



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr L Lawson

Costco Wholesale UK Ltd

OPEN PRELIMINARY HEARING

Heard at: London South Employment Tribunal

On: 2 February 2021

Before: EJ Webster

Appearances

For the Claimant:

In person

For the Respondent:

Ms Wedderspoon (Counsel)

RESERVED JUDGMENT

1. The claimant is disabled for the purposes of the Equality Act 2010.
2. The claimant's claims for unfair dismissal and disability discrimination are in time.
3. The respondent's application for the claimant's claim for disability discrimination is not upheld.

The hearing

4. The hearing took place by way of CVP. Both parties were able to fully participate. The claimant occasionally had difficulties with his internet connection but was always able to rejoin the hearing.
5. The claimant did not originally have access to a copy of the bundle but the hearing was adjourned and the respondent's solicitor helpfully liaised with the claimant to ensure he was able to download the bundle.

6. I heard from the claimant and his partner Ms Ombok in support of his claim and Mr E Green for the respondent. All provided written witness statements and were present at the hearing.
7. In addition to the bundle I was provided with a skeleton argument by the respondent which was also shared with the claimant. The law summarised by the respondent's representative was very helpful and I have replicated that below.
8. During the course of my questions to the claimant he clarified that his disability discrimination claim arises from the respondent's failure to contact him in the lead up to his dismissal and their subsequent decision to dismiss him without taking into account his ill health at the time.

The Issues

9. The hearing was listed to consider the following points:
 - (i) Whether the claimant's claims were in time and if not whether an extension ought to be allowed because it was not reasonably practicable for the claimant to bring the claim earlier (unfair dismissal claim) or because it was just and equitable to extend time (disability discrimination claim).
 - (ii) Whether the claimant was, at the relevant time, disabled within the meaning of s 6 of the Equality Act 2010 by reason of osteo arthritis.
 - (iii) Whether the claimant's claims ought to be struck out because he had failed to comply with the Tribunal's order to provide further and better particulars of his claim.

The Law

Disability

10. For the purposes of section 6 of the Equality Act 2010 (EqA) a person is said to have a disability if they meet the following definition:

"A person (P) has a disability if –

 - (a) P has a physical or mental impairment, and*
 - (b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities."*
11. The burden of proof lies with the claimant to prove that he is a disabled person in accordance with that definition.
12. The term "substantial" is defined at section 212 as "*more than minor or trivial*". Normal day to day activities are things people do on regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socializing (see D2 to D9 of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)).
13. Further clarity is provided at Schedule 1 which explains at paragraph 2:

- “(1) The effect of an impairment is long term if –*
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.
- (2) *If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”*

14. Likely should be interpreted as meaning “it could well happen” rather than it is more probable than not it will happen; see **SCA Packaging Limited v Boyle (2009) ICR 1056**. In the case of **Patel v Metropolitan Borough Council (2010) IRLR 280** the EAT stated that the issue of whether the effect of an impairment is long term may be determined retrospectively or prospectively. A claimant must meet the definition of disability as at the date of the alleged discrimination.

15. As to the effect of medical treatment, paragraph 5 provides: -

- (1) *An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day to day activities if- (a) measures are being taken to treat or correct it and (b) but for that it would be likely to have that effect.*
- (2) *Measures include in particular medical treatment...*

16. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government’s office for disability issues entitled “Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability” The guidance should not be taken too literally and used as a check list (see **Leonard v Southern Derbyshire Chamber of Commerce (2001) IRLR 19**).

17. Some guidance is given in paragraph B1 as to the meaning of “Substantial adverse effects” namely,

“The requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect.”.

Claim in time

18. S97 Employment Rights Act 1996

Effective date of termination.

(1) Subject to the following provisions of this section, in this Part “*the effective date of termination*” —

