



EMPLOYMENT TRIBUNALS

Claimant: Mr S Fitzpatrick

Respondent: Richmond Housing Partnership Ltd

Heard at: Croydon

On: 12 June 2019

Before: Employment Judge Nash

Representation

Claimant: In person

Respondent: Ms Lord of Counsel

JUDGMENT having been sent to the parties on 20 July 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Procedural History

1. There was a case management hearing on the 18 May 2018 in these proceedings in front of Employment Judge Morton. This hearing was adjourned as the Claimant became unwell.
2. At the Tribunal's request, the Claimant provided a letter from his GP on 3 September 2018 that stated that the Claimant was suffering from anxiety and depression, a fluctuating condition exacerbated by stress. The GP stated that the Claimant, however, was fit to participate in the hearing. The Claimant agreed with this assessment and confirmed that no special measures would be necessary for this hearing.

The Hearing

3. By way of oral evidence, the Tribunal heard from the Claimant. The Respondent led no oral evidence.
4. The Tribunal had sight of an agreed bundle and all references are to this bundle unless otherwise stated. The Claimant confirmed at the beginning of the hearing that all the relevant documents were in the bundle (save for a without prejudice letter which the Tribunal did not see). However, later in

cross-examination he referred to a judgment of the Social Entitlement Chamber. The Tribunal determined that this document was potentially relevant and, accordingly, it was added to the bundle.

The Claims

5. The only claim before the Tribunal was for unfair dismissal under section 98 Employment Rights Act 1998, so-called “ordinary unfair dismissal”.

The Issues

6. The sole issue for this preliminary hearing was whether the tribunal had jurisdiction to consider the claim for unfair dismissal although it was presented after the expiry of the statutory time limit.

The Facts

7. These were the facts relevant to the preliminary issue.
8. The Claimant started work for the Respondent, a housing provider, on 14 August 2006. He worked as a Caretaker.

Termination

9. For the eleven months prior to his termination (on 16 June 2017) the Claimant was signed off work sick with anxiety and depression, and provided sick notes to his employer. It was not in dispute that he did not grant permission for the Respondent’s Occupational Health (OH) to ask his GP for a report on his health. In his opinion, the Respondent had all the evidence it needed as to his health without OH becoming involved.
10. There was a meeting between the Claimant and the Respondent on 9 June 2016 (soon before the dismissal). According to the respondent’s minutes of this meeting, the Claimant told the Respondent that he was taking legal advice from the CAB (page 11 of the bundle). The Claimant told the Tribunal that although he did not have good recall of the meeting, he did not believe that he said this.
11. The Tribunal found, on the balance of probabilities, that it was more likely than not that the Claimant did make a reference to legal advice and the CAB. Although the minutes were expressly not verbatim, there was a direct quote of the Claimant’s speech on this point. The Claimant accepted that that the minutes were accurate in respect of his refusing permission for Occupational Health to contact his GP. Further, the appeal minutes also contained a reference to legal advice and the CAB and, although the Claimant did not accept these minutes either, it is somewhat less likely that the respondent would have, deliberately or through oversight, included a similar comment which the Claimant had not made in two sets of minutes made some time apart in meetings chaired by different people. Finally, the Claimant’s recall of the meeting, very naturally, was diminished after two years. The Tribunal accordingly, preferred the account in the contemporaneous document.

12. The Respondent dismissed the Claimant on **16 June 2017**, the effective date of termination.
13. According to the authorisation certificate, the CAB was authorized to act for the Claimant as of 21 June 2017.

The Appeal

14. The Claimant, with the help of the CAB, appealed his dismissal on the 30 June 2017 by way of a letter. The Claimant said that he could not recall details, but that he did, in his own words, “with great struggle” go to the CAB. The Claimant did not have access to the internet and therefore everything was done in person or by post. The CAB also helped the Claimant with a statement.
15. The grounds of appeal were essentially that the Claimant could return to work if he was provided with a different line management structure.
16. There was an appeal meeting on 14 July and the decision to dismiss was upheld on the 19 July 2017.
17. According to the minutes of the appeal hearing (at page 22) the Claimant said that he would take the matter to ACAS and the Tribunal because he thought it was an unfair dismissal.
18. The Claimant again was unsure that he had said this. The Tribunal found on the balance of probabilities that the Claimant did make this statement for the following reasons. It was consistent with his earlier comments in the dismissal meeting. It was also consistent with his having given the CAB authority to act and received their assistance. The Claimant’s recollection of the meeting was uncertain; the Tribunal preferred the account in the contemporaneous document.

