EMPLOYMENT TRIBUNALS

Claimant: **Mr W Barnett**

Respondent: **Euro Car Parts Limited**

Heard: **By CVP**

On: **30 September 2020**

Before: **Employment Judge Cookson (sitting alone)**

Appearances
For the claimant: In person
For the respondent: Mr Way (counsel)

Reasons having been given orally and a judgment having been sent to the parties on 12 October 2020 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:

Written Reasons

1. This was a preliminary hearing to determine whether, given the date when the claim form was presented and the dates of early conciliation, the claimant ("the claimant"), had brought his claims in time. In particular:

    a. whether the claimant's claims of discrimination under the Equality Act 2010 (EqA) were made within the time limit in section 123 or within such further period as the tribunal such other period as the employment tribunal thinks just and equitable; and

    b. whether the claimant's claim of unfair dismissal was made within the time limit in section 111 of the Employment Rights Act 1996, that is within three months (plus early conciliation extension) of the effective date of termination and if not, whether it reasonably practicable for the claim have been made to the Tribunal within the time limit. If it was not

reasonably practicable for the claim to be made to the Tribunal within the time limit, and if not whether it was made within a reasonable period.

2. In reaching my decision I took into account:
    a. the bundle of documents prepared by the respondent, which contains various documents sent to the claimant to the tribunal in connection with this claim and a document which is in essence a short witness statement,
    b. a short letter from the claimant dated 1 July 2020 sent to the tribunal;
    c. oral evidence provided by the claimant
    d. oral and written witness evidence from Mr Massey for the respondent;
    e. Brief oral submissions for the claimant and written and oral submissions from the respondent.

My findings of fact

3. I make my findings of fact on the basis of the material before me taking into the account the documents, and the conduct of those concerned before me. I have resolved any conflicts of evidence as arose on the balance of probabilities.

4. This is not a case in which many of the facts material to the decision are significantly disputed. The claimant was dismissed with effect from 22 July 2019 for reasons related to his capability. He appealed against that decision and an appeal hearing was held on 7 August 2019. He was notified of the outcome of the appeal on 22 August 2019.

5. The claimant should have contacted ACAS to initiate tribunal proceedings before 21 October 2019. He accepts that he did not do that. Early conciliation was not initiated until 24 January 2020. The claim form was submitted on 25 February 2020. The claimant accepts that his claim was not brought within the relevant statutory time limits.

6. The claimant gave straightforward and candid evidence about his reason for not bringing a claim earlier. At the time the claimant was dismissed for reasons related to his health the respondent had suggested to him that if he was well enough in the future and it had a vacancy it would be prepared to consider him for re-employment.

7. The time limit for bringing a claim had already passed when the claimant contacted the respondent about explosibility of reemployment in late October 2019.

8. Initial discussions between the claimant and the respondent seemed hopeful and at the end of October he was told there would be work from 4 November 2020. Mr Massey was willing to take the claimant back on as a casual driver with the hope that perhaps that could lead to more permanent employment in the future. I am satisfied that those discussions were entirely genuine. Unfortunately a recruitment freeze was initiated at the respondent at a national level shorty after that and it was not possible for the claimant to start in that

casual employment. The claimant thought he was starting work on 4 November 2019 and filled in the paperwork and even reported for work only for none ot be offered but did not find out about the freeze until he received a text message on 7 November 2019 . The recruitment hold was in place until December and then was extended to the beginning of January 2020.

9. When the national recruitment freeze was lifted in early January 2020 the local site did not have any casual work available. The claimant felt that he was treated in a discourteous way when he tried to find out what was going on. It seems to have been that which prompted him to act. He may be right that he was treated somewhat unfairly in January 2020 but that is not relevant to the issues I have to determine.

10. It was only then that the claimant turned his mind to bringing a claim. On the advice of friends he contacted ACAS on or around 13 January 2020 and following a period of early conciliation from 24 January to 24 February 2020 he submitted his tribunal claim on 25 February 2020.

11. The claimant does not suggest that there was any impediment to bringing his claim earlier such as ill-health, it was simply that his focus had been on engaging with the respondent in the hope that he could secure new casual employment with the company. He had not been aware of the time limits for bringing a claim and had simply not turned his mind to bringing a claim until he became unhappy about the failure of the local site to offer him work when the recruitment freeze was lifted.

12. Mr Massey admitted that the respondent faces no particular prejudice due to the delay in proceedings being brought. An HR officer who the claimant clearly had substantial contact with has since left the respondent employment, but the main decision-makers still employed by them.

The Law

Unfair dismissal

13. s 111 of the Employment Rights Act provides that the tribunal shall not consider complaint under this section unless it is presented to the tribunal before the end of the period of three months beginning with the effective date of termination or within such further period as the tribunal considers reasonable in the case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that three months.

14. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. ‘That imposes a duty upon him to show precisely why it was that he did not present his complaint’ — *Porter v Bandridge Ltd* 1978 ICR 943, CA.

15. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or

her favour. The tribunal must then go on to decide whether the claim was presented '*within such further period as the tribunal considers reasonable'*.

16. In *Palmer and anor v Southend-on-Sea Borough Council* 1984 ICR 372, CA, the Court of Appeal concluded that 'reasonably practicable' does not mean reasonable, but means something like 'reasonably feasible'. Lady Smith in *Asda Stores Ltd v Kauser* EAT0165/07 put it in the following way: '*the relevant test is not simply a matter of 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*'.

17. A claimant's complete ignorance of his or her right to claim unfair dismissal may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. The questions I must *ask myself where a claimant pleads ignorance as to his or her rights, are 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived*?' The correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them.

18. Lord Denning in *Walls Meat Company Limited -v- Khan* [1978] IRLR 499, set out the test which should be applied as follows, "*had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights or ignorance of the time limit is not just cause or excuse unless it appears that he or his advisors could not reasonably be expected to have been aware of them. If he, or his advisors could have been so expected, it was his or their fault and he must take the consequences"*.

19. Where the claimant is generally aware of his or her rights, ignorance of the time limit will rarely be acceptable as a reason for delay. This is because a claimant who is aware of his or her rights will generally be taken to have been put on inquiry as to the time limit. When a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right.

Discrimination claims

20. The most recent Court of Appeal guidance on how I should exercise my discretion in a discrimination case to determine what is "just and equitable" was given in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640. In that case, Leggatt LJ said as follows: -

"It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list

of factors specified in section 33(3) of the Limitation Act 1980, the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh) "

21. That means that when I consider how to exercise this broad discretion I must take a multi-factual approach, taking into account all the circumstances of the case in which no single factor is determinative in addition to the length and reason for the delay, the extent to which the weight of the evidence is likely to be affected by the delay, the merits, and balance of prejudice. Other factors which may be relevant include the promptness with which a claimant acted once he or she knew of factors giving rise to the course of action and the steps taken by the claimant to obtain the appropriate legal advice once the possibility of taking action is known.

22. I have also taken into account the guidance of the Court of Appeal in *Robertson -v- Bexley Community Centre* which reminds me that it is important to note that time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim on the amount of time on just and equitable grounds, there is no presumption that they should do so, unless they can justify their failure to exercise the discretion, quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise for discretion is the exception rather than the rule.

Conclusion

23. I am satisfied that it was reasonably practicable for the claimant to bring his complaint of unfair dismissal within the statutory time limit. He offered me no explanation for failing to act after his dismissal and the expiry of the three-month time limit. He has not suggested any impediment to discovering his rights nor has he suggested any difficulty in establishing what he should do when he eventually decided to turn his attention away from seeking further work with the respondent. He has not shown me that his ignorance of the time limits was reasonable. Further when the claimant learnt of employment rights in early January he should have acted promptly at this stage and he has not shown he acted with the reasonably urgency which he should have done when it should have been apparent he was already out of time to bring his claim. Even if I had found that it was not reasonably practicable to bring the claim in time, I would find that it was not brought in a reasonable period.

24. Turning then to the disability discrimination claim the approach I take is rather different. As set out above I must determine what is just and equitable. I must

take not account that the length and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, how the respondent has responded to requests for information and the promptness with which the claimant acted once he knew of facts giving rise to a cause of action and the steps he took to obtain appropriate advice once he knew the possibility of taking legal action. I have also taken into account that time limits are exercised strictly in employment and industrial cases and that when Tribunals consider their discretion to consider a claim on the amount of time on just and equitable grounds, there is no presumption that they should do so, unless they can justify their failure to exercise the discretion, indeed quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise for discretion is the exception rather than the rule.

25. I have some sympathy with the claimant and his desire to get more work with his old employer if he could, but quite simply that was a choice he made. He was not misled by his former employer either. The claimant should have acted before he even contacted the respondent about reemployment. The claimant could and should have acted when he was told about the recruitment freeze, and the claimant acted with no reasonable urgency even after his initial contact with ACAS. Although the respondent has not pointed to any particular prejudice it is not the case that I should extend time for the claimant simply because the respondent has not pointed to any particular prejudice. The burden is on the claimant to satisfy me that it would be just and equitable to extend time. This claim was brought substantially out of time. The claimant contacted ACAS nearly 3 months later than he should have done and offers me no compelling reason why he could not have done that earlier. The claimant faces the prejudice of not pursing his claim if I do not extend time but that is true in every case where a claim is submitted late and I remind myself that Parliament set a time limit which should apply in most cases in order to create certainty for employers. The claimant has not shown me that his is one of those exceptional cases where time should be extended.

26. Accordingly the tribunal has no jurisdiction to consider these claims.

Employment Judge Cookson

19 November 2020