



EMPLOYMENT TRIBUNALS

Claimant: Mr D H Halpern

Respondent: Deloitte LLP

Heard at: Manchester

On: 2 May 2019

Before: Employment Judge Grundy
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr B Williams, Counsel

JUDGMENT ON PRELIMINARY HEARING

1. It is declared that the claimant's claim for unfair dismissal and other claims under the Wages Act and for holiday pay were presented out of time.
2. It is declared that the Tribunal considers it was not reasonably practicable for the claimant to pursue his claims within time.
3. The claimant presented his claims within a reasonable time thereafter.
4. The Tribunal has jurisdiction to deal with the unfair dismissal, Wages Act and holiday pay claim.
5. It is declared that the claimant's claim in respect of disability discrimination was presented out of time. It is declared that it is just and equitable to allow the claimant to present his claim out of time.
6. The claimant's claims which the Tribunal has extended jurisdiction to hear shall be listed for a case management hearing on **14 August 2019** at **Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA** commencing at **2.15pm**.

REASONS

1. The case was listed for preliminary hearing on the question of whether or not the claimant's claims were out of time or whether or not the Tribunal had jurisdiction by means of extending time to hear those claims.
2. The claimant was employed from 1 October 2015 or 2 October 2015 (it matters not for today) until 29 June 2018 as an Audit Trainee/Senior Associate with the respondent large accountancy practice.
3. The basic chronology is that the claimant resigned with notice on 3 June 2018. The effective date of termination of his contract was 29 June 2018. In the first instance his early conciliation contact with ACAS would have to have occurred by 28 September 2018. The notice in the bundle showed that that had occurred on 14 November 2018, seven weeks later, and the Tribunal received his claim form on 19 November 2018.
4. During the course of the hearing it transpired, and the claimant showed to the Employment Judge and the respondent's counsel, that he had actually received an early conciliation certificate when he spoke to ACAS on 6 July 2018 with notification on the same day.
5. The claimant brings claims in respect of unfair dismissal, disability discrimination and other payments including notice pay, holiday pay and arrears of pay. The respondent counterclaims in respect of £1,815.84 of a £5,000 loan made to the claimant at the outset of his employment.

The Law

6. The law applicable to the claimant's claims in respect of presentation before the Tribunal is not in dispute. Pursuant to section 111(2)(a) of the Employment Rights Act 1996 the presenting of the claimant's unfair dismissal claim runs from the effective date of termination and is subject to a three month time frame subject to the early conciliation certificate.
7. The breach of contract claim is subject to Article 7 of the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 and must be within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, subject to the caveat that unless the Tribunal is satisfied that it was not reasonably practicable for the claim to be brought within the time limit. The question of practicability is a question of fact for the Tribunal.
8. The Tribunal must consider even if it is not reasonably practicable whether the period within which the claim was presented was such period as the Tribunal considers reasonable. In considering the question of reasonable practicability the Tribunal has to consider what is not just physically possible, nor reasonable but what is reasonably feasible.

9. So far as the discrimination claim is concerned, the provisions of section 123(1)(a) of the Equality Act 2010 apply such that the claimant is obliged to make his claim within three months beginning with the date of the act complained of. The period may be extended if the Tribunal finds that the presentation is within such other period as the Employment Tribunal thinks is just and equitable.

10. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles: The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended; The tribunal may take into account anything which it judges to be relevant, consideration is likely to include whether it is possible to have a fair trial of the issues.

Evidence

11. The Tribunal heard evidence from the claimant on oath and accepted in written evidence the evidence from his mother, Debra Hayley Halpern, in a written statement; a letter from Dr Alistair Caldwell, his GP, dated 4 March 2019; a letter from Rabbi Dr R M Silberman dated 8 March 2019 of the Manchester Reform Synagogue; and a statement from Julie Catherine Bond dated 29 April 2019.

12. The respondent relied on the witness statement of Samantha King and that of Karen Lang. Those witnesses did not give evidence although Karen Lang was present at the Tribunal.

13. The claimant's evidence was essentially that he was too ill due to mental health issues to present his claim within time and the Tribunal should exercise its discretion to allow his claims to proceed.

