



EMPLOYMENT TRIBUNALS

Claimant: Mr Mohammed Mahmud

Respondent: OCS Group Limited

Heard at: London South **On:** 26 June 2018

Before: **Employment Judge Fowell**

Representation:

Claimant: Mr Jajdish instructed by Abbott Solicitors

Respondent: Mr Johnston instructed by Irwin Mitchell LLP

JUDGMENT

1. The complaints of unfair dismissal and of discrimination on grounds of race, religion or belief and/or disability are struck out as presented out of time.

REASONS

Background

2. By a claim form dated 18 December 2017 the claimant brought claims of unfair dismissal, and discrimination on grounds of disability, race and religion or belief. These claims arose from his dismissal on 5 December 2016.
3. Few details of the circumstances of that dismissal were given in the claim form. According to the response, he was off sick from April 2016 until his dismissal, although not all of that period was covered by sick notes. He then contacted the company again in May 2017, about six months after his dismissal, to enquire if he was still employed. He explained that he had been diagnosed with cancer and been to Germany for treatment. Following that meeting he wrote to appeal his dismissal and the company responded refusing to change its mind. The claim form was not however submitted until 18 December 2017.
4. An application to strike out the claims as out of time was made in the response form and reiterated by email to the Tribunal on 27 February 2018. This Preliminary Hearing was convened to deal with that issue, and if

necessary to make further directions.

5. Mr Mahmud provided a short witness statement responding to the time limit issue and was cross-examined about it. I was also provided with a short bundle containing the letters just described, and the Claimant also provided me with additional documents including various letters from his GP and medical certificates.

Findings

6. The Claimant was absent from work from April 2016 and in August 2016 was diagnosed with colon cancer. He has family in Germany and in September 2016 he moved to Germany to stay with them and seek treatment. At that time his condition was very serious and his life was in the balance.
7. He stated in cross-examination that he contacted the company before he left and was told simply to let them know when he was better. I cannot accept that he did so however. There was no mention of this in his witness statement, his claim form or in any correspondence from his solicitors. It is also unlikely that he would be given this advice. As a minimum his contact details would have been updated and he would have remained under an obligation to provide further sick notes. No more were provided from then onwards.
8. It is also at odds with the company's next steps. He was invited to a disciplinary hearing in November 16 to discuss his unauthorised absence and failed to attend. This was then rescheduled for 5 December 2016 and the hearing went ahead in his absence. The outcome letter, as earlier correspondence, was sent to his address in Coldharbour Lane.
9. His tenancy continued there for a while but he made no arrangements to forward post. By the time he returned to the UK in February 2017 the landlord had let it to someone else.
10. His return to the UK at that time is clear from a letter from his doctor and his own claim form. This states that he was provided with temporary accommodation from the council. He made no attempt to contact the Respondent at this time, and returned to Germany shortly afterwards, returning on 6 May 2017.
11. On 15 May he and a friend went to visit the Respondent's offices and explained the situation. He was told that he had been dismissed and given a copy of the dismissal letter. He was also told to put things in writing and it would be considered. He did so the next day, giving his new address, and appealed against the decision. An HR business partner responded to that letter, at the new address, on 19 May 2017 and I find that he received that letter in the ordinary course of post, by 21 May 2017.
12. No further contact was made with the company, until ACAS were contacted on 7 December. Their certificate was issued the next day, and the ET1 lodged 10 days later on 18 December 2017.

