



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121537/2018

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Held in Glasgow on 14 and 16 October 2019

Employment Judge R Gall

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Mr W MacLeod

Claimant

ARK Housing Association

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is as follows: –

1 The claim of unfair dismissal, although presented out of time, is permitted to
20 proceed, time being extended to enable that to occur. It was not reasonably
practicable for the claimant to present the claim within a period of 3 months
following upon his dismissal. The claim has been presented within a time
which it is considered to have been reasonable after expiry of the time for
presentation of the claim. This is by application of the principles of Section
25 111 (2) (b) of the Employment Rights Act 1996.

(2) The claim of discrimination, the protected characteristic being disability,
although presented out of time, is permitted to proceed, time being extended
to enable that to occur. It is just and equitable that time is so extended. This
decision was taken in terms of Section 123 (1) (b) of the Equality Act 2010.

30 **Rule 62**

E.T. Z4 (WR)

As stated at the hearing, in terms of Rule 62 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the hearing itself or by written request presented by any party within 14 days of the sending of the written record
5 of the decision. No request for written reasons was made at the hearing. The following sets out what was said, after adjournment, at conclusion of the hearing. It is provided for the convenience of parties.

REASONS

1. This case called for a Preliminary Hearing (“PH”) at Glasgow on 14 and 16
10 October 2019. Mr Allison appeared for the claimant. Mr Eadie appeared for the respondents. Evidence was led from the claimant and from his wife, Mrs Karen MacLeod. Evidence was also taken via video conference link from Dr Elaine Anderson, consultant psychiatrist. Mr Allison produced a chronology. Mr Eadie confirmed that the dates in the chronology were not challenged by
15 him. He also confirmed that he accepted that what was said to have happened on those dates in the chronology had happened. Given that Mr Allison’s firm had been instructed by the claimant on 6 September 2018 and that the claim was presented on 12 October 2018, Mr Eadie reserve the right to comment on the absence of evidence from the solicitor as to why that time had elapsed
20 without presentation of the claim. Mr Allison said he relied upon evidence which would be given by Mr and Mrs MacLeod on this point.
2. A joint bundle of productions was submitted. The respondents also submitted a bundle although no reference was made to documents within that bundle.
3. The PH had been set down to consider and determine whether the claimant
25 was disabled in terms of the Equality Act 2010 (“the 2010 Act”). In addition the PH was to consider whether time would be extended to enable the claim to proceed, it having been presented late. It was accepted by the claimant that his claims of unfair dismissal and of disability discrimination had been presented more than 3 months after the relevant date. The Tribunal was to
30 determine whether time would be extended on the basis that it was not reasonably practicable for the claim of unfair dismissal to be presented in time

and whether it had been presented within a reasonable time of the expiry of the period for presentation of the claim. It was also to determine whether it was just and equitable to extend time for presentation of the claim of disability discrimination.

- 5 4. At the outset of the PH I raised with Mr Eadie an email from him on behalf of the respondents sent on 19 May 2019. In terms of that email it was confirmed that the respondents accepted that the claimant possessed the protected characteristic of disability in terms of the 2010 Act at time of his dismissal. The respondents maintained their position that they did not know, and that there
10 was no reasonable basis on which they ought to have known, that the claimant was disabled at that time.
5. Mr Eadie accepted that, given this email, the question of disability was no longer an issue, that having been confirmed by him in the email.
6. The PH therefore considered whether the claimant was able to persuade the
15 Tribunal that it was not reasonably practicable for him to have presented the claim in time insofar as it comprised a claim of unfair dismissal and that he had presented within a reasonable time of expiry of the time limit. He sought to persuade the Tribunal that it was just and equitable to permit the claim of discrimination to proceed.
- 20 7. The evidence from Dr Anderson related principally to the claimant's health and treatment around the time of his dismissal and to knowledge of his medical history.
8. The relevant dates are as follows: –
 - (i) The claimant was suspended on 31 October 2017.
 - 25 (ii) The claimant was dismissed on 4 May 2018.
 - (iii) The appeal against dismissal was heard on 4 July 2018 and was unsuccessful.
 - (iv) The claimant was notified of the outcome of the appeal by letter from the respondents on 25 July 2018.