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

19. An unfair dismissal claim should be brought 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 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 (S111 ERA 1996). The reasonably practicable test can be defined as what is reasonably feasible (**Palmer and Saunders v Southend on Sea Borough Council (1984) IRLR 119**).
20. A discrimination claim must normally be submitted to an employment tribunal before the end of "the period of three months starting with the date of the act to which the complaint relates" (*section 123(1), EqA 2010*). Time in any discrimination case can be extended by such a period as the tribunal thinks just and equitable (*section 123(1)(b) and (2)(b)*).
21. **Robertson v Bexley Community Centre (2003 EWCA Civ 576)** held that *"time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise discretion. A tribunal can not hear a complaint unless the applicant convinces it that it is just and equitable to extend time."*
22. The Court of Appeal held in the case of **Adedeji v University Hospital Birmingham NHS Foundation Trust** held that the tribunal has a wide discretion under the Equality Act 2010 to consider whether to allow in a claim out of time. The Court of Appeal stated *"the best approach for tribunal in considering the exercise of the discretion under section 123 (1)(b) Equality Act 2010 is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular "the length of and the reasons for the delay. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."*
23. In the case of **Gisda Cyf v Barratt (2010) UKSC 41** held the effective date of termination for the purpose of unfair dismissal claims under the Employment Rights Act 1996 was the date on which the employee opened and read the letter summarily dismissing her or had a reasonable opportunity of doing so. In the case of **Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood (2018) UKSC 22** the Supreme Court held (the common law contractual position) that the notice of termination runs from the date it is read or from the date the claimant has a reasonable opportunity to read it.

Non-compliance

A claim may be struck out non-compliance of an order of the Tribunal pursuant to Schedule 1 of Rule 37 (1)(c) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. In making any of these orders the

tribunal takes account of the Presidential Guidance on Case management and the overriding objective, rule 2 of the rules; this means the Tribunal must deal with cases fairly and justly when interpreting and exercising its powers under the Rules. This includes (a) ensures that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay so far as compatible with proper consideration of the issues; and (e) saving expense.

Relevant factual conclusions

24. The claimant was employed as a Receiving Supervisor from 6 October 2008. The main dispute of fact for me to consider was the date on which his employment was terminated. The respondent asserts that the date of termination was 27 August 2018 and the claimant asserts that it was on 19 September 2018.
25. The claimant notified ACAS on 10 December 2018 and had the certificate issued on the same day. He submitted his ET1 form on 13 December 2018
26. It was not in dispute that the claimant was off sick from October 2017. This followed straight on from a disciplinary sanction that had been imposed on the claimant. This is relevant as it appears that the respondent and Mr Green believe that some or all of the claimant's absence and conduct thereafter were caused by this situation. I make no findings of fact in that regard as it will be for any subsequent tribunal to consider when assessing the fairness of the dismissal.
27. I also make the observation that whether it was reasonable for the respondent to correspond with the claimant at any of the various addresses is also not an issue I intend to comment upon unless it assists me in reaching a conclusion regarding his receipt of the dismissal letter.
28. From 2 October 2017 until 30 June 2018 the claimant's absence was covered seamlessly by sick certificates. All of them cited 'Left Shoulder Pain' or Left shoulder pain and reduced range of movement' as the reason for absence. It appears that the certificates were all hand delivered by Ms Ombok to the respondent and that there was no direct contact whatsoever between the claimant and anybody at the respondent during this period. I was shown no letters, emails or records of telephone calls to that effect and nobody provided me with evidence that either party had made any effort to stay in touch.
29. After 30 June 2018 the claimant did not provide another absence certificate for some time. No explanation has been provided by the claimant for the delay in sending this final fit note.
30. The claimant claimed that he did not receive any letters or other contact from the respondent during this period. The respondent asserts that it wrote to him

on several occasions and at several addresses and that the claimant saw one of the letters and/or avoided seeing the others.

31. They wrote to him on 6 July 2018 stating that if he failed to make contact with them his job was at risk. The letter was sent by Royal Mail Signed for and in the normal second class post to the Croindene address which was the address on the claimant's sick certificates. Both those letters were returned to the respondent.

32. Shortly after this however the claimant submitted another sickness absence certificate which covered him for the period 1 July to 31 July 2018. This also had the Croindene address on it.

33. The claimant asserted that he had lived at all of the addresses written to by the respondent, but for the following periods:

Elms Road – October 2017 – present day

Deans Walk – October 2015- October 2017

Croindene – 2012/13 (unsure) to October 2015

Violet Lane – 2010-2013

Pampisford Road – Prior to these dates, claimant is not sure of how long he lived there for.

34. The respondent wrote to the claimant again on 6 August 2018 stating that unless the claimant got in touch within 3 days they would dismiss him. They sent both those letters to Croindene address again despite the fact that the earlier 2 had been returned. Both those letters were also returned and the respondent did not hear from the claimant.