Presenting the Claim to the Employment Tribunal

19. The primary limitation date - to take the first step in Tribunal proceedings (starting ACAS Early Conciliation) - expired on **15 September 2017**, three months less one day after the termination date.
20. The Claimant’s account was that he was barely functioning after the dismissal. He lived in a single room. He obtained Universal Credit and his rent, including utilities, was paid directly to the landlord by the Benefits Agency. He relied on a small local shop for food and for topping-up his mobile phone. He was abusing alcohol, drinking perhaps two bottles of vodka every day. He suffered from suicidal ideation. He rarely left the house. He said that his recall of this period was very poor. The Tribunal accordingly considered what could be ascertained from the documents.
21. According to a GP letter of 14 November 2017 (at page 83), the Claimant had had a medical assessment for Universal Credit and the Claimant confirmed this. Accordingly, he must have made the claim for benefits –

and attended the medical assessment - before 14 November 2017. The

Claimant thought that he probably attended the GP at about this time.

22. The Benefits Agency originally determined that he attend a work program. The Claimant challenged this assessment on the grounds that he was unable to work.
23. The Claimant first contacted ACAS on 22 November 2017, according to the ACAS certificate. He told the Tribunal that he probably phoned them, although he was not sure. He stated that ACAS (and he gave the name of a well-known ACAS Conciliator) did not tell him about time limits or that the time limit had already expired. He said that he did not get much advice from them.
24. ACAS issued the Early Conciliation certificate on 24 November 2017.
25. According to the judgment of the Social Entitlement Chamber, the Benefits Agency made another decision about the Claimant's benefits. It was not possible to ascertain the date of this decision, although it appeared likely to be in late December 2017 or early January 2018. The Claimant was dissatisfied with this decision.
26. The Claimant's first contact with the Employment Tribunal was by way of a letter dated 4 January 2018, which was received at the Tribunal on 12 January. In this letter he, in effect, asked for an extension of time to present his claim; he said that he had received significant help from the CAB. Before the Tribunal Claimant again explained that his recall of this period was now poor. He could not remember how or when he got in touch with the CAB. He agreed that the CAB helped him with his ET1, and he believed that they may have sent it to the Tribunal by post but he was not sure.
27. The Tribunal records appear to show that the ET1 was submitted by post. The Tribunal received the ET1 on 12 January 2018.
28. The Claimant's appeal to the Social Entitlement Tribunal against the last decision of the Benefits Agency was heard at Hatton Cross hearing centre on 22 May 2018. The appeal was allowed but the determination does not state what period it refers to. According to the determination, the Claimant, by reason of alcohol dependency syndrome, suffered from significant limitations.

The Applicable Law

29. The applicable law is found at s111 Employment Rights Act as follows

111Complaints to employment tribunal.

(1)A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2)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.

30. Employees who have the right to claim unfair dismissal generally lose that right if they do not start ACAS early conciliation before the end of three months beginning with the date that they were dismissed. They must in addition present their claim to the Tribunal either within three months less a day of the dismissal, not counting the period of ACAS Early Conciliation, or within a month of the date of the ACAS Certificate, whichever is the later.
31. Tribunals have a discretion to extend time if the Claimant can show that it was not reasonably practicable to present the claim on time and that the claim was submitted within a further reasonable period.

Submissions

32. The Tribunal heard brief oral submissions from both parties.

Applying the Law to the Facts

33. It was not in dispute that the un-amended time limit was 15 September 2017 and thus Early Conciliation should have been started by that date. The Claimant started Early Conciliation a little over two months later, on 22 November 2017 and it ended on 24 November. The ET1 was presented on 12 January 2018.
34. Accordingly, the claim was presented out of time and the Tribunal had to consider whether to exercise its discretion to extend time.
35. There was no suggestion that the Claimant was ignorant of his rights. He knew at the beginning of the three-month limitation period, that he wanted to bring a claim for unfair dismissal – he knew this, at the latest, by the date of the appeal hearing. It also recorded that he wanted to contact ACAS. He had taken advice from the CAB.
36. The Claimant relied solely upon his health as grounds as to why it was not reasonably practicable to present his claim in time. He relied on his suffering from depression, anxiety and alcoholism at the material time.
37. The Court of Appeal held in *Schultz v Esso Petroleum Co Ltd 1999 ICR 1202, CA* that illness may make it not reasonably practical to present a claim in time; the test is one of practicability, what could be done and Tribunals should have regard to the surrounding circumstances such as what else the Claimant had done during the material period. Further, attention should be focused on the closing stages, rather than the earlier stages, of the three-month period.
38. The case law tells us that medical evidence is usually required and must not only confirm the Claimant's illness, but also show that the illness prevented him or her from complying with the statutory time limit.

Nevertheless, medical evidence is not necessarily essential according to the Scottish EAT in *Norbert Dentressangle Logistics Ltd v Hutton EATS 0011/13*.

