in the Equality Act 2010. The issues that arise from the applicable statutory limitation periods in the claimant's claims are: was it reasonably practical, or doable, for these complaints to have been presented by 30 November 2018?

17. Practicability and "doability" involve a number of matters. They involve knowledge of the time limit. The claimant knew the time limit. They involve the practical means to present a claim: in this day and age access to the internet, or the ability to fill in a hard copy form and post it or deliver it to the Tribunal. There is no doubt that the claimant practically could have completed his claim form earlier. They also involve the desire or free will or choice to pursue a claim. There are occasions, or matters, which render a person unable to present a complaint in time. These might include, for example, hospitalisation, serious illness, or a state of mental impairment of the kind that prevents a party being able to start a claim.

18. In this case, it is clear that over the summer the claimant's resilience was low, and I have every sympathy with him, and those who were advising him in that part of

the summer to take a rest from the upset of the preceding events. I also have every sympathy with him deciding that he wanted to wait, and that his mental health could not contemplate proceedings at that time. Nevertheless the claimant then returned to the cognitive good functioning of a professional teacher, prioritising his career, albeit still feeling that he has been very much wronged. Again, I have every sympathy with his wish to have his name cleared, even though that has, in effect happened by the decision of the school in January 2019.

19. Unfortunately for the claimant's wish to pursue this claim now, the test that I apply is not a matter of discretion. It is a matter of applying the reasonably practicable test in a consistent and just way, and in the way that is applied to all who come before the Tribunal. In this case there is simply not the evidence to find that the three month period (plus ACAS conciliation) was not the reasonably practicable period in which these complaints could have been brought. For these reasons they are out of time and are dismissed at this very early stage.

Employment Judge Wade

15 April 2019