



EMPLOYMENT TRIBUNALS

Claimant: Mr M Galea

Respondent: British Telecommunications PLC

Heard at: Manchester

On: 12 June 2019

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person

Respondent: Mr S Proffitt, Solicitor

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. It was reasonably practicable for the claimant to present his unfair dismissal claim in time, consequently the tribunal does not have jurisdiction to hear that claim and it is dismissed.
2. It is not just and equitable to extend time in relation to the claimant's section 15 Equality Act 2010 claim relating to his dismissal but time is extended to allow the claimant's claims under section 20 and 21 Equality Act 2010 to proceed.

REASONS

1. This matter was listed for a preliminary hearing today to decide whether the claimant's claim whether his unfair dismissal claim should be allowed to proceed out of time on the grounds that it was not reasonably practicable to present his claim in time, and his discrimination claims on the grounds that it would be just and equitable to extend time. It was agreed at the previous Preliminary Hearing on 3 January 2019 that the date of termination was 28 February 2018.

Claimant's Submissions

2. The claimant submitted that he was confused as to his termination date thinking it was later because the respondent allowed him to keep his work equipment, did not know about the time limits until the end of May and that his illnesses prevented him from acting sooner.

Respondent's Submissions

3. The respondent submitted that the termination date was entirely clear and that in spite of the claimant's illnesses he had been able to issue proceedings and also issue a successful appeal in respect of his medical retirement. Further, his doctor had not indicated that the claimant was ill after May 2018. His ignorance of time limits was not reasonable.

Evidence and Witnesses

4. For the claimant the Tribunal heard from the claimant himself, and for the respondent Miss Leah Tulsie, Manager.

5. There was an agreed bundle.

The Law

6. The limitation period applicable to complaints of unfair dismissal are set out in Section 111 of the Employment Rights Act which provides that: -

“Subject to the following provisions of this section 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.

The basic approach is two staged – to decide if it was reasonably practicable to put the claim in in time, and if it was not to decide whether it was the put in within a reasonable time after the primary time limit. This typically involves consideration of what action a claimant took after legitimately becoming aware that the claim needed to be submitted.

7. The factors to be taken into consideration are, inter alia, ignorance of rights but that must be reasonable; ignorance of a relevant fact(s); bad advice; illness /disability; technical or postal problems.

8. The primary time limit (and also in discrimination cases see below) is extended to facilitate ACAS conciliation by section 207B of the Employment Rights

Act 1996 which provides that:

“(2) In this section

- (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in sub section 1 of Section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings). In relation to the matter in respect of which the proceedings are and
 - (b) Day B the day on which the complainant or applicant concerned receives or if earlier is treating as receiving (by virtue of the Regulations made under sub-section 11 of that Section) the certificate issued under sub-section 4 of that section.
- (3) In working out when a time limit set by relevant provision expires the period beginning with the day after day A and ending with day B is not to be counted.
- (4) If a time limit set by relevant provisions would (if not extended by this sub section) expire during the period beginning with Day A and ending one month after Day B the time limit expires instead at the end of that period.
- (5) Where an Employment Tribunal has the power under this act to extend the time limit set by a relevant provision the power is exercisable in relation to the time limit as extended by this section.

9. The issue of whether those provisions in three and four were alternatives or sequential was considered in the case of **Luton Borough Council v Haq EAT 2018**. It was decided in that case that the sections were sequential and were not mutually exclusive.

10. In relation to the claimant’s discrimination claim the primary time limits are the same, three months less one day but the grounds on which time can be extended is not reasonably practicable but on the basis of just and equitable. Section 123(1) Equality Act 2010.

11. In **Robertson v Bexley Community Centre trading as Leisurelink 2013 Court of Appeal** the Court of Appeal stated that when Employment Tribunals consider exercising the just and equitable discretion “there is no presumption that they should do so unless they can justify failure to exercise the discretion, quite the reverse the 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”.

