



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Gowler (Barrington)

v

Clarion Housing Group

Heard at: Cambridge Employment Tribunal

On: 1 August 2019

Before: Employment Judge Johnson

Appearances

For the Claimant: Did not attend and was not represented

For the Respondent: Mr N Caiden, Counsel

JUDGMENT

1. The judgment of the Employment Tribunal in this case is that the claim of unfair dismissal brought by the Claimant under the Employment Rights Act 1996, and discrimination on grounds of sexual orientation under the Equality Act 2010, are dismissed as the Tribunal has no jurisdiction to hear them.

REASONS

1. The claim was initially listed Closed Preliminary Hearing to deal with case management, but was later converted to an open preliminary hearing in order that the jurisdiction issue of time could be considered as a preliminary issue.
2. It was listed to take place at Bury St Edmunds Employment Tribunal on 1 August 2019. However, due to listing difficulties it was transferred to the Cambridge Employment Tribunal by notice on 31 July 2019.
3. The Listing Officers at Watford Employment Tribunal confirmed that they called the Claimant on 31 July 2019 and were unable to speak with him directly and were unable to leave a message on his phone. This morning, before the hearing commenced at Cambridge, Court Officers attempted to establish where the Claimant was and Bury St Edmunds Employment

Tribunal confirmed that the Claimant had not attended that Employment Tribunal in error. Further telephone calls were made to the Claimant's mobile number and unfortunately a message could not be left, however, a further message was left at his home telephone number.

4. In any event, the Claimant has not responded and he has not attended the Hearing this morning. I deliberately delayed the start of this Hearing until 10.30am in case the Claimant was running late, but even allowing for this adjustment he has failed to appear.
5. I did consider whether I should deal with this case today in the absence of the Claimant, or whether I should seek to postpone the Hearing. I took into account the fact there were no written representations from him and on that basis, I decided that under Rule 47 of the Employment Tribunal's Rules of Procedure it was reasonable to proceed in the absence of the Claimant given that Counsel for the Respondent had attended and had prepared significant submissions for use at the Hearing this morning. This further satisfied the Tribunal's duties under the overriding objective to deal with cases fairly and justly.
6. As a consequence, I have relied upon the limited documentary evidence produced by the Claimant; namely the form ET1 Claim Form. These proceedings were issued in the Employment Tribunal on 29 March 2019. There had been notification to Acas by the Claimant of Early Conciliation and the Certificate identified a date of receipt of notification on 28 March 2019 and the issue of a Certificate on 29 March 2019.
7. The Respondents had presented a response which was received by the Employment Tribunal on 16 May 2019 and which was in time. The Respondents had identified the issue of whether the Claimant had presented his claim form in time and requested that this matter be raised as a preliminary issue at the Case Management Hearing which had been listed to take place on 1 August 2019. The Tribunal had agreed to this request.

The Issues

8. Following the consideration of the Claimant's form ET1 by the Employment Tribunal, it was established that there were two potential claims that could be considered by the Tribunal:
 - i) a complaint of Unfair Dismissal under the Employment Rights Act 1996; and,
 - ii) a complaint of unspecified Discrimination under the Equality Act 2010, on the grounds of the Claimant's sexual orientation.
9. The Claimant had been dismissed by the Respondent following a disciplinary hearing on 6 December 2018. The Claimant was subsequently sent a letter confirming this dismissal dated 11 December

2018, which he acknowledged on the same day. He did not present his claim form ET1 with the Tribunal until 29 March 2019. This appeared to be more than 3 months following the date when he became aware of the decision to dismiss him. Accordingly, the Respondent's representative, Mr Caiden addressed me on the law concerning the late presentation of complaints to the Employment Tribunal and sought to argue that the Claimant's claims had been presented out of time and that the Tribunal should not exercise its discretion to extend time using the relevant statutory tests for each complaint brought.

