Case No: 3325707/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Kindoki	v	Amey Services Limited

Heard at: Bury St Edmunds **On:** 11 June 2019

Before: Employment Judge Laidler

Appearances:
For the Claimant: Mr Van Heck, Counsel.
For the Respondent: Mr J Humphreys, Counsel.

JUDGMENT having been sent to the parties on 28 June 2019 and reasons having been requested by the Employment Appeal Tribunal in an order dated 13 February 2020.

REASONS

1. This was an open preliminary hearing to determine whether the Employment Tribunal had jurisdiction to determine the claim issued by the claimant on 31 July 2017, it appearing on the face of it to have been issued out of time. The preliminary hearing had originally been listed for the 4 February 2019 by Employment Judge Gumbiti-Zumuto at a hearing before him on 13 July 2018. That hearing took place before Employment Judge Ord at which both parties were represented by counsel. It was however adjourned to the 11 June 2019 due to concerns about the claimant's ability to provide instructions due to his schizophrenia. Before dealing with what transpired at this hearing it is relevant to set out some of the procedural history of this matter.

2. The claim form was received on 31 July 2017 and was accepted as it provided an ACAS Early Conciliation certificate number. The claim form was completed by the claimant's solicitors, Calices Solicitors. At section 8 of the ET1 Form they ticked the boxes claiming unfair dismissal and discrimination on the grounds of race and disability.

3. In box 8.2 were handwritten details stating that the claimant had been sacked without formal warning.

4. In box 12.1 was stated that the claimant had a mental impairment although no further information was provided.

5. Additional information was provided in section 15 of the ET1 form stating that the claimant believed he had been unfairly dismissed. He had been represented it stated by UNISON during the disciplinary hearing and after his dismissal the trade union invoked Early Conciliation through ACAS. That failed and a certificate was issued on 29 December 2016. However, it was asserted that UNISON failed to provide the claimant with the certificate which he only received in May 2017.

6. No other details of the claims were set out in the claim form but attached to it was a Schedule of Loss. Whilst the date on which employment ended was not provided in the ET1 form the schedule of loss gave the effective date of termination as 'August 2017', which appeared incorrect as it was after the date of the claim form. This set out a claim for unfair dismissal calculating a basic and compensatory award and made no provision for any claim of discrimination.

The response by the respondent

7. The ET3 Response was received on 20 September 2017 in which the respondent resisted the claims in their entirety. It was pleaded that the claimant was not unfairly dismissed but was fairly dismissed for gross misconduct in accordance with the respondent's procedures at a disciplinary hearing on 5 September **2016**. It was also however asserted that the claim had been submitted out of time. It was denied that the claimant had been subjected to discrimination, but no further details could be provided as the disability and race discrimination claims had not been particularised in the claim form.

Preliminary hearing before Employment Judge Gumbiti-Zumuto on 13 July 2018

8. The first preliminary hearing took place as set out above. Counsel appeared for the claimant and a solicitor for the respondent. A preliminary hearing was listed on the issue of jurisdiction to take place on 4 February 2019. Orders were also made for any witness statements to be exchanged by 21 January 2019 and for the claimant to provide any medical evidence on which he sought to rely and an Impact Statement by 10 August 2018.

9. Following that hearing there having been a failure to comply, the Judge issued a strike out warning on 15 October 2018. This was responded to by the claimant's solicitors by letter of 19 October 2018. They stated that they had given evidence of the claimant's disability as required although it was acknowledged it had been served late as "the claimant was admitted at North Middlesex Hospital during that time and could not attend our offices. We continue to represent the claimant in this case and the latter wishes to proceed and comply with further court directions". No information was given as to why the claimant had been admitted to hospital. The claim was not struck out.

Preliminary hearing 4 February 2019 before Employment Judge Ord

10. At this hearing both parties were represented by counsel and the hearing adjourned "in the light of concerns over the claimant's ability to give full and proper instructions in this matter given his stated condition of paranoid schizophrenia". The matter was adjourned to 11 June 2019. Orders were however made on that occasion as follows:-

    1) The respondent's costs of that hearing to be paid by the claimant to be assessed if not agreed and not to be enforced without the leave of the Tribunal.

    2) The claimant to disclose to the respondent any further medical reports, notes and evidence with a copy of any further witness statements on which he seeks to rely by no later than 15 April 2019.