12. In the **Chief Constable of Lincolnshire Police v Caston 2010 CA** this approach was also confirmed. Tribunals are also encouraged to have regard to the checklist in Section 33 of the Limitation Act 1980 as discussed in **British Coal Corporation v Keeble and Others 1997 EAT** which says the following matters

should be taken into account - all the circumstances of the case and 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 request for information, the promptness with which the complainant 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 advice once he or she knew of the possibility of taking action. The Tribunal must also balance the prejudice to the parties of extending time or not.

13. In addition, the merits of the claim can be taken into account **Lupetti vs Wrens Old House 1984 CA**

Findings of Fact

14. The claimant had worked for the respondent since 1984 and has been ill with depression for 24 years i.e. since 1995. He has been diagnosed with white finger and cramping of his fingers, tinnitus, dyslexia, sleep apnoea and in 2015 he was diagnosed with fibromyalgia. He also has back problems.

15. From May 2016 to May 2017 the claimant was put on restricted duties and on 7 September 2017 he signed a form following a meeting with his second line manager, Emma Naughton, where it was said that:

“Marcel wants me to explore the options around medical retirement and RITIE. Marcel doesn’t feel he would be able to provide regular and consistent service with Openreach and BT Group.”

16. RITIE refers to being retired on inefficiency grounds and entitles an individual to a pension however it is less than a medical retirement pension.

17. The claimant was on a Adjusted Job Search (AJS) from May 2017 to February 2018 i.e. looking for suitable alternative employment.

18. An indicative medical opinion was obtained on 17 October 2017 which stated that it appeared the claimant would not meet the criteria for medical retirement, and on 10 November 2017 Ms Naughton asked the claimant to attend a meeting on 24 November 2017 to discuss his current situation, pointing out that he had been in a Job Search group since 10 May 2017 but no suitable alternative employment had been identified. She warned him that his termination may be considered.

19. At the meeting in November the decision whether or not to dismiss was placed on hold whilst the decision maker obtained further Occupational Health information.

20. In January 2018 the Medical Retirement Assessor stated he was unable to make a decision due to insufficient information, and on 20 February 2018 the claimant received a letter stating that Ms Naughton had decided to dismiss the claimant now she had received Occupational Health reports and taking his previous employment history into account. She gave the claimant 12 weeks’ notice to take effect from 21 February 2018, thereby making his last day of employment 16 May 2018. She advised outstanding annual leave should be taken during his notice

period and he should continue with his job search up to and including his last day of service.

21. However, she went on to say:

“If you would prefer you do have the option to request to receive pay in lieu of notice (“PILON”). This is where you can opt to waive your notice period, halt the job search and receive your notice period in a lump sum, bringing your last day of employment date forward. Please note that PILON will reduce your reckonable service and will therefore have an impact on your eventual pension. If you want PILON please let Dawn Wardle know within five working days of this letter and I will arrange for appropriate authorisation and amendments to be made. I will confirm to you in writing.”

22. Ms Naughton then went on to explain that the claimant had the right to appeal the decision to dismiss him, but the claimant did not appeal the decision to dismiss him.

23. This letter was hand delivered by Miss Tulsie the claimant’s immediate line manager who explained it to him. I do not accept the claimant’s assertion that she simply read it out as her visit would then have been pointless.

24. Miss Tulsie had attended the claimant's house on around 20 February 2018 and discussed with him the PILON situation. She asked for him to return his work equipment but he stated that he was not expecting that and he would like to keep the equipment to send an email to the team and to remove personal numbers from his phone. Miss Tulsie agreed that that was acceptable as he had another week to go to decide whether he wanted to leave and take PILON or work his notice.

25. The claimant relied on the fact that he kept his equipment and his email account etc was not closed to explain his confusion regarding his termination date. Miss Tulsie was unaware why the claimant’s email had not been cut off after his leaving date and she tried to contact the claimant via his home phone as she assumed his email would not work . She was unconcerned about his mobile phone as he had been supplied with new one which was in the office and therefore he only had an old one. She tried to arrange to collect the equipment but the claimant was not available on the two occasions she rang, and eventually an engineer picked it up from the claimant when he was in Preston, he advises he was there seeing his union. Miss Tulsie could not remember when this was.