Findings of Fact

10. In the absence of the Claimant at the Hearing today, the only information I had before me which set out his case and the reasons why he presented the claim when he did, is contained in his claim form ET1. The Claimant identified that his date of dismissal was 10 December 2018, which was from his role as an 'Available Homes Officer' at the Respondent Housing Association.
11. Mr Caiden was able to provide further information concerning the Claimant's employment history. I was referred to the Response and also to the skeleton argument which he had prepared for the Hearing today.
12. I am satisfied that the Claimant was dismissed following a disciplinary hearing on 6 December 2018 for the potentially fair reason of gross misconduct. It was noted that the Claimant had suggested his date of termination was actually 10 December 2018 and indeed he had acknowledged receipt of the dismissal letter dated 11 December 2018 when he sought to appeal this decision by a hand-written appeal letter of the same date.
13. The Claimant was not present at the hearing where he was dismissed on 6 December 2018. Instead he was represented by his trade union officer, Julia Drummond of UNISON. One would have expected that the Trade Union Officer would have informed the Claimant of the decision which was reached that day on 6 December 2018 or shortly afterwards. However, even if the Claimant did not receive notification of the decision until he received the subsequent letter dated 11 December 2018, it is clear that more than three months elapsed before he presented his complaint to the Employment Tribunal on 29 March 2019.
14. I was addressed by Mr Caiden concerning the dates from when time began to run for the purposes of calculating whether both complaints had been presented in time. In particular, I noted his comments regarding the potential complaint of discrimination on grounds of sexual orientation. Very little information was available from the claim form but it was clear that the Claimant was suggesting he was bullied by Ms McGrath and a Ms Dienelt concerning an investigation which had taken place and which would have been prior to the date when he was dismissed for gross misconduct. Mr Caiden sought to argue that it was likely that the last

relevant date of any discrimination would have concluded before the date of dismissal, but in any event, it is that date of dismissal which would be a long stop for that complaint.

15. From the information available to me at the hearing, I am satisfied that the Claimant failed to present his complaint of discrimination in time as more than three months had elapsed since the last date at which a potential discriminatory act could have taken place.
16. The Claimant acknowledged in his claim form that his complaint had been presented out of time and described it as being slightly late. He said he was unaware that there was a three month deadline for presenting claims and he expected his union representative to let him know. It is not entirely clear what advice was given by the trade union Representative at that time, but there was no suggestion from the Claimant that he had been given incorrect advice from the information available to the Tribunal.
17. While it is acknowledged that the Claimant did notify Acas and sought Early Conciliation, this would have taken place more than three months after the effective date of termination. Accordingly, this would have served no purpose in 'stopping the clock' for the purposes of time and it had no impact upon the calculation of time limits in this case.

The Legal Framework

Time Limits for Unfair Dismissal under the Employment Rights Act 1996

18. Section 111(2) of the Employment Rights Act 1996, provides that a Tribunal shall not consider such a complaint unless it is presented to the Tribunal: (a) before the end of the period of three months beginning with the 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.
19. The burden of proof in showing that it was not reasonably practicable to present the claim in time rests upon the Claimant; see Porter v Bandridge Ltd [1978] ICR 943 CA. If the Claimant does succeed in doing so then the Tribunal must also be satisfied that the time in which the claim was in fact presented was in itself reasonable. One of the leading cases is Palmer and Saunders v Southend-On-Sea Borough Council [1984] IRLR 119 CA in which May LJ referred to the test as being in effect one of "*reasonable feasibility*" (in other words somewhere between the physical possibility and pure reasonableness).
20. In Adsa Stores Ltd v Kauser EAT 0165/07 Lady Smith described the reasonably practicable test as follows: "*the relevant test is not simply looking at what was possible but to ask whether, on the facts of the case*

as found, it was reasonable to expect that which was possible to have been done”.