35. On 15 August 2018 the respondent wrote to the claimant again giving him another 3 days in which to respond. I accept Mr Green's unchallenged evidence that the letters were sent to:

(i) Croindene Court

(ii) Deans Walk

(iii) Pampisford Road

36. The letter to the Pampisford Road address was returned, the letter to Deans Walk was signed for by someone listed as Lawson and it is unclear what happened to the Croindene letter as the tracking information was inconclusive.

37. Subsequently the respondent sent the claimant the letter of dismissal on 20 August 2018. That was sent to the same three addresses. The letters to the Croindene address and the Deans Walk address were returned after they exceeded the holding period at the local post office. The Pampisford Road letter was returned on the basis that the claimant no longer lived at that address.

38. The respondent however continued to treat the claimant's employment as terminated as of 27 August 2018 and assert that the claimant has deliberately avoided opening the letters.
39. I conclude that the claimant never received any letters at the Croindene Court address. I have only been provided with evidence that the claimant did not receive those letters as every single one was returned. Whilst I accept that the address was the one on the claimant's fit notes, it is also clear that every letter sent to that address notifying the claimant that his employment was at risk or had been terminated was returned unopened to the respondent. There is no evidence to suggest that the claimant was avoiding these letters or had any contact with the Croindene address after he moved in 2017.
40. I also accept that he did not receive any of the letters sent to the Deans Walk address for the same reason. All letters sent to that address were also returned unopened. I have no reason to believe that the claimant had any contact with that address or was deliberately avoiding post at that address.
41. Turning to the Pampisford address. Mr Green asserts that Ms Ombok told his colleague Kevin Ager, that the claimant had been living at the Pampisford address when she went in on 19 September to deliver another sick certificate. Ms Ombok denies that. Given that there is no evidence to suggest that the claimant has lived at the Pampisford address since before approximately 2010, I find, on balance, that this is very unlikely that Ms Ombok made any such comment. Had there been a concerted effort, as asserted by the respondent, by the claimant to avoid correspondence to avoid being dismissed, then it is very unlikely that his partner would have asserted that he was living at an address to which correspondence had been sent.
42. The only evidence that the respondent has provided me with that suggests that the claimant may have received a letter warning him that his employment was at risk is the 15 August 2018 letter to the Deans Walk address. That was signed for with the name 'Lawson'. The claimant asserts that it is not his signature and that he never received the letter. Whilst the signature is unexplained, I find on balance that it is extremely unlikely that the claimant received this letter. The second letter sent to that address was returned unopened.
43. I have heard no convincing evidence that the claimant was trying to avoid contact with the respondent. He has submitted a claim within 3 months of the day that he thinks he was dismissed. The respondent's argument seems to credit the claimant with a pretty devious knowledge of the tribunal system to suggest that he deliberately did not open letters in order to buy himself more time to submit a claim in the ET. No other motive has been suggested for why he would put off opening a dismissal letter.
44. He found out that he was dismissed because he asked Ms Ombok to take in a fit note – had he been trying to avoid the situation or finding out about his dismissal presumably he would not have asked her to go in at all and continued to deny all knowledge of his dismissal until the point at which he wanted to return to work.

45. I therefore conclude that whilst a strange anomaly, the presence of the signature of Lawson does not necessarily mean that the claimant received that letter and subsequently avoided all further correspondence from the respondent. There is simply not enough evidence to substantiate such an elaborate ploy. On balance I find that the evidence of the subsequently returned letter and the events that follow mean that it is more plausible that the claimant no longer lived at those addresses and did not receive the correspondence.
46. I therefore conclude that the claimant never received any of the respondent's correspondence sent on 6 August, 16 August or 20 August 2018. I conclude that the claimant only found out that he had been dismissed on 19 September when Ms Ombok informed him of what she had been told by Mr Ager.
47. Why neither party sought to try and make contact with the other by alternative means is a puzzle that will have to be considered by the next tribunal.
48. With regard to disability. I need to assess the claimant's status at the relevant time which, from the clarification of the claimant's claims at today's hearing, mean the period of August 2018 and shortly beforehand.
49. The claimant provided a Statement of Case (pgs 29i – 29k) which he also asked me to take as his witness statement for today's hearing. Attached to that were various medical records.
50. In response to various questions from me, the claimant asserted that, at the relevant time, he had serious pain on his left side that meant he was unable to get dressed, bathe/wash himself, carry shopping and that he was frequently in pain in a way that could affect his ability to sleep. As I stated at the hearing, the claimant's ill health as caused by sepsis have not formed part of my decision making as it is not the impairment relied upon by the claimant for his disability claim.
51. There are various aspects of the medical records that support his assertion that his condition had the above impacts:
- (i) Letter dated 30 June 2017 from Mr Jahangiri (pg 29(o)) which states: "... there was evidence of muscle wasting especially in the supraspinatus area. He struggles to move his arm above shoulder height. He tells me that the problem has been present for almost 6 years." The treatment provided was by way of a steroid injection.
 - (ii) GP notes there is consistent reference from 2016 onwards (when the notes I have start) to shoulder pain, reduced movement and subtle upper arm muscle wasting along with relatively regular references to there being restriction in the claimant's left shoulder movement. There is some reference to it causing insomnia. The notes show that throughout the period from 2016 – October 2018, the claimant is referred to and received treatment from various muscular skeletal specialists and physiotherapists and then receives treatment in the form of pain killers,