Findings of Fact

14. The Tribunal made the following findings of fact during the course of the hearing.

15. The claimant has consulted his GP a number of times over the past two years with problems with his mental health; that is two years going back from 4 March 2019. Those consultations have also related to his chronic rheumatological problem. It is his rheumatological problem, which is at the heart of his disability discrimination claim in the substantive claim. The letter from Dr Caldwell indicates:

“Daniel has had problems with anxiety in the past but I have to say they were significantly worse over the past 18 months and he feels this was related to problems he was having with work. I am inclined to agree. I have had a number of consultations and letters about how low Daniel has been in mood and I have started him on regular medication for this. Despite this he feels his confidence is poor, his sleep is dreadful and he often states he feels life isn't worth living.”

She goes on to say:

“I know he is engaging with counselling services and complies with his medication.”

16. At the time of the hearing the claimant told me that he was being prescribed Duloxetine Propanolol and Hydroxine. He indicated that the latter may have been prescribed later after the period of the September/October 2018 period.

17. The claimant accepted that he knew Employment Tribunals have a three month time limit for presentation of a claim. He accepted that he knew he had to contact ACAS before bringing a claim and he accepted that he knew that there were extension provisions described by the Tribunal as “escape clauses” which could be applied to extend the time limits.

18. The Tribunal considered the period from 3 June to 17 November 2018, particularly from 29 June, as relevant to the claimant’s assertion that it had not been reasonably practicable for him to lodge the Employment Tribunal claim within the original three month period. The claimant relies on a fitness for work certificate.

19. Looking to the earlier period, the Tribunal accepts that the claimant had made known to the respondent that he was considering an Employment Tribunal claim.

20. The Tribunal accepted the screenshot of the claimant’s mobile phone in messages to his mother on 7 June 2018 that he knew about ACAS as that page of screenshot shows that he was too scared to call ACAS and had become doubtful about speaking.

21. The claimant accepts there was a meeting to consider his grievance on 25 June 2018 with David Hughes, a partner in the respondent’s Risk Advisory section. Also present were Sarah Meade, Business Partner from HR, and Ruth Cooper from HR Advisory Services who was available on the phone. The respondent’s record of that meeting at page 131 indicates that the claimant said that he was still ill and injured but would have had a job and an income, but he said according to the respondent’s note:

“I’m box ticking because I’m planning to submit an ET claim. I’m not trying to be difficult but there has [sic] been no attempts to deal with this. I don’t want to work at Deloitte anymore. I don’t feel safe.”

22. David Hughes asked whether that was for the purpose of the Employment Tribunal and the claimant said, “change in policy in Manchester office and compensation for what I’ve lost”.

23. The respondent’s record was not accepted by the claimant in the hearing. He does not recall having that conversation with Mr Hughes. Notwithstanding that he does not recall that conversation it seems unlikely that the respondent would have fabricated that part of the discussion. The meeting minutes are extremely closely typed and read as a full and appropriate discussion regarding the grievance the claimant had brought.

24. In the light of the medical evidence to which I have already referred and having regard to the claimant having been in low mood and on medication, the Tribunal considers it likely he did indicate he was planning to submit an ET claim at that juncture. The Tribunal accepts that the claimant was on medication, had low mood, had poor confidence and struggled with a desire to continue living. The Tribunal considered that position to be present throughout June, July, August, September, October and November 2018.

25. Anxiety/depression affects individuals in different ways and affects their rational thinking and is not a linear course. Therefore, in considering the period between 29 June and 17 November the Tribunal has to apply its mind to the totality of that period and the presentation of the claimant in that period. The claimant described having been bedridden for a short period and the telephone evidence at page 168 between 24 August and 3 September seemed to show that he was in no way active in contacting his mother. That would not be the case for the entire period of time, but the Tribunal accepts that there were days in a row when the claimant did not leave his bed, did self-harm and was ultimately thereby not able to function in a rational way.

26. The Tribunal accepts that the claimant was not hospitalised and he did not seek emergency medical treatment. However, he was referred for counselling.

27. The Tribunal also accepts the claimant's evidence that although he was posting on his social media and had a profile which appeared in some vein a positive profile, it did not at all reflect the activities with which he was then involved. For example, at page 291 of the bundle of documents the claimant referred to a picture of him at a piano recital, which was actually taken on 27 March 2018 although it may have been posted elsewhere to relate to a date within the timeframe of the consideration for submission of the claim. The Tribunal accepts that the social media profile of the claimant on Instagram and Facebook and on occasion LinkedIn did not at all times reflect the truth of the activities in which he was involved.

28. The claimant is skilled in being able to communicate in a large number of different languages. He took a French examination on 21 June 2018 in Manchester and he accepted that he did travel to Tokyo in July 2018.

29. On page 133 of the bundle of documents, on 4 July 2018 the claimant accepted he talked of an ex-employee who is taking legal action, at that time saying he was seeking to get leverage.