Applicable Law and Conclusions

Unfair dismissal

13. Starting with the unfair dismissal claim, the normal time limit for presenting such a complaint is three months from the date of dismissal plus additional time allowed for early conciliation through ACAS. Otherwise the claim will be out of time unless, applying the test in section 111(2)(b) Employment Rights Act 1996, it was not reasonably practicable for him to have done so.
14. In considering that test, three general rules apply:
 - a. It should be given a 'liberal construction in favour of the employee' — *Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA*;
 - b. what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide;
 - c. the onus of proving that presentation in time was not reasonably practicable rests on the claimant. As the Court of Appeal observed in *Dedman* - 'That imposes a duty upon him to show precisely why it was that he did not present his complaint'.
15. This is not a case in which the Claimant has pleaded ignorance of the time limits: he says simply that he was unaware of his dismissal. Ignorance of a fact that is fundamental to the right to bring an unfair dismissal complaint may render it not reasonably practicable to present the complaint in time. The leading case in this area is *Machine Tool Industry Research Association v Simpson 1988 ICR 558, CA*. The Court of Appeal held that the first thing for the Claimant to show is that his ignorance of the fact relied upon was reasonable.
16. It is not necessary to go further. It has to be accepted that the Claimant was the architect of his own misfortune by failing to keep in contact with his employer, failing to provide them with his address and keeping them up to date with his medical situation. The fact that he went to Germany did not relieve him of that obligation, and indeed I find that he did not tell them that he had gone to Germany. He therefore has no one else to blame for the fact that he was dismissed, or that he was unaware of the dismissal.
17. Secondly, I note that he failed to make any contact at all in February 2017 when he was back in the UK. It is unnecessary to elaborate the point any further. Making an enquiry in May 2017, eight months after the last sick note he provided, was too little too late and it was not reasonable for him to be unaware of the position.
18. If that conclusion is wrong for any reason, it also has to be shown that the claim was presented 'within such further period as the tribunal considers reasonable'. The delay between May and December 2017 is, in my view, far too long. There was no suggestion that Mr Mahmud was not aware of the time limit. He later instructed solicitors but there has been no suggestion from them either that he was unaware of the time limit, despite setting out extensive grounds in the claim form for allowing extra time. The main point made is that Mr Mahmud was very ill. As a general proposition that is understandable, but it does not explain, for example, whether he was in hospital for any of this period, or even when he instructed solicitors. I note

too that he was in regular contact with his GP from his return in February 2017.

19. I am therefore not satisfied that the further period was reasonable, and so the complaint of unfair dismissal was out of time.

Discrimination Claims

20. Complaints of unlawful discrimination must be presented to an employment tribunal before the end of the period of three months beginning with the date of the act complained of — S.123(1)(a) Equality Act 2010 (EqA). Here it was the date of dismissal, 5 December 2016. A tribunal may consider any such complaint which is out of time provided that it is presented within 'such other period as the employment tribunal thinks just and equitable' — S.123(1)(b) EqA. This test is therefore in similar terms to the test of reasonableness just considered.
21. While employment tribunals have a wide discretion to allow an extension of time under this test, the Court of Appeal made it clear in *Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA*, that 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.'
22. The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit.
23. The Employment Appeal Tribunal in *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT*, suggested that tribunals would be assisted by considering the factors listed in S.33 of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular, the length of, and reasons for, the 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 any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.
24. In *Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT*, the Appeal Tribunal added that tribunals may, if they consider it necessary, also consider the merits of the claim, but if they do so they should invite the parties to make submissions.
25. Here:
 - a. As already noted, the length of the delay is very considerable, involving over six months, at the latest, since Mr Mahmud found out about the dismissal.
 - b. Again, no real reasons for that delay have been provided, beyond a general reliance on ill health.

- c. There is no suggestion that the respondent was in any way at fault or dragged its feet.
 - d. The Claimant did not act promptly once he knew the position.
 - e. No evidence was presented about any difficulties in obtaining advice or representation.
26. No evidence was advanced on behalf of the company either about any prejudice arising from the delay, although there will inevitably be some additional difficulty in defending a claim brought over a year after a dismissal.
27. The merits of the claims for discrimination was not explored in any depth at this hearing, but I notice that no mention was made in the claim form of race discrimination or religion and belief, beyond ticking the relevant boxes. On enquiry, Mr Jajdish confirmed that it was alleged that the dismissal was discriminatory. However, it is trite law that it is not enough to establish a protected characteristic and dismissal: “something more” is required to show that the dismissal was related to that characteristic, and as matters stand, those claims have no reasonable prospect of success. Even the claim for disability discrimination go no further than establishing that the Claimant had a disability.
28. I have considered Mr Mahmud’s health problems, which I accept, but given the delay involved in this case, and the lack of any clear evidence or explanation as to why this preventing him from acting earlier or taking advice, I cannot find that it would be just and equitable to extend time. The fact that he was unaware of his dismissal for so long through his own failure to keep in touch is also relevant to this test.
29. For the above reasons all of the complaints are struck out as presented out of time.

Employment Judge Fowell
Date 25 May 2019