- (v) The time limit for presentation of a claim was 3 August 2018, subject to any extension of time applicable had there been an ACAS Early Conciliation Certificate (“ECC”).
 - (vi) The claimant consulted solicitors on 6 September 2018.
 - 5 (vii) Notification was given to ACAS in terms of the ECC procedure on 7 September 2018. The ECC was issued on 11 September 2018.
 - (viii) The claim was presented on 12 October 2018.
9. The mental impairment which is such that the claimant is disabled in terms of the 2010 Act is that of depression and anxiety. This is a condition by which he
10 has been affected over some years. It is ameliorated to a degree by use of drugs. It does however increase in its effect from time to time.
10. When the claimant was suspended at the end of October 2017 he struggled to understand and cope with that decision. He became very anxious and depressed. He was very concerned about what people on the island would
15 think if he was out during the day in that they would know that he was not at work. He could not function properly and relied on his wife to deal with correspondence or phone calls. He was not able to speak to his mother and has not spoken to her for around a year at time of the PH.
11. When the claimant was dismissed in May 2018 the impact of his anxiety and
20 depression became greater. He spent most of his time in the months thereafter in bed. He was unable to cope with letters or emails. His mental health had been better since commencement of his employment with the respondents in January 2015. It deteriorated in May 2018 so that it was worse than it had been at the end of October 2017 upon suspension of the claimant.
- 25 12. The claimant had the assistance of his union in connection with the disciplinary hearing and the appeal against dismissal. His wife however handled the communications with the union.
13. The claimant regarded and continues to regard his dismissal as being unwarranted and unfair. He had from the outset intended to proceed as far as

he could through internal appeals and then to proceed to an Employment Tribunal in the event of there being no success through the internal appeal route. He knew therefore of Employment Tribunals and of there being a right of recourse to the Employment Tribunal. He did not know however of there being any time limit for applications to an Employment Tribunal to be made. The union did not inform him of there being any such time limit.

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14. The impact upon the claimant of his appeal against dismissal being unsuccessful in July 2018 was a large one. He deteriorated after May 2018 upon dismissal occurring. He hit, however, rock bottom as he put it on his appeal being refused in July 2018. He was largely house and indeed bed-bound thereafter and could not deal with mail, phone calls or social contact. The outcome of the appeal was made known to the claimant by letter of 25 July 2018. I accepted the evidence of the claimant that he was devastated when he received that letter.
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15. The claimant attended Dr Anderson in July 2018. This was a routine appointment in that he had seen her a year prior to that when this appointment had been scheduled. Dr Anderson regarded the claimant as being mentally stable in July 2017. In July 2018 however when she saw the claimant, she noted that he was distressed. He was not managing to get out of bed. His wife had had to leave work to help to care for him. The claimant's father had passed away around June 2018. The claimant's mood was very low. His condition had deteriorated such that it was akin to his condition when Dr Anderson had first seen the claimant in 2008. Dr Anderson prescribed increased medication when she saw the claimant in July 2018.
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16. Dr Anderson prepared a report on the claimant. That report is dated 12 March 2019 and appeared at pages 59 to 61 of the bundle. In her view it was likely that the mental health of the claimant in July 2018 impacted negatively on his ability to bring a claim within a fixed timescale. Her view was that the claimant would struggle to handle either presenting a claim himself or instructing someone to present a claim. He was struggling to leave his house even to do shopping at that point.
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17. Dr Anderson reviewed the claimant's health at a consultation in the month of October 2018. She saw no evidence that he had improved between July and October. At the beginning of October the claimant was still restricting his movements so that he was in the house almost permanently. He was relying upon his wife substantially.
18. The increase in medication for the claimant in July 2018 had led, in the case of the increased antidepressant drugs, to the view of the claimant being that his cognitive powers were slowed down. Dr Anderson therefore reduced the dosage of that drug in October as the claimant felt that his mind was taking too long to engage, as he put it.
19. It was the view of Dr Anderson that between July and October 2018 the claimant would have struggled to have focused on an Employment Tribunal claim or any official documentation, requiring to deal with such matters through his wife. That was consistent with the evidence of the claimant and his wife. I accepted that evidence.
20. The outcome of the appeal led the claimant's wife to investigate the possibility of obtaining a solicitor. She did some research online. Ultimately she identified the claimant's current solicitors. In the lead up to contact with those solicitors on 6 September the claimant had been compiling extensive notes as and when he felt able to do that. It eventually reached the point where his wife had the relevant information and had the claimant's authority to speak to solicitors, the call being initiated by the claimant. The call was however essentially dealt with by the claimant's wife, with his authority. It was made when the relevant information had been compiled by the claimant. There was no evidence of delay in making the call once the claimant had been able to prepare the information.
21. By the time of contact with the solicitor on 6 September 2018 the claimant was already out of time, both for unfair dismissal and for discrimination.
22. On 12 September the claimant's solicitor wrote to him expressing a preliminary view on the claim subject to sight of documents. The legal aid application was submitted on 12 September 2018 with a letter being sent to