physio and injections (presumably steroid). There is also reference to a diagnosis of Osteoarthritis NOS of acromioclavicular joint (26 July 2016) and inflammatory arthritis (15 March 2017).

52. The respondent pointed to two aspects of the notes that undermined any suggestion of the claimant having an impairment that had a substantial impact on his ability to carry out day to day activities. Firstly that the fit notes he provided to the respondent just say that he has shoulder pain; they do not state that he has osteo-arthritis. Secondly that his GP notes show that he told his GP that he drove a forklift truck and this was why he was provided with a fit note. Suggesting that he would be able to do the remainder of his role which was largely sedentary and paperwork based. Whilst these points may go to the respondent's knowledge at the relevant time and/or the reasonableness of the claimant's sickness absence, they do not detract from the medical evidence and the claimant's evidence regarding the impact his osteoarthritis and left sided pain had.
53. I conclude that at the relevant time the claimant was suffering from osteoarthritis that prevented his left arm/shoulder from having a full range of movement and that this would have been even worse had he not been receiving treatment such as physiotherapy and steroid treatment.
54. I conclude that this evidence supports the claimant's statement, and accept his evidence to me that he did have difficulties dressing (in particular putting on socks), washing his back, carrying the shopping and that he experienced pain that sometimes interrupted his sleep.

Conclusions

Time point

55. I conclude that the claimant's unfair dismissal claim was submitted in time as I conclude that his date of termination was 19 September 2018 when he was first told of his dismissal. His ET1 was therefore submitted within 3 months of the date of termination.
56. I do not accept the respondent's argument that he either expressly knew or had a reasonable opportunity to find out that his employment had been terminated before that date.
57. The cases of Brown v Southall & Knight [1980] IRLR 130, McMaster v Manchester Airport plc UKEAT/49/97 and Gisda Cyf v Barratt [2010] IRLR 1073) establish that where there is no evidence that an employee has deliberately chosen not to open a letter dismissing him, the EDT is the date on which the employee learns of their dismissal or has a reasonable opportunity of learning of it. In Gisda v Barratt, the Supreme Court confirmed that the EDT was when the employee actually read the letter informing her of her summary dismissal. It was not the date on which the letter was written, posted or delivered. "Ordinary contractual principles" have no place when determining the EDT. The protection of employees' rights provides the "overarching backdrop" to the proper construction of section 97(1) ERA 1996.

58. I do not accept that the claimant in this case deliberately failed to open a letter from the respondent. I find that he was not aware of those letters as none of them were sent to the address at which he was residing. The evidence that the vast majority of letters whether they were sent by Signed for Delivery or by second class post were returned to the respondent confirms this. The plausibility of the respondent's argument is further undermined in circumstances when the claimant's partner went into the respondent's premises only a month later in an attempt to submit a further sick note. Had the claimant been attempting to avoid contact with the respondent to avoid finding out about his dismissal, presumably he would not have asked her to undertake this task. The gap in her attending was plausibly explained by her absence abroad. I make no findings as to the reasonableness of the claimant's behaviour here as this will need to be determined by the subsequent tribunal – but in terms of assessing whether the claimant was avoiding discovering his dismissal, her attendance on 19 September 2019 coupled with the fact that the vast majority of the letters to the various addresses being returned undermines such an argument.