26. Miss Tulsie advised that once she was aware of the claimant's dismissal she had actioned him as a leaver. There was no paperwork in respect of this as this was inputted electronically to HR.

27. On 23 February 2018 the claimant confirmed by email to Miss Tulsie that he had rung Dawn Wardle and stated that he wanted the PILON payment and she was starting the process “today”. He also stated to Miss Tulsie:

“Dear Leah, this will be my last AJS XL log.” i.e. his last day of the alternative job search.

28. On 23 February 2018 Emma Naughton wrote to the claimant stating the following:

“Further to my letter of 20 February 2018 where I informed you that it would not be reasonable to continue with a job search indefinitely I am therefore authorising termination of your employment on grounds of impaired capability due to ill health, with the retirement in the interests of efficiency benefits.

You have been offered the option to request pay in lieu in notice (“PILON”), waiver your notice, halt the job search and receive your notice pay in a lump sum, bringing your last day of employment date forward. You have since advised that you do wish to opt for pay in lieu of notice halting your job search.

Your new last day of employment is now therefore 28 February 2018.”

29. There was additional information including a leaver’s checklist:

“If you’ve not done so already you must remember to hand back any BT equipment. You should work with your manager to make sure all the relevant parts of the leaver’s checklist are completed.”

30. There was also a reference to an obligation under the Official Secrets Act to protect any information the worker had access to while they worked for BT, and details about the BT employee share plans.

31. On 28 February 2018 the claimant received his PILON Payment.

32. On 30 May 2018 the claimant’s medical retirement was refused and a letter was sent to him on 22 June 2018 advising him of this.

33. On 24 June 2018 the claimant wrote to Dawn Wardle stating:

“From when you told me the outcome last week after weeks and months of waiting I was shocked, surprised and extremely disappointed with the decision made. I cannot help but feel utter despair...My intention is to appeal so I am therefore confirming and giving you notice of this...I will ring you on Monday 25th for advice...Please can I have the actual report from the CMO of the team for rejection as need to know on what grounds/basis he/she ended up with this conclusion.”

34. There was a series of emails starting on 26 June 2018 where the claimant wrote to Ms Wardle again stating:

“I forgot to tell you this morning. Can you please let me know about my pension lump sum and what I will be getting (whilst going through the appeal and processes)? In the meantime, as all I got was the advance payment for PILON February to April.

The Wage Department never gave me any options to choose (I mean like a big lump sum and less monthly pension or vice versa). I never got any other

details or money whatsoever up to now. All I got from them two or more months ago was the benefits estimate with no options and no money other than the PILON money in my bank account. Need to know as soon as possible because coming to the end of month soon.”

35. Ms Wardle replied saying that she was really sorry but it appeared that the Pensions Team had not actioned the request she had sent to them in February 2018 but they would now process it and all his pension payments would be backdated to 1 March 2018.

36. On 27 June 2018 the claimant replied saying:

“Just to remind you, they paid me three months’ advanced on PILON already.”

He went on to say:

“Please can you send me the last date of employment because in one letter that Emma sent me dated 20 February 2018 it says that the last date of employment was 16 May 2018, and in the last letter (the medical retirement rejection one dated 20 June 2018) it says the last day of employment will remain as 28 February 2018! Was I still employed by BT till the end of the PILON? Please can you let me know the exact date of my last of employment.”

37. I note the claimant did not mention the letter he had received on 23 February 2018 confirming the date of termination was 28 February 2018.

38. Dawn Wardle replied saying that he should have received a further letter confirming 28 February 2018 was his last day of employment (which he had received) and therefore was payable from 1 March 2018.

39. On 28 June 2018 the claimant received confirmation of his intention to appeal and he was given further advice on how to do this.

40. On 28 June 2019 it is apparent from the documentation that the claimant applied for a conciliation certificate to ACAS. The certificate was discharged on 27 July 2018 and the claimant presented a case on 10 August 2018. The claimant tells us today that he was on holiday from around 4 August 2018 for six days.