21. A number of factors may need to be considered. The list of factors is non-exhaustive but may include:
- (i) the manner and reason for the detriment;
 - (ii) the extent to which the internal grievance process was in use;
 - (iii) physical or mental impairment (including illness – see Shultz v Esso [1999] IRLR 488 CA, a case concerning a claimant suffering from a depressive illness, as to the approach for the Tribunal to adopt when determining the “*reasonably practicability*” question);
 - (iv) Whether the Claimant knew of his rights. **Ignorance of the right to make a claim** may make it not reasonably practicable to present a claim in time, but the claimant’s ignorance must itself be reasonable. In such cases the Tribunal must ask: what were the claimant’s opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? See Dedman v British Building and Engineering Appliances Ltd 1974 ICR 54 CA. In other words, ought the claimant to have known of his rights? **Ignorance of time limits** will rarely be acceptable as a reason for delay and a claimant who is aware of his rights will generally be taken to have been put on enquiry as to the time limits.
 - (v) any misrepresentation on the part of the Respondent;
 - (vi) reasonable ignorance of fact;
 - (vii) any advice given by professional and / or other advisors (such as the CAB). The Claimant’s remedy for incorrect advice will usually lead to a remedy against the advisors and the incorrect advice is unlikely to have made it not reasonably practicable to have presented the claim within the statutory time limit. See for example: Dedman (cited above); Wall’s Meat Co Ltd v Khan 1979 ICR 52 CA;
 - (viii) postal delays or losses; and
 - (ix) the substantive cause of the Claimant’s failure to comply.
22. I have also been taken to some of these cases (and others) in the skeleton argument which was provided by Mr Caiden and I am grateful for his assistance in that matter.

Time Limits under the Equality Act 2010

23. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of (a) the period of 3 months starting with the date

of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

24. The primary case law in this is Robertson v Bexley Community Centre [2003] IRLR 434, the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they consider it just and equitable in the circumstances to do so. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. In accordance with British Coal Corporation v Keeble [1997] IRLR 336 a Tribunal may have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay, the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case; and in that case, see Department of Constitutional Affairs v Jones [2008] IRLR 128.
25. Again, I am grateful to Mr Caiden for providing additional cases in relation to the reasonably practicable issue and in particular the case of Miller v The Ministry of Justice.

Findings of fact in relation to the Law

26. Mr Caiden made submissions in relation to the effective date for calculating time in relation to the complaint of discrimination and sought to argue that it could even have ended prior to the date of termination on 6 December 2018. However, having listened to his submissions and considered the details provided in the claim form by the Claimant and the Response, I am satisfied that the relevant date from which time should be calculated for both claims is the date of dismissal following the disciplinary hearing on 6 December 2018.
27. I do so because it was clear that the Claimant, although not in attendance himself, was represented by a trade union representative from a large trade union, UNISON. It is reasonable to expect that this officer, Ms

Drummond would have communicated details of the decision to the Claimant on that date. However, even if this is not the case and the Claimant did not receive notification until a later date, I am satisfied that by 11 December 2018 when he acknowledged that the letter confirming his dismissal of the same date was received, he would have been aware of his dismissal and by way of a 'long stop', this must be the last relevant date for the purposes of calculating time. However, this makes no difference to the presentation of the claim form at the Employment Tribunal on 29 March 2019 being out of time. Indeed, even if we assume he did not know his date of dismissal until 11 December 2018, he should have presented his complaint by no later than 10 March 2019.

