Case No: 2302411/2018

EMPLOYMENT TRIBUNALS

Claimant: Mrs O Talbot (as personal representative of the late Mr M Talbot – deceased)

Respondent: Edwards Limited

Heard at: London South (by video) **On:** 12 November 2020

Before: Employment Judge O'Rourke

Representation
Claimant: Ms Klycheva - counsel
Respondent: Mr Dennis - counsel

PRELIMINARY HEARING JUDGMENT

1. The Respondent's title is amended to Edwards Limited.

2. The Claimant's claims of unfair dismissal, breach of contract in respect of notice, arrears of holiday pay and other deductions from salary are dismissed, for want of jurisdiction.

3. The Respondent's application to amend his claim, to include a claim of disability discrimination, is refused.

4. The Claimant withdrew the previously-made applications in respect of strike-out of the Response, due to alleged non-compliance with Tribunal Orders and for a Preparation Time Order.

REASONS

Background and Issues

1. The Claimant was employed by the Respondent as a software support engineer, for approximately five years, until his dismissal for alleged gross misconduct, with effect (the Respondent asserts) 3 January 2018. In particular, the Respondent alleged that the Claimant had submitted false pay and subsistence claims. As a consequence, the Claimant brought

claims of unfair dismissal, breach of contract in respect of notice, arrears of holiday pay and other arrears of pay, which claim was presented on 27 June 2018.

2. The Respondent noted, on receipt of the claim that it appeared to have been brought out of time and that therefore the Tribunal may not have jurisdiction to hear it and accordingly, after considerable delay, this issue was listed for hearing today, by way of open preliminary hearing, conducted by video.

3. On 10 August 2018, the Claimant applied to amend his claim, to include one of disability discrimination, to which application the Respondent objects.

4. Sadly, the Claimant died in a road traffic accident on 28 December 2018. Following, again, much-delayed correspondence from the Tribunal, the Claimant's wife, Mrs Olga Talbot, indicated, subject to s.206(4) of the Employment Rights Act 1996 ('ERA') that as her late husband's personal representative, she wished to continue with the claim.

5. While the Claimant had, prior to his death, indicated that he wished to bring applications to strike-out the Response, due to alleged failure by the Respondent to comply with Tribunal Orders and also to apply for a Preparation Time Costs Order, Ms Klycheva confirmed that these applications were no longer pursued, although, dependent on the outcome of this hearing, she may consider an application for costs.

The Law

6. I was referred by Mr Dennis, in his skeleton argument, to the relevant law in respect of these issues, to which I shall refer below, as I consider appropriate. Ms Klycheva also referred to some authorities, which, again, I shall refer to below as I consider appropriate or relevant.

7. I also referred myself to the case of **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53 EWCA**, in which Lord Denning MR set out the principles to be considered in a case relevant to the 'reasonably practicable' test, to include the reasons for the failure to meet the deadline, whether there was acceptable ignorance of the fact and other factors, such as awaiting information from the employer, or physical impediments etc. The burden of satisfying the Tribunal that it was not reasonably practicable to present the claim on time rests firmly on the claimant (**Porter v Bandridge Ltd [1978] IRLR 271 EWCA**).

The Facts

8. I heard submissions from both parties and also evidence from a Ms Tara Barnes, an HR advisor to the Respondent.

9. I summarise the Respondent's submissions (both in respect of their application on the limitation point and their resistance to the amendment application), as follows:

a. While he denied it, the Claimant knew of the termination of his employment and the reasons for it, on 5 January 2018 (all dates hereafter 2018) and therefore the claim was approximately three months out of time. All the documentary and witness evidence indicates that the Claimant was receiving correspondence from the Respondent, both by post and email, despite his subsequent protestations that he was not. Also, it was Ms Barnes' undisputed evidence (para.13 her statement) that she had hand-delivered the dismissal letter and related documents to the Claimant's home, on 10 January.

b. Accordingly, the three-month time limit expired, at the latest, on 9 April. The Claimant did not notify ACAS of his proposed claims until 15 May, outside the time limit.

c. It was reasonably practicable for the Claimant to have presented his claim within time. His contention that he was unable to do so, for health reasons, is not supported sufficiently by the available medical evidence. While the Claimant has provided fit notes for the entirety of the period from his dismissal, to the presentation of his claim [54 – 62, December 2017 - asthma, January to March – stress, April to July – 'depressed'], these are insufficient to show that he was medically unable to submit his claim within time. Indeed, these same conditions continued through to his eventual death, but, nonetheless, during the second half of that year, he was in fact able to present his claim, engage in lengthy correspondence and make detailed applications. He was also, during this time, fit enough to make multiple applications for new employment, on an almost daily basis and attend interviews [160-185].