    3) The respondent had leave to provide any evidence in reply by no later than 16 May 2019.

Letter from the claimant's GP, 25 February 2019.

11. A letter from Dowsett Road Surgery dated 25 February 2019 was received by the Employment Tribunal on 15 April 2019 and it is therefore assumed it was in compliance with the above order. It confirmed that the claimant had suffered with paranoid schizophrenia since 1997 and had previously been under the Community Mental Health Team for that. He had been admitted to mental health hospitals three times in the past under the Mental Health Act and continued with medication for that issue. As a result of his paranoid schizophrenia it was stated he has issues with concentration, forgetfulness, hearing derogatory voices with paranoid thoughts and as a result poor sleep and low mood at times. It stated the medication he was on. It also provided information on a chronic severe lower back pain due to osteoarthritis which had been a problem since 2010 and which had previously been investigated by the Rheumatology Team at the North Middlesex Hospital. As a result of that issue he suffered with chronic back pain, difficulties with mobilising at times, stiffness and reduced exercise tolerance secondary to the pain.

Application to postpone

12. Counsel who appeared for the claimant at this hearing applied to postpone. There was no new witness statement on behalf of the claimant, the only witness statement being that of the 18 January 2019 (which appears to have been prepared for the February 2019 hearing). The claimant's witness statement did not deal with the issue of jurisdiction which was it was stated was the reason for the adjournment on the previous occasion. Counsel had been informed by his instructing solicitor that when the claimant came in to give his witness statement there had been some difficulty in eliciting information from him. The claimant had instructed counsel that he had supplied the ACAS Early Conciliation certificate to his instructing solicitors in May 2017. The respondent's solicitor had a copy which was provided to the claimant's representative and to the Judge. It was submitted on behalf of the claimant that a

witness statement dealing with the issue of why the claim had been submitted late needed to be prepared by those instructing him also.

13. The application was resisted by the respondent. It was pointed out this was the third preliminary hearing in the matter. The orders made at the July 2018 hearing had been crystal clear and the claimant had then been represented. The witness statement that had been prepared does not address the issues. To adjourn would be prolonging matters even further in a particularly old claim which would add further to the respondent's costs and to the time of the Employment Tribunal. The claimant has had every opportunity to prepare.

14. In response it was submitted on behalf of the claimant that the claimant should not be punished for the fault of his instructing solicitor. If a further adjournment could be granted, then it was accepted that an unless order might be appropriate. It was accepted that this was a very old claim.

The Tribunal's decision on the application to postpone

15. The Tribunal determined it was not proportionate nor in accordance with the overriding objective for there to be further delay. This matter had already been adjourned once for the claimant to give further instructions. If that had not been adequately dealt with by the claimant's solicitors, then that was a matter between the claimant and those solicitors. This is not the first time either that there has been delay. On 15 October 2018 Employment Judge Gumbiti-Zumuto had to issue a strike out warning in view of the claimant's failure to comply with one of his orders. Other than the GP letter of 25 February 2019 there was no evidence before the tribunal as to how the claimant's mental health condition had contributed to delays in preparing for this hearing.

16. If the matter were postponed it would be many months just to re-list a preliminary hearing. If any of the claims proceeded the full merits hearing would be some time in 2020, dealing with events that took place in 2016. The claims needed to be progressed now.

17. The Tribunal took into account that the claimant was represented, and the claimant was present and time could be given to Counsel to take instructions so that the Tribunal could deal with the issue of jurisdiction. The claimant could give live evidence and be cross examined on it.

18. The application therefore to postpone was refused. It was however necessary to clarify the claims first as different tests would be applicable to a claim of unfair dismissal as opposed to the discrimination complaints. The Tribunal had noted that there had been nothing in the ET1 as to what the claims of disability discrimination and race discrimination are. The claimant's representative would have time to take instructions and advise as to what claims were being brought.

19. On resuming it was stated on behalf of the claimant that the race discrimination claim was a claim of indirect discrimination in that the claimant's area supervisor Jorgie required those working to be Spanish speakers and that had indirectly discriminated against the claimant who came from the Democratic Republic of Congo.

20. The disability discrimination claim was based on the claimant's paranoid schizophrenia and it was alleged he was dismissed because of that condition. It was also alleged that Jorgie abused him as someone with mental health issues at the dismissal hearing. The day after the events which led to the claimant's disciplinary, Jorgie told colleagues he was going to sack the claimant, that the claimant was not well and had hidden information about his mental health.