the claimant for his signature, this on 13 September 2018. A further discussion between the solicitor and the claimant took place on 17 September 2018. Scottish Legal Aid Board requested additional financial verification on 18 September 2018. The claimant's solicitor received from the claimant legal aid papers, this on 25 September 2018. On 5 October 2018 the solicitor perused the papers on a final basis and prepared the statement of claim. There was then a discussion between the solicitor and the claimant and his wife on 10 October 2018. Advice by way of representation under the legal aid scheme was granted on 12 October 2018 and the claim was presented online that day.

23. The claimant has been too ill to obtain employment since termination of his employment with the respondents. He has received Employment Support Allowance ("ESA") for the period since termination of his employment. The benefit started when he completed the forms by way of telephone conversation in August 2018 with the benefit then being backdated. The claimant's wife was present during that telephone application. He was unable to deal with the application for ESA, even to the extent of giving authority for his wife to deal with it, until the date in August. He dealt very briefly with the application before authorising his wife to deal with the detail of the application.

24. In July and August in particular, therefore, the claimant struggled with his health. He slept to a significant degree. He was on very strong medication. This was at the point where he later described to Dr Anderson the feeling that it took a long time for his brain to engage.

Unfair dismissal

25. In order to extend time to enable a late claim to proceed, the Employment Tribunal requires to be satisfied that it was not reasonably practicable for the claim to be lodged in time. Case law equates "reasonably practicable" to "reasonably feasible". Consideration also requires to be given to whether

there was any impediment preventing presentation of a claim. An impediment can be a physical one or a mental one.

26. I was no doubt from the evidence that the claimant's mental health issues, particularly around the time of dismissal and appeal, extending to the time of the outcome of the appeal being made known to him and immediately thereafter, were severe and debilitating. Although the appointment with Dr Anderson might have been advanced on one of view, when she saw him her evidence as to what she saw and how the claimant's mental health was in July 2018 compared to the year previously was clear and convincing. He had, unfortunately, gone backwards such that his own description and that of his wife as to what was happening in his life was borne out by Dr Anderson's assessment. It was akin to the depths reached in 2008 unfortunately. The claimant was house-bound and indeed bed-bound. He could not face seeing or interacting with others. His wife dealt with all household matters and business type of interactions. His wife therefore dealt with emails and correspondence. The claimant was nominally communicating but in fact was doing this through his wife. Dr Anderson increased the claimant's medication.

27. This is all relevant as a Tribunal must give particular consideration to the later stages of the 3 month period within which a claim requires to be presented. It was clear to me on the evidence that in the period immediately prior to 3 August 2018, the last date for presentation of a claim in time, subject to the ECC procedure, the claimant's mental health was not good at all.

28. On the evidence I heard and accepted, there was a very real mental health impediment to presentation of the claim in time. It was not reasonably practicable to present the claim in time.

29. It is relevant that I accepted the claimant's evidence that he always intended to proceed with a claim to an Employment Tribunal if his position at time of the disciplinary hearing was not upheld or if the appeal against dismissal was not upheld. Had he been able to therefore, I believe that he would have taken steps to instigate Tribunal proceedings.

30. I was also satisfied that the claimant was unaware of time limits applicable for presentation of an Employment Tribunal claim. Although the claimant had had union assistance with the disciplinary and appeal hearings, I accepted his evidence and that of his wife that the union had made it clear that they would not be assisting beyond the appeal stage and that no indication of any time limit had been given by the union. Again, given the claimant's determination to proceed further if the appeal went against him, I believe that he would have initiated Tribunal proceedings or attempted so to do had he been aware of the time limit for presentation of a claim. His illness and lack of knowledge of time limits impeded him from presenting the claim on time. His ignorance of time limits was further reinforced by the fact that he only appreciated that there was a time limit when the solicitors who he contacted on 6 September made that known to him. I was satisfied that his ignorance was reasonable in circumstances where he was not, in my view on the evidence as to his health, in a position to make enquiries as to proceeding with a claim.