d. In the event that the Tribunal were to find that it was reasonably practicable to present the claim within time, the Claimant did not present it within such further time as was reasonable, as there was a further two months' delay before he did so.

e. The same principles apply to the breach of contract, holiday and other claims (less that perhaps time may run from the last pay-slip, provided at the end of January).

f. In respect of the Claimant's application to amend his claim, the submissions are as follows:

    i. The application is itself unclear as to whether he is in fact alleging discrimination in the legal, as opposed to the colloquial sense.

    ii. While he refers to suffering from diabetes, it is unclear as to how any such condition may have been relevant to his dismissal – he only mentioning it in relation to him purchasing two separate drinks, on the same occasion, at Starbucks, to increase his blood sugar levels [32]. However that allegation did not form part of the rationale for his

dismissal, which related to meals, mileage and payments for call outs [dismissal letter 136].

iii. Applying the principles in **Selkent Bus Co Ltd v Moore [1996] EWCA ICR836**, the application should, in any event, be refused, as this is an entirely new claim, not previously referred to and based on new factual allegations and is therefore a substantial amendment. While the claim form does refer to 'stress' and 'depression', there is no mention of diabetes and in any event the whole tenor of the claim is in relation to the unfairness of the dismissal. No discrimination box is ticked in the ET1 and indeed the Claimant confirms, in answer to the question at paragraph 12, that he does not have a disability. The application was not made until 10 August and is therefore over four months out of time. While the Claimant suggests that he only became aware of a possible discrimination claim on receipt of the Respondent's grounds of resistance, he was already aware of the Respondent's grounds, having seen the dismissal letter, back in January.

iv. There would be substantial prejudice to the Respondent in defending such a claim, due to the passage of time since the events in question and a likely hearing date, in perhaps late 2021/early 2022.

v. Any such claim is unlikely to have reasonable prospects of success, with Type-2 diabetes not, *per se*, amounting to a disability (**Metroline Travel Ltd v Stoute [2015] UKEAT IRLR 465**).

10. I summarise the Claimant's submissions as follows:

a. Section 111.2(b) ERA permits the Tribunal discretion to extend time, in respect of the unfair dismissal and related claims and as set out in **Marks and Spencers plc v Williams-Ryan [2005] EWCA Civ 470**, such discretion should be interpreted liberally in the employee's favour, taking into account the manner and reason for the dismissal, knowledge of rights and the substantive reasons for the failure to comply.

b. The Claimant's ill-health was a major factor in it not being reasonably practicable for him to have met the time limit, with him referring, as early as 20 November 2017, to his mental health and thereafter asthma, stress and depression (as set out in the fit notes).

c. It is unfair to seek to rely on the Claimant's efforts to find employment, as he was obliged to endeavour to provide for his family.

d. He effectively lodged an appeal against the decision, as indicated by the Respondent's invitation to him, on 10 January, to discuss the matter further, indicating that the matter was ongoing [147].

e. The receipt of his p45 in March (although dated April) further confused the issue [186-188].

f. The Claimant was not a legal professional and not represented at the time and was therefore unlikely to have been aware of the time limits.

g. He did present the claim within such further time as was reasonable, bearing in mind the confusion over the P45, his attempts to resolve the matter with the Respondent, without recourse to the Tribunal and his continuing ill-health.

h. In respect of the application to amend, the submissions were:

i. The Tribunal had wide discretion to extend the time limit, on the basis that it would be 'just and equitable' to do so (s.123 Equality Act 2010 ('EqA')).

ii. The Claimant did refer to his ill-health in his claim form and therefore any amendment would not be a substantial one, but a 're-labelling' exercise.

iii. Account should be taken of his continuing ill-health, to include hypertension, autism and Asperger's (although it was pointed out to Ms Klycheva that no evidence whatsoever had been provided as to these conditions).