21. The Tribunal had to point out to the claimant's representative that none of this information was on the claim form and leave to amend would be required. For the purposes of this hearing it would be assumed that there were claims under the Equality Act 2010. There was a dispute as to whether the claimant had two years' service to bring a claim of ordinary unfair dismissal but again it was assumed that there was such a claim for the purposes of this preliminary hearing.

The evidence of the claimant

22. The claimant relied upon a witness statement dated 18 January 2019. That primarily deals with why he states he was unfairly dismissed. It does refer to a diagnosis of paranoid schizophrenia and a letter from his GP on or around 15 June 2016 confirming that. It does not set out in any respect why he alleges that his dismissal was because of his disability and makes no reference to race.

23. At paragraph 3 of the witness statement the claimant gave evidence that he contacted his trade union in or about August 2016 straight after he was invited to attend the disciplinary hearing and it goes on to state:-

> "Normally it takes the Trade Union up to 90 days to receive a decision from the union, but it took more than 90 days for me to receive the certificate from the Trade Union. I made several phone calls to John Man from the union to chase it up but to no avail. By the time I received the certificate, the date had elapsed."

24. The claimant's evidence on this paragraph was very confusing and inconsistent. He initially stated that the trade union representative had not told him of the need to raise his case with ACAS. He then said that this paragraph in the witness statement was referring to chasing up the Early Conciliation certificate as he was told by his trade union representative that before they took the case to a Tribunal they needed the certificate. He recalled waiting a long time for the Early Conciliation certificate. He first chased John Mann, the union representative, before December and called him several times and his solicitor was also calling him. He also went to see John Mann in the trade union office which is in the same office as the respondent as Mr Mann is employed full time by the respondent.

25. The claimant also gave oral evidence that his solicitors were chasing up the Early Conciliation certificate as they advised that they could not go ahead with proceedings without it. A solicitor called Patrick was chasing Mr Mann and emailing him also. The claimant thought that he did not see the ACAS Early Conciliation certificate until he went to his solicitors to make his statement. ACAS emailed him in December with the certificate. He thought that must have been January 2017.

26. The Judge specifically asked the claimant if that was the case why was the claim not put in until July 2017. The answer was because the solicitor was preparing the claimant's witness statement. When the Judge questioned how it had taken the solicitor that length of time to prepare the handwritten statement on the ET1 form the claimant stated, "I don't know why it took until July to put the claim form in".

27. There was no further evidence heard and no evidence from the claimant as to how his mental health condition had prevented him submitting his claim in time. There was no evidence from the claimant's solicitors. They were not present at this hearing.

Submissions

28. On behalf of the respondent it was submitted that it was now clear that the Early Conciliation certificate was received at the end of December 2016 at which point the claim would have been in time. The claim had a month in which to ensure the claim was lodged. He had the ACAS certificate and was pursuing the matter with his solicitors. The critical question is why there then was the delay and to that there has been no response and no explanation. What occurred before the certificate is not really the question as the certificate was issued when the claim was still in time.

29. With regard to the unfair dismissal claim the test is one of reasonable practicability and it was reasonably practicable it was submitted to lodge the claim in time. The claimant knew all the facts that gave rise to the claim and had the necessary certificate. He was actively pursuing the matter. If there is another explanation, then one has not been provided. If it is the case, and we do not know, that the solicitors have been negligent then the claimant is fixed with that, but the details are not known.

30. With regard to any discrimination claims that are brought and assuming that they have been then Tribunal must look at all of the relevant factors. The length and reason for the delay is approximately 6 months. We are not told the reasons for the delay. Although the respondent did not make specific representations that the evidence was likely to be affected, it is of course relevant that witnesses' memories fade as time passes.

31. There is a lack of explanation as to why the claim was not presented in time and the claimant had taken advice from solicitors before the end of 2016.

32. In conclusion the respondent submitted that there has not been any explanation as to why the claim was not made in time. The claimant has had every opportunity to explain that but has not done so. It cannot be just and equitable to extend time.

33. On behalf of the claimant it was submitted that the Tribunal had been left "with an even greater lacuna in evidence than before". All that counsel could say was that the claimant did all that he could. He personally chased the ACAS certificate more than 10 times and his solicitor did that as well when in the room with him. Counsel said he was unable to assist the Tribunal with regard to the 6 months of delay which is critical. He was not able to do so in the absence of any evidence.