41. The claimant’s claim form at para 5.1 says his last date of employment was 28 February 2018. In his claim form narrative he also said that “till my termination of employment in February”, although he does go on to assert he believed his employment was still continuing to the end of the notice period as he did not receive his pension and because he kept his sim card, laptop etc.

42. The claimant was asked about what advice he had received from his union regarding bringing a claim and potential time limits. The claimant's evidence was that he had spoken to his union towards the end of May, that they had suggested to him that he might be out of time and that he needed to put in a claim as soon as possible. He also advised that this is what ACAS had told him when he spoke to

them on initiating the conciliation process on 28 June 2018. The claimant said he know nothing about time limits until he spoke to his union.

43. However, I am afraid that I find the claimant's evidence unreliable as it is inherently unlikely that the union would not have advised him earlier regarding time limits, particularly as his dismissal clearly took effect from 28 February 2018. Further, the claimant chose not to appeal his dismissal and it seems almost impossible he would not have discussed the ramifications of that with his union. Further the claimant could not satisfactorily explain why he contacted his union in May, I suggested maybe he contacted them in June when he was rejected for medical retirement and that is what prompted his concern, but he denied this. Even so there is no logical explanation for the contact in May and as a result of this also I found the claimant's evidence unreliable. I accept that the advice was received at the end of May but not that there was no reason for the contact ,this was implausible and I find the claimant was not being totally candid.

44. In any event even on the claimant's own evidence he knew by the end of May 2018 that time limits applied.

45. In addition, the claimant stated that his medical conditions made it difficult for him to bring a claim in time. His doctor's letter, however, stated: "It is my view that it would be reasonable for the Tribunal to consider that during the period in question of January 2018 to May 2018 Mr Galea would not have been functioning at a normal cognitive level. His depressive symptoms would have made it more difficult for him to deal with correspondence and to plan rationally and think about his options effectively. These mental health symptoms would be relevant when considering whether the Tribunal would allow his late application." There was no other medical evidence referring to the period after May nor any notes to show the claimant's visits to his doctor and their purpose

46. A Preliminary Hearing Case Management was held on 3 January 2019 and the claimant's claims were set out as an unfair dismissal claim under the Employment Rights Act 2019 on the basis of the respondent not seeking alternative work for the claimant for long enough and a section 15 Equality act 2010 based on the same facts.

47. There were also 2 reasonable adjustment claims under sections 20 and 21 Equality Act 2010 as follows:

5(a) the PCP of requiring employees to leave employment first before seeking medical retirement;

And

5(b) the PCP of providing limited information to those facing retirement in the interests of efficiency about that process and the medical retirement process.

Conclusions

Unfair Dismissal Claim

48. I find that it was reasonably practicable for the claimant to present his claim within the initial time limit on the basis that I find it was abundantly clear that his termination date was 28 February 2018 and he had been advised of this promptly on 23 February 2018.

49. I do not accept that the claimant genuinely thought he was still employed “in some way” because of the laptop, etc. I prefer Miss Tulsie’s evidence that she asked him to return it and he asked to keep it. Also she made efforts to arrange for its return which were inconsistent with the claimant being in employment.

50. The claimant must have considered the meaning and effect of the PILON payment when he decided to take it, he must have balanced the pro and cons. He also referred to 28 February as his leaving date in his claim form and on 23 February referred to making his last job search.

51. Accordingly, the claimant's unfair dismissal claim is out of time and is dismissed.

52. If I am wrong on this and it was not reasonably practicable for the claimant to file his claim in time, in relation to my factual findings that he did know the date of termination was 28 February 2018, then the claimant would have been expected to proceed on the basis of his mistaken belief that he was employed to 16 May 2018.