11. Knowledge of Effective Date of Termination. I have no hesitation in concluding that the Claimant knew, by, or about 5 January 2018 that he had been dismissed, summarily, for gross misconduct (and shortly afterwards as to his alleged holiday and notice pay shortfalls) and I do so for the following reasons:

a. All relevant correspondence had been sent to him at the correct postal address, by recorded delivery, for which either he or his wife had signed [examples 132-133], or by email, to the correct email address. He had acknowledged receipt, or responded to much of that earlier correspondence, but ceased to do so, once summoned to a disciplinary hearing and then, having failed to attend, on being informed of his dismissal. He changed his email address shortly after the point the dismissal letter was sent [143] and I consider that this was a deliberate attempt on his part to 'muddy the waters', to assist him in denying receipt. In any event, following his notification of that new email address, subsequent emails, containing copies of all relevant correspondence) were addressed to both his old and new addresses [147].

b. It was uncontested evidence that Ms Barnes had hand-delivered the dismissal letter to his home.

c. The Claimant's belated submission that he had, in fact, submitted some form of appeal to the Respondent, indicated that therefore he must have been aware of his dismissal.

d. The later administrative provision of a P45 did not contradict or confuse the already-clear position.

12. 'Reasonably Practicable'. Unlike the test in discrimination cases for extension of time (whether it is 'just and equitable' to do so), the test in unfair dismissal, deduction from wages and breach of contract claims is more stringent, i.e. whether or not it was reasonably practicable (or 'reasonably feasible') for a claimant to have presented their claim within time. While the 'just and equitable' test allows for consideration of the reason for the delay, the length of it, the effect of such delay on the cogency of the evidence, the speed with which a claimant took corrective action and the balance of prejudice to both parties, no such factors apply to the test I must apply. I considered the following factors:

a. Ignorance of the Law – such ignorance must itself be reasonable. However, in this case, applying **Dedman**, the Claimant had not at any point, in his lengthy correspondence, previously asserted that he was unaware of the time limit, instead relying solely on his medical condition. I note, from his correspondence that he was clearly an educated and intelligent man, who, it could be assumed, would be perfectly able, by virtue of an internet search to find out the time limit and very many unrepresented claimants routinely do so successfully.

b. I don't accept that his health rendered it not reasonably practicable for him to have met the time limit, for the following reasons:

i. The medical evidence is extremely limited, simply referring to broad-brush medical conditions, but without indicating why such conditions would prevent him from bringing his claim.

ii. Those conditions continued for the rest of 2018, but he was nonetheless, despite them, in due course, able to bring his claim and engage in lengthy and detailed correspondence.

iii. He engaged in very active job-searching (to his credit), in the same timeframe, to include attending interviews, thus indicating that he was not so impaired that he could not have brought what was, in the end, a very straightforward claim.

iv. There is no evidence that he was awaiting the outcome of an appeal. Nor is there evidence that he had formally lodged one and indeed he failed to do so, despite the deadline this step being extended by the Respondent [151].

13. Conclusion. I conclude therefore that it was reasonably practicable for the Claimant to present his claim on time and that therefore he cannot rely on s.111 ERA, or the equivalent provisions of other legislation, in respect of the other claims. His claims of unfair dismissal, breach of contract, arrears

of holiday pay and other arrears are accordingly dismissed, for want of jurisdiction.

14. Application to Amend. Applying **Selkent Bus Co Ltd**, I considered the following factors:

    a. The nature of the amendment sought – this is clearly a major and substantial amendment, not a mere 're-labelling' of an existing claim. An entirely new cause of action is pleaded, based on previously un-mentioned facts (the Claimant's alleged diabetes and his need for sugary drinks and whether such matters should have been taken account of in his disciplinary proceedings) and therefore considerations as to time limits apply, bearing in mind, of course that the existing claim was also, itself, out of time.

    b. The proposed claim is substantially out of time (approximately four months) and no real rationale has been offered as to why it was not brought earlier, or at least at the same time as the unfair dismissal claim. The Claimant contended that he did not realise he may have had a discrimination claim, until receipt of the Respondent's grounds of resistance, but it has not been explained why that might be the case, particularly when, as I have found, he was fully aware of the Respondent's position at the time of his dismissal. If he genuinely thought that his diabetes was a factor that contributed to the alleged unfairness of his dismissal, then he had ample opportunity to raise that matter before he did so, but didn't. I don't consider, therefore that it would be just and equitable to extend time in this case.

    c. I consider that any such claim is likely to be of little merit, bearing in mind that the Claimant was dismissed for making false call-out claims, mileage claims and meals claims. It is difficult to see (apart perhaps from the claims for meals) how any diabetes that he was suffering from could have had any relevance to those allegations.

    d. In balancing the prejudice to be suffered by the parties, I consider that the balance falls firmly in the Respondent's favour, bearing in mind that they would have to face a potentially serious claim, based on only sketchy evidence, after an interval of potentially four years, as opposed to the Claimant being unable to bring a claim for which there seems to be little merit.

15. Conclusion. For these reasons, therefore, I refuse the Claimant's application to amend the claim.

Employment Judge O'Rourke

Date: 12 November 2020