The relevant law

34. The tribunal must consider the following statutory provisions.

Section111 Employment Rights Act 1996

Complaints 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.

Section 123 Equality Act 2010

Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 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 employment tribunal thinks just and equitable

The Tribunal's conclusions

35. It was reasonably practicable for the claim of unfair dismissal to be presented in time. The claimant had union representation and then instructed solicitors. The union invoked Early Conciliation following the claimant's dismissal on the 5 September 2016. The primary limitation period expired on the 4 December 2016 but was extended by virtue of the ACAS EC certificate to the 28 January 2017.

36. Both the claimant and his solicitors were chasing the ACAS Early Conciliation certificate. The claimant's evidence is that the certificate was received towards the end of December 2016 and he saw his solicitor in early 2017 to prepare a witness statement. It was therefore reasonably practicable to have submitted the claim in time yet the claim form was not received until 31 July 2017 with the briefest of handwritten statements on it.

37. There is no reason given to this Tribunal as to why there was that delay. The claimant could not assist and his solicitors have not provided any evidence. They have known since the ET3 that the respondent was taking a jurisdictional issue (although this should have been known to any competent solicitor at the time they issued the claim form). The respondent first applied in September 2017 for a preliminary hearing to deal with this issue. There was a case management discussion in July 2018 at which the Employment Judge listed a preliminary hearing to deal with the time issues. That did not proceed in February 2019 but was re-listed. At no time during the whole of that period to today have the claimant's solicitors put in any evidence to explain the delay.

38. As it was reasonably practicable to have presented the claim in time it is not necessary for the tribunal to consider the second part of the section. However, were it necessary, it would have found that the claim was not then submitted within a reasonable time thereafter. As stated there is no reason given as to why the claim was not submitted sooner than July 2017.

39. The unfair dismissal claim is struck out as the Tribunal has no jurisdiction to determine it, it having been received out of time.

40. In relation to discrimination complaints, it has been assumed for the purposes of this hearing that both a disability discrimination and a race discrimination case have been brought although no particulars have been provided. It is often suggested that the Tribunal has a wide discretion as the test is one of what would be just and equitable but the case law reminds the Tribunal that it is not a foregone conclusion that time will be extended. In Robertson v Bexley Community Centre [2003] IRLR 434 Court of Appeal it was stated there is no presumption that the Tribunal should do so unless they can justify the 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 discretion is the exception rather than the rule.

41. The Tribunal takes into account all of the same matters it has considered and set out above in determining that it must strike out the unfair dismissal complaint. Whilst this test is one of just and equitable the Tribunal's conclusions are the same. It has no evidence before it as to why it would be just and equitable to extend time. The claim was 6 months late. There is no explanation as to why despite the long history of these proceedings.

42. Whilst the respondent does not make specific submissions that the cogency of the evidence is likely to be affected, it has to be the case that memories fade as time passes. It would likely be late 2020 before the case is heard. That will be 4 years since the events complained of.

43. It is for the claimant who seeks to invoke the jurisdiction of the Tribunal to produce evidence as to why it would be just and equitable to extend time. He had not done so.

44. These written reasons have been prepared pursuant to the order of the Employment Appeal Tribunal dated 13 February 2020. In that order the Tribunal was specifically requested to respond to the points made by the claimant's representative in the grounds of appeal. In the grounds of appeal at paragraph 7 it is submitted that the Tribunal answered the question of time limits:

> "Without regard to the medical evidence. In a report from the appellant's GP (dated 25/02/2019) before the Tribunal and served upon the respondent as was said in previous medical documents the appellant was stated to be suffering from paranoid schizophrenia to the extent that he had issues with concentration and forgetfulness. This explained why his legal representatives were at pain eliciting information from him as to how he had got into trouble with filing his claim in time. It seems that he had initially relied on his union with respect of the claim being filed. He could not recall in a detailed manner the series of events regarding this aspect of his claim."

45. That was not a matter of evidence before this Tribunal. The medical report has been seen on the tribunal file. It was not specifically referred to. It did not give any explanation as to how the claimant's condition had affected him in issuing the claim. There was no evidence by the solicitors before the Tribunal that his condition had led to them having difficulties in obtaining instructions.