53. In respect of the claimant's illness, his doctor’s letter does not say his functions were impaired following May. However, even if the doctor did say this the claimant engaged in an extremely challenging process of appealing against the refusal of medical retirement. Accordingly I find that the claimant was able to engage at this level in June onwards and therefore there was no reason why he could not have presented his claim earlier than he did, as the concentration required for the Tribunal claim was much less than that required for the pension appeal

54. The claimant, on his own evidence, received advice in May 2018 and when he went to ACAS in June that he was likely to be out of time but that such claims could be allowed in late. The claimant, however, did not act speedily on being advised of this; he did not act speedily after being advised of this by his union at the end of May 2018, waiting nearly a month to go to ACAS, and he did not act speedily after ACAS advised him of this, leaving the discharge of the certificate for a month. If that was bad practice from ACAS, and I am not finding that it is, I am speculating, the claimant then left it for 14 days before presenting his claim. Whilst he says he was on a short holiday I do not find this was a reasonable excuse for not filing his claim any earlier, as he had time between the discharge of the certificate and before he went on holiday on 4 August, or alternatively he could have filed the claim whilst on holiday given that claims can be filed online.

55. Accordingly, as the claimant did not go to ACAS until 28 June 2018, nor get the certificate discharged until 27 July 2018, nor present his claim until 10 August 2018, I find that the claimant does not meet the test in the second limb of the unfair dismissal time limit test, which is that he must file it within a reasonable time thereafter.

Discrimination Claims

56. As I have found that the claimant did know that the date his employment terminated was 28 February 2018, the claimant was out of time with his discrimination claim.

57. A number of factors fall to be considered in relation to an out of time discrimination claim and the test is different: it is what is just and equitable.

58. In this case the respondent state that they would be subjected to prejudice with the passage of time and argue that the claimant would not be subject to prejudice because in effect his prospects of succeeding are so limited given that the claimant has received medical retirement on the grounds which he pursued that he was unable to work in any capacity for British Telecommunications PLC, which completely contradicts the case that he presents that the respondent should not have dismissed him before further exploring alternative work.

59. I accept the respondent's submissions in this regard. Whilst the prejudice to the respondent is not overwhelming, there is prejudice to the respondent as I have seen today when Miss Tulsie was unable to recall some factual details in relation to what happened with the equipment when the claimant was dismissed. Further, that the claimant's claim in respect of dismissal appears to have no reasonable prospect or certainly very little prospect of success given that he himself was arguing with the respondent that he was not fit to work for them following the initial refusal of medical retirement, and indeed had confirmed this at an earlier date in September 2017.

60. Accordingly, I find that it would not be just and equitable to extend time in respect of the claimant's section 15 claim which wholly relates to his dismissal.

61. The claimant has two other claims, however, listed at 5(a) and 5(b) in section 11 of the previous case management minutes of Employment Judge Franey (set out in para 47 above). Whilst 5(b) is somewhat difficult to understand, these are freestanding claims which are wholly related to the claimant's medical retirement situation not to his dismissal per se and accordingly have some prospect of success compared to his dismissal claims.

62. The prejudice of the claimant not being able to pursue the claims appears slight as the claimant did obtain medical retirement in any event and his losses would be extremely limited in this regard. Nevertheless he is entitled to pursue that claim. Further they appear to be claims which do not require recall evidence to a large extent as they are based on the respondent's policies.

63. I find it is just and equitable to extend time in respect of claims 5(a) and 5(b) as there is some potential merit in them and the amount of recollection evidence is limited. I have taken into account my findings on the claimant's capacity above at paragraph 53 but rely on the prejudice to the claimant.

64. I order the claimant within 14 days of this judgment to provide the respondent with a schedule of loss in relation to claims 5(a) and (b) only. The parties to advise the Tribunal within 14 days after the service of the updated schedule of loss if they wish to engage in judicial mediation. The respondent have liberty to serve a counter schedule in the same period.

65. Otherwise the following Case Management Orders are made for preparation for the final hearing:

- (1) The parties to exchange lists of relevant documents by 19 July.
- (2) The respondent to be responsible for the bundle and to send a draft index to the bundle to the claimant by 26 July.
- (3) The parties to agree a bundle by 2 August 2019 and one copy to be served on the claimant by 9 August 2019.
- (4) The parties to send to each other their witness statements by 16 August 2019. Witness statements should be set out in numbered paragraphs and each page should be numbered. They should contain only relevant evidence.

Employment Judge Feeney

Date: 24 June 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

26 June 2019

FOR THE TRIBUNAL OFFICE

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(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.