30. On 1 August at page 154 in his screenshots to his mother the claimant talked about having woken up "really depressed and I don't know what to do. I just have this nagging worry that it's not going to work out and Argyle has succeeded in completely ending my life".

31. At page 156 on 2 August the claimant indicates he cannot enjoy anything and he wished he had stayed at home.

32. At page 184 on 10 October 2018 the claimant says:

“How could I have submitted ET1 when until a fortnight ago they were still holding all my possessions hostage. That would have definitely meant never seeing them again. When you leave an employer there’s meant to be a clean break. If they’re holding on to your stuff how can you possibly start legal proceedings?”.

33. On 12 October 2018 the claimant appears to post on Facebook (page 188) in respect of World Mental Health Day. On 12 October he said:

“A couple of days ago was World Mental Health Day and I normally post something about it to encourage people I know to engage more with their mental health. I didn’t this year because I’m currently going through some really hard stuff and I want to share it with you because for over a year now I’ve been bullied by my employer and to keep silent about it.”

34. The claimant was also sending in the period before lodging the claim, some offensive emails to members of the respondent staff. For example, sent on 12 November 2018 to Sarah Meade:

“How you read this and saw Samantha King was acting in a normal professional way is beyond me, Sarah. You are scum and your parents raised anthropomorphic filth.”

35. Given the nature of these postings and the emails and messages to the respondent’s staff, the claimant does not appear to have been of a balanced, stable mental condition at the time he was sending these offensive postings, emails and Whats Apps. In evidence the claimant accepted that that was not the way he talks when he is well.

36. On 19 September (page 236) the respondent drew to the Tribunal’s attention a post of an incomplete ET1 which was placed on the claimant’s public Instagram account, saying:

“Up bright and early after umpteenth night of no sleep caused by these reckless and negligent monsters. Preparing for final meetings with my legal advisers before submitting this beast. I really really never thought this day would come. I believed rather naively I must say that at some point one of my employer’s internal functions would step up, apologise for making me so very ill for three years then make reparations and allow me to go back to work with adjustments in place recommended by an independent medical team as well as dictated by the law.”

37. The claimant goes on to describe HR as “sadistic sociopaths”.

38. These posts are pretty extreme. The Tribunal accepts that the claimant was not well in a mental health sense when he was posting such as that ET1 and writing in offensive terms on his Instagram account.

39. On 10 October 2018 it is clear from the screenshots of the telephone call (page 184) that the claimant was still discussing the submission of the ET1 with his

mother, and it was ultimately submitted on 17 November 2018, after the claimant had received a photograph sent to him by another employee of the respondent of an item from his locker which he had concerns about securing. The claimant was also concerned other contents of the locker were not returned to him.

Submissions

40. The Tribunal heard submissions from the respondent who asserted that the only disability relied upon in the substantive claim was the claimant's rheumatoid condition in relation to a disability and that the clock was ticking from 29 June for the submission of the claimant's claim within a three month period. The respondent does not accept that the claimant was unwell throughout that period and does not accept, from the claimant's evidence, that nothing had changed and that he was in a position not to submit his ET1 within the timeframe of the legislation. The claimant had knowledge of the timeframes and of the early conciliation and ACAS procedure. The respondent submits the medical evidence was not sufficient to allow the Tribunal to extend the time limits both in respect of reasonable practicability and reasonable time thereafter, and the just and equitable test.

41. The claimant's submissions were to the effect that he has suffered from mental health difficulties throughout this period. There was a period when he was bedridden. His social media accounts do not reflect his activity in the real world. He has not worked since leaving the respondent and in fact both parties agree he had been off sick from the respondent since 26 January 2017 and had not returned to work since that date having had an Occupational Therapist appointment on 2 May 2018, a welfare appointment on 24 May 2018 and resigning on 3 June 2018.

42. The claimant's case on jurisdiction is based on inability to comply with time limits due to mental health issues.

Conclusions

43. The Tribunal reached the following conclusions.

44. The claimant is a high functioning, extremely intelligent individual with a degree from Cambridge who speaks nine languages. He was well aware of the time for presenting a claim, and the procedure with the ability to ask the Tribunal to extend time for presenting a claim where presentation occurred outside the original limitation period.

45. Time limits in employment cases should be observed strictly and an extension is the exception not the rule, see **Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576. The duty to proving that presentation in time was not reasonably practicable rests on the claimant. Even if the claimant satisfies the Tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The Tribunal must then go on to decide whether the claim was presented within such further period as the Tribunal considers reasonable.