46. The notice of appeal also goes on to suggest that the Tribunal:

> "appeared to have moved on from the issue of timeliness of the claim as the issues related only to the appellant's disability and the extent of it with reference to his discrimination claim rather than the issue of time limits".

This ground is not understood. It is correct as set out earlier in these reasons that it was necessary to try and clarify the issues before the issue of time limits was determined. The Tribunal proceeded on the basis that the claimant had a disability and race discrimination complaint even if they were not particularised.

47. It is further set out in the grounds of appeal that the respondent had submitted its grounds of resistance referring to the time limit without regard to the appellant's health issues. It is asserted "this was done in order to escape being held to account in respect to the appellant's disability which formed the basis of his claim issued with the Tribunal". It is not set out in the ET1 that the claimant's disability was the basis of his claim. There is nothing setting out in the ET1 that the claimant was dismissed because of or for matters arising from his disability. Whether or not the respondent has accepted that the claimant satisfied the definition of disability within the meaning of s.6 was not the issue before this Tribunal. In any event as stated in the Tribunal's conclusions it was incumbent upon the claimant and/or his solicitors to provide evidence to this Tribunal as to the way in which they assert his disability played a part in the delay in submitting the claim form.

The respondent's costs application

48. At the hearing before Employment Judge Ord the respondent was awarded its costs to be assessed if not agreed. The respondent advised there had been no agreement regarding its costs and asked that they be summarily assessed at this hearing. The brief fee they incurred by counsel on last occasion was £800 net of VAT and it is assumed the respondent could recover the VAT element. They were not seeking any costs for the solicitors. A Schedule of Costs had not been prepared. The brief fee was wholly and entirely incurred in coming to that hearing and it would be appropriate to assess the costs at £800 and no more is sought.

49. On behalf of the claimant it was said that £800 seemed a high fee for someone of 6 years call and they would suggest £500-£600 more appropriate.

50. With regard to the costs of today, the respondent submitted that it would be limited to the fee of £1,250 counsel being called in 2012. It was made on the basis that the claims had no reasonable prospect of succeeding at all and all the conclusions reached by the Judge were relied upon by the respondent. It was for the claimant to persuade the Tribunal it had jurisdiction and there had been no evidence to properly explain the delay. In the alternative it can be argued that the way in which the litigation has proceeded is unreasonable. The claimant's representative today has quite rightly identified gaping holes in the evidence. The claimant's solicitors could have identified the evidence or conceded there were no reasonable prospects. It was not a reasonable way to conduct the litigation.

51. On behalf of the claimant it was submitted that the claims might have had reasonable prospect of success, but they have not got through the gateway of extending time. There was culpable default by the claimant's solicitor who might have come to give evidence. It was only however after the claimant gave evidence that it was clear that there were no reasonable prospects.

52. The respondent did not accept that at all. On the face of the claim form there had been delay and no explanation.

53. The Judge recalled the claimant to give evidence as to his means. He was not working and on benefits due to his disability. His condition has worsened since he lost his job and he could not afford anything. He has to pay rent from his benefits as rent is not paid separately. He has no other savings and no other assets. In answer to questions on behalf of the respondent the claimant said he was paying solicitors from his own money and was having to borrow money to do that. One of his friends with a small business is trying to support him and lending him the money for the solicitors' fees.

Conclusion on Costs

54. The Judge was satisfied that the threshold at which the Tribunal could consider costs had been reached. The Tribunal also found that on 4 February but did not assess the amount. Today's hearing was again about time limits. It is not accepted that the difficulties only became clear after the claimant gave live evidence. It was always the case on the face of the ET1 that the claim was submitted out of time and that the claimant who had had solicitors throughout would have to explain that delay. He and his solicitors had failed to do so. They had no reasonable prospects. The way in which the issue of time limits had been dealt with had been unreasonable. Orders made on the last occasion were not complied with and no witness statement was filed dealing with the issue.

55. Rule 84 however states that the Tribunal may have regard to the means of the paying party. The Tribunal has done so. It cannot then order the claimant to pay costs if he is borrowing money to pay his own costs. The order of 4 February requires this Tribunal to make an assessment and the Tribunal does that by applying rule 84. Having considered the claimant's lack of means, no order is made.

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Employment Judge Laidler

Date: 5 August 2020

Judgment sent to the parties on

.....6 August 2020.....

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For the Tribunal office