28. Dealing with the question of whether I should extend time in relation to the unfair dismissal, I am in some difficulties because the Claimant has provided few reasons for his failure to present this complaint in time.
29. However, it is clear from his form ET1 that he was represented by a trade union representative at the material time and while he said that he did not know, or was not aware of the three month time limit, there is no suggestion from him or from any other evidence available to me today that his trade union representative or another advisor, misled him as to the time limits. As a consequence, his ignorance of the time limits are not an acceptable reason for his failure to present his complaint.
30. I was aware from the claim form and indeed, addressed on this issue by Mr Caiden, that the Claimant did allude to having mental health issues. However, the Claimant did not seek to identify an impairment caused by his mental health issues or explain how such an impairment affected his ability to present a claim in time. Taking this into account, together with his representation by a responsible trade union officer, I am not convinced that it was not reasonably practicable for the complaint to be presented before the end of the three month period.
31. For those reasons I am also unwilling to extend time in relation to this particular complaint.
32. Turning to the question of extension of time in the complaint of discrimination on grounds of sexual orientation under the Equality Act 2010, I considered whether it is just and equitable for the Tribunal to extend time under Section 123(1)(b) of the Equality Act 2010.
33. When considering the exercise of my discretion in this case, I am reminded that Lord Justice Auld in the decision of Robertson v Bexley [2003], IRLR 434 makes clear that I have a wide ambit within which to reach a decision. It is, however, for the Claimant to convince me that it is just and equitable to extend time. The absence of the Claimant at this hearing therefore causes me some difficulties in that the only explanation that I have for his delay is contained within his claim form.

34. I would repeat the reason that I have given in relation to the failure to present the complaint of Unfair Dismissal in time, in that the Claimant was at all times represented during his disciplinary process by a trade union officer. Although he was not present at the hearing on 6 December 2018, that trade union officer represented him and it is reasonable to expect that she would have communicated the decision to him shortly after the end of the hearing when she was informed of the decision.
35. It is also reasonable to expect this officer to have informed the Claimant of time limits for the purposes of presenting a complaint to the Employment Tribunal in time.
36. I have, however, taken into account the various factors that have been referred to me in submissions by Mr Caiden and also identified in the case of British Coal Corporation v Keeble [1997] IRLR 336.
37. In terms of the length of the delay, this is not a case where the Claimant where due to difficulties with IT he was unable to present his claim before the end of the final day for presenting a claim, or where he failed to present his complaint by a very short period of a day or so.
38. If the Claimant felt that he was not properly represented by his Trade Union, that is not a concern for the Tribunal, or indeed the Respondent. That is a matter that he should address with them directly.
39. I have also taken into account the question of the Claimant's ill health and his reference to mental health issues within his claim form. For the reasons I have already given in this Judgment, I am not satisfied that sufficient evidence has been provided to demonstrate it was not reasonable for the Claimant to present his claim within time. Health does not appear to have played a part in his failure to present his claim in time and that it would be just and equitable to extend time to the date when he actually presented his complaint.
40. In terms of prejudice to the Claimant, I am aware that by dismissing this complaint he will be denied the right to bring a complaint of discrimination. However, the only information we have so far concerning the complaint is contained within the claim form and which refers to bullying in very limited terms and within minimal particulars. No further particulars have been identified since the claim form was presented by the Claimant. This hearing was also listed to consider matters of case management and the Claimant would have had the opportunity to provide further details of the issues that the Tribunal and the Respondent needed to consider. However, the Claimant has failed to attend this hearing without any explanation and has therefore denied himself an opportunity to provide these further details and to explain to the Tribunal why it would be just and equitable to extend time in the discrimination complaint.
41. The Tribunal also has to consider prejudice to the Respondent and there is a real concern that by postponing this hearing and relisting this case for

another date, further time will elapse in this matter. This will affect the ability of the Respondent's witnesses to recall the incidents which have been identified by the Claimant and for which minimal particulars have been provided.

42. Additionally, the Respondent has already spent a great deal of time preparing this case for the hearing today and the absence of the Claimant at this hearing without any good reason convinces me that in terms of balance of prejudice, it would be unreasonable to give the Claimant a further opportunity to make submissions at a further hearing in the future.
43. In terms of merits, I have had limited information available to me concerning the claim and as the Claimant has not been able to assist me at the hearing today, I am not convinced that the Claimant has a strong claim and it would not be just and equitable to extend time to allow this complaint to proceed.
44. Accordingly, all claims that have been brought within these proceedings are dismissed.

Employment Judge Johnson

Date:21.08.19.....

Sent to the parties on:28.08.19...

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For the Tribunal Office