46. This is a highly unusual case. The claimant does not plead ignorance. On the contrary, he knew the rules. What is clear to the Tribunal on reviewing the evidence in the bundle is that the claimant has not had a stable functioning mental state throughout the course of the three months during which he ought in the first instance to have brought his claim, nor has he had a stable functioning mental health position in the following several months after 28 September 2018.

47. In consideration of the question whether it was reasonably feasible for the claimant to have presented his claim in time, the Tribunal considers that an individual as the claimant has demonstrated suffering in particular from anxiety, depression and self - harming does not in his actions thereby follow a logical course.

48. In the claimant's view which the Tribunal accepts he was, in thinking about what he wanted to say in his ET1, prejudicing and potentially harming his mental health in thinking about it. The claimant's evidence about the time it took to fill in the ET1 was credible in that when he went to fill in the ET1 he found it extremely difficult to write down, recollect and articulate those facts that he wanted to rely on, and this was compromising his mental health and causing him anxiety, causing him to be bedridden, causing him to not function in an appropriate way. Thus the Tribunal is of the view that the debilitating nature of the mental health condition that the claimant was experiencing affected his ability such that it was not feasible for him to submit his claim in time.

49. The Tribunal is fortified in its conclusion in considering the decision of **Shultz v Esso Petroleum Company Limited [1999] ICR 1202** where the Court of Appeal accepted that illness may justify the late submission of claims. In that case the Court found that during the last six weeks of the three month time limit "S" had been too depressed to instruct solicitors and overruling the Tribunal in the EAT held that it was not reasonably practicable for "S" to have presented his claim in time. The Court emphasised that the test is one of practicability: what could be done, not whether it was reasonable not to do what could be done.

50. The Tribunal considers that this claimant was suffering more than stress. He was struck down by mental ill health relating to anxiety and depression. His mother's statement supports that she was extremely worried about his mental state such that she feared him causing trauma to himself in re-living the events in writing the ET1.

51. The claimant had in the first instance also delayed because he said he hoped for a favourable and amicable resolution to the dispute. Whilst this would not justify the later delay, it does give some reason for the earlier delay in the claimant not making the claim promptly. Although this is a rational view it does not detract from the Tribunal's overall conclusion.

52. In considering whether the claim was therefore presented within a further reasonable period, the claimant relied on his totality of employment and having difficulties with the respondent over a further significant period in that the delay between the date upon which the ET1 should have been filed and it was filed was a period of 7 weeks. The test to be applied relates to whether the claim was presented within a reasonable time after the time limit expired.

53. Considering all the circumstances in terms of the claimant's ill health, that the claim was made a matter of weeks after the time period expired rather than a matter of months, that the delay to the respondent is not significantly prejudicial as it is a matter of a few weeks rather than months elapsing over which the material relevant to the dismissal would become stale, and considering what is at stake to the claimant in terms of a serious and significant claim, in the Tribunal's view the claimant has satisfied the test of submitting his claim in a reasonable period thereafter.

54. As to the just and equitable extension, the claimant's disability claim having fallen outside the original limitation period given that it seems the claimant relies on conduct extending over a period to be treated as done at the end of that period under section 123(3)(a), and the Tribunal is treating the same date as the termination of his employment, that claim ought also in the first instance to have been brought within three months. Thereafter the Tribunal has a wide discretion to allow an extension of time under the just and equitable test in section 123 of the Equality Act 2010.

55. The Tribunal has taken into consideration the claimant's mental ill health and has adopted a liberal approach to extension of time given the relevant test. If the claimant has satisfied the more onerous test it would be inconsistent if her did not satisfy the just and equitable test.

56. The Tribunal gave consideration to the prejudice that the respondent would suffer in that the claims can proceed. However, the respondents contend that they have a full defence to the claimant's claims which they will be put to proof upon in the circumstances that the claims are allowed to proceed. The delay in the claim proceeding is not so significant that the cogency of the evidence is going to be affected by the delay.

57. The Tribunal concludes that it would be just and equitable to allow the claimant's claim to proceed in respect of disability discrimination given the claim was brought within a reasonable period after the ending of the original limitation period.

58. For the avoidance of doubt the Tribunal repeats that the claimant's claims shall be listed for a case management hearing on **14 August 2019 at Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA** commencing at **2.15pm**.

Employment Judge Grundy

Date 16.5.19

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 May 2019

FOR THE TRIBUNAL OFFICE

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