39. The Tribunal duly considered the medical evidence in this case. There were limitations in the medical evidence provided. The Tribunal had sight of sick notes from before the effective date of termination up until the date the ET1 was presented, according to which the Claimant was suffering from anxiety with depression, and was unfit for work. However, there were no GP records covering the material period or at all.
40. The only medical evidence, apart from the sick notes, was as follows. There was a report from an occupational health advisor dated 11 May 2017 during the employment. This recorded that the claimant said that he did not feel able to return to work. There was reference to symptoms of anxiety and depression. The OH opinion was that the claimant was unfit for work at that time and it was not possible to estimate a timeframe for return.
41. There was a doctor's letter of 14 November 2017, a couple of months after the expiry of the primary limitation period. This letter was written in support of the Claimant's challenge to a Universal Credit assessment that, in effect, he could attend a work program. It stated that the Claimant was suffering from recurrent depression, hyperthyroidism and alcohol dependency syndrome. It said that he had been referred for physical illnesses caused by this to a specialist. There was no reference to any referral for a mental health. It also stated that the Claimant was reporting daily suicidal thoughts. This was the only contemporary medical evidence, apart from sick notes, before the date of presentation of the ET1.
42. There was a GP letter dated 5 April 2018 that recorded that the Claimant had told the GP that his mental health had suffered and therefore been signed off sick. This did not contain any medical opinion.
43. There was also the letter of 3 September 2018, referred to above. This was the letter from the GP responding to the Tribunal's questions about the Claimant's ability to manage the Tribunal process. It confirmed that the Claimant was suffering from anxiety and depression that fluctuated. It then reported what the Claimant had said, but did not give any opinion as to this.
44. The final medical evidence was a recent letter from the GP dated 6 June 2019. The GP stated that the Claimant had said that he was affected at the material time and was having difficulty carrying out basic tasks such as shopping. He was becoming unkempt and keeping to a poor diet. He was struggling with self-care and to leave the house. It said that he attended the GP about monthly at that time (which the Claimant thought sounded about right). It also said that the Claimant had been on citalopram an anti-depressant.
45. The Tribunal considered this medical evidence and the Claimant's oral evidence. In the view of the Tribunal it was entirely natural that the Claimant would have difficulty in recalling the events between the dismissal and his presenting the ET1. Time started to run nearly two years prior to the date of this hearing. Therefore, the Tribunal was particularly reliant on the

documentary evidence.

46. The Tribunal reminded itself that the burden was on the Claimant.
47. The difficulty for the Claimant was that there was no medical evidence going to the question of whether or not the Claimant was unable to comply with the statutory time limit. The contemporaneous fit notes showed that the Claimant was not fit for work. He was suffering from depression and anxiety and was on anti-depressants. There was no referral by the GP to mental health specialists, although there was a referral in respect of his physical health. In November, approximately two months after time had expired, the evidence showed that he was suffering from alcohol dependency.
48. The Tribunal considered what the Claimant had been able to do up to 15 September 2017, when the statutory time limit expired. He, evidently, had managed to obtain state benefits to pay his rent. He had taken legal advice and had actively pursued an appeal following the termination.
49. The Tribunal also noted that, as the Respondent pointed out, this was not a complex case; the Claimant knew he had been dismissed and wanted to complain to a Tribunal about this. He had challenged his dismissal and sought legal advice.
50. Accordingly, in the absence of medical evidence going to the question of whether the Claimant could comply with the time limit and taking into account the wider circumstances, the Tribunal did not find that the Claimant discharged the burden upon him of showing that it was not reasonably practicable to bring his claim within time.
51. However, if the Tribunal has fallen into error and it was not reasonably practicable for the Claimant to bring his claim in time, the Tribunal went on to consider, for the avoidance of doubt, whether the claim was brought within such further period as the Tribunal would find reasonable.
52. This was a different test. It was a question of reasonableness and required an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances and the decision should be made against the general background of the primary time limit, and the strong public interest in claims being brought promptly.
53. There was further significant delay from 15 September to the 12 January 2018. This was a delay of nearly three months, in the context of a three-month original time limit. During this period the Claimant was engaged dealing with his benefits situation. He was in receipt of at least two Universal Credit decisions, which he took active steps to challenge or appeal. He visited his GP a number of times. Further, he contacted ACAS on 22 November. After this, there was further delay until 12 January.
54. Again, there was no medical evidence going to whether or not the Claimant was able to start his Employment Tribunal claim between 15 September 2017 and 12 January 2018. In the circumstances, the Tribunal would find that, even if it were reasonably practicable for the Claimant to have

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presented his claim within time, he did not bring his claim within such further period, as the Tribunal would have found reasonable.

Employment Judge Nash
Date 25 August 2019