59. As part of the hearing, the claimant has clarified that his disability discrimination claim is based primarily on his dismissal and the failure to contact him prior to his dismissal. He states that the failure to contact him in the lead up to his dismissal and the decision to dismiss him without taking into account his health, amounts to discrimination. Any decisions not to contact the claimant in an alternative way predate 19 September and therefore may be technically out of time as the time starts running from the date of the discriminatory act or omission. However given that the claimant did not find out about those decisions until 19 September, I conclude that it is just and equitable to extend time to allow the disability discrimination claim in out of time as he has brought the claim within three months of the date he found out about his dismissal.

Disability

60. The claimant has been diagnosed with osteoarthritis. This condition affects the movement of his left shoulder and arm. I have found that the claimant has reduced movement and pain and that this affects his ability to get dressed, bathe, carry the shopping and sometimes to sleep. Those are all day-to-day activities. Whilst the respondent made submissions that it may not have affected his ability to do his job which can also be considered a day-to-day activity, I remind myself that I must concentrate on what he can do as opposed to what he cannot do. Further, the respondent had not requested an OH referral at any time and so there is no evidence for me use to base a conclusion that the claimant was able to carry out his job.

61. I find that the impact of the impairment on the claimant's ability to do those day-to-day activities is more than minimal at the relevant time and accept the claimant and Ms Ombok's evidence that she had to assist him with those tasks on a daily basis. From the notes I also conclude that this was and is a long term impairment as it had lasted more than a year by the relevant time.

62. I therefore conclude that the claimant is disabled for the purposes of the Equality Act 2010.

Strike Out application

63. The respondent's application for a strike out was on the basis that the claimant had failed to particularise the basis for his disability discrimination claim following EJ Andrews' orders dated 21 October 2020. EJ Andrews ordered, at paragraph 10 of her Orders that the claimant was to set out Further particulars on or before 18 November. It stated that he had to set out the basis for any section 13 claim and any section 15 claim with explanatory notes.

64. The claimant instead submitted a Statement of Case dated 17 November 2020. The statement of case did not specify the discrimination alleged in the format requested by EJ Andrews. The Statement instead addresses some aspects of the impact that the impairment has and the narrative behind that. The last two substantive paragraphs say as follows:

"The Costco wholesale employee Agreement United Kingdom 2016 from section 14.0 to 14.10 states Costco's intentions on how to address such issues. I am highly disappointed in Costco wholesale UK for the way they have handled this matter amongst others.

At no point did Costco try to find out the extent of my disability. All the letters written to me can confirm their intentions all along.

Their failure to make a reasonable adjustment, discrimination due to my disability, the harassment and victimisation, are things that stand out in their actions to date."

65. When I asked him at the hearing he confirmed that his disability discrimination claim was:

"Costco was aware that I wasn't well – they didn't contact me, nobody got in touch with me, nobody communicated and I had the handbook – they said what they would do to support me – they didn't do anything of that nature and so they didn't want me to receive the letters or correspondence because they didn't phone or email me. So would have been more compassionate with my health if at any time they offered me anything and I refused that would have been a different situation. They did not take the disability into account when they decided to dismiss." **[Note: these are not verbatim notes but my notes from the hearing taken at speed].**

66. This chimes with what was written in the two paragraphs in the statement of case which was submitted on 17 November 2020. The claimant is unrepresented and explained that due to the pandemic it has been difficult to obtain legal advice.

67. When an order has been breached, a tribunal can impose a sanction. However, when considering what sanction to apply I must consider the overriding

objective and all the circumstances of the case. Relevant factors I should consider are:

- the magnitude of default;
- what disruption, unfairness or prejudice has been caused; and
- whether a fair hearing is still possible.

68. I conclude that the claimant has attempted to comply with the order by providing the information that he did in the Statement of case. His answers to me during the hearing demonstrate that he is not seeking to rely on anything else that is not set out in the two paragraphs. Whilst he has not inserted them into the technical pleadings format requested by EJ Andrews I consider that he has complied to the extent necessary for the respondent to be able to understand the basis for his claims. Taking into account the fact that the claimant is a litigant in person and the fact that any unfairness on the respondent can be corrected through orders allowing them to put in an amended response, to strike out the claimant's claim would be an unnecessarily draconian measure and not in accordance with the overriding objective.

69. I therefore refuse the respondent's application for the claimant's disability discrimination claim to be struck out.

70. Orders reflecting my Judgment will be sent out separately.

Employment Judge Webster

Date: 8 February 2021