31. The test which I have to apply is an objective one, whether it was not reasonably practicable to present the claim in time. It may well be true in this and another cases that the claim could have been lodged at an earlier stage. That however is not the test applicable. The evidence I heard led me readily to conclude that there was a serious mental health issue which impeded the claimant from presenting the claim in time. I was satisfied that his ignorance of time limits was real and was reasonable. I concluded therefore that it was not reasonably practicable for him to present the claim in time.

32. Mr Eadie submitted that the period between 6 September 2018 and 12 October 2018 in particular was such that the claim had not been presented within a reasonable time of expiry of the time limit.

33. Again the test I have to apply is an objective one, namely whether the claim was presented within a reasonable time of expiry of the time limit. Mr Eadie's submission was that the claimant ought to have taken different steps, perhaps reaching different arrangements with his chosen solicitors enabling the claim to be advanced at an earlier time after 6 September. Other than asking the claimant as to potential instruction of solicitors on a private basis without legal

aid, different other fee-paying arrangements were not explored with the claimant or his wife. It is not enough for Mr Eadie to raise the possibility of a different and quicker time-frame for presentation of the claim after 3 August and in particular after 6 September. If I am to refuse to extend time applying this leg of the test, I would require to be satisfied that the claim had not been presented within a reasonable time of expiry of the time limit.

34. I was given a candid and full explanation of what had happened both after 3 August and after 6 September.

35. In my assessment of this area I took account of the fact that the ECC resulted from notification to ACAS on 7 September 2018, the day after the solicitors were consulted. The ECC was issued on 11 September 2018. I took account of the fact that the claimant is based in Stornoway, the solicitors operating from Glasgow. Mrs MacLeod was able to photograph or scan papers and send them by post. There was therefore a degree of delay necessitated by postal communication, for example when legal aid forms were being sent to the claimant and returned by him.

36. My view was that things had moved forward between 6 September 2018 to the point where on 12 October 2018 the relevant ECC had been issued and legal aid cover was in place making it possible for the claim to be presented. That did not seem to me to be an unreasonable time. Whilst things might have moved potentially slightly quicker between 6 September and 12 October, the explanation given in the chronology as to what happened when, explained the steps which were being taken and the dates on which those steps were taken. Without legal aid cover in place, it was not advisable, for example, simply to present the claim on 11 September after the ECC was issued.

37. I also kept in mind that the reasonableness of the delay required to be assessed in the knowledge of the extent and effect of the mental health issues affecting the claimant at that time.

38. I was satisfied that the test had been met and that the claim had been presented within a reasonable time given the explanation tendered and evidence supporting that.

39. I was therefore persuaded that it was not reasonably practicable for the claim to have been presented within the time period largely due to the claimant's health in that time and his lack of awareness of any time limit applying. I was also satisfied that the claim had been presented within a reasonable time after the time for presentation of the claim expiring. The claim of unfair dismissal is therefore able to proceed.

Discrimination claim

40. The test in relation to extension of time for a claim alleging discrimination is whether it is just and equitable for that to happen. I am therefore able to take a broad account of the facts and circumstances applicable. It seems to me that the test in this regard is not as stringent as that applicable in relation to the claim for unfair dismissal.

41. For clarity however, I regard the claimant's illness as being of key importance in reaching the view that it is just and equitable to extend time to enable the claim of disability discrimination to proceed. The other facts and circumstances set out in the part of this Judgment dealing with the claim of unfair dismissal and possible extension of time also lead me to the conclusion that it is just and equitable for time to be extended to enable the claim of disability discrimination to proceed. For clarity, had I concluded that time would not be extended to enable the claim of unfair dismissal to proceed, I would have taken the view that it was just and equitable for the claim of disability discrimination to proceed by extension of time.

42. Having communicated this Judgment to parties, it was agreed that case management PH would be arranged to make the relevant arrangements for the hearing. That PH will take place by telephone on 28 November at 9.30, half an hour being set down. The Clerk to the Tribunals is requested to send hearing notices to parties with appropriate dial in information. Mr Eadie did not have his diary with him. If it transpires that he cannot take part on 28 November he will speak with Mr Allison and a fresh date will be agreed and proposed to the Tribunal.

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**R Gall
Employment Judge**

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**16 October 2019
Date of Judgment**

Date sent to parties

22 October 2019

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