



EMPLOYMENT TRIBUNALS

Claimant: Mr D Cavanaugh

Respondent: Folsana Pressed Sections Limited

HELD AT: Manchester

ON: 9 November 2020
15 December 2020
(in Chambers)

BEFORE: Employment Judge Ainscough

REPRESENTATION:

Claimant: Mr Frew, Counsel

Respondent: Dr E Morgan, Counsel

JUDGMENT

The claims of unfair dismissal, wrongful dismissal, unlawful deduction from wages and detriment because of a protected disclosure are out of time and are dismissed.

REASONS

Introduction

1. This was a preliminary hearing to determine whether the claimant's claims were brought within the relevant time limits, following the respondent's application made on 3 March 2020.
2. On 18 January 2020 the claimant wrote to the Tribunal seeking permission to submit a claim on the grounds that it had not been reasonably practicable to do so on or before 14 April 2019. In support of the application, the claimant gave details of periods of ill health and treatment.
3. The claimant worked as a company director for the respondent until 21 November 2018. The claimant commenced early conciliation on 15 February 2019 and was in receipt of the certificate on 15 March 2019. The claimant submitted his Employment Tribunal application for unfair dismissal, unlawful deduction from

wages, wrongful dismissal, detriment as a result of protected disclosure, failure to provide an employment contract and personal injury on 29 January 2020.

4. On 3 March 2020 the respondent submitted a response to the claims and applied to convert the final hearing to a preliminary hearing in public to consider whether the claims were time barred.

Evidence

5. **The parties submitted their own bundles of documents. The claimant's consisted of 163 pages and the respondent's consisted of 218 pages.** I heard evidence from the claimant and his wife.

The Law

6. The claim for unfair dismissal is brought as a result of the right provided by section 94 of the Employment Rights Act 1996, that an employee has a right not to be unfairly dismissed by his employer.

7. Section 111 of the Employment Rights Act 1996 provides that the Tribunal should not consider a complaint of unfair dismissal 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.”

8. A complaint of unlawful deduction from wages is made via section 13 of the Employment Rights Act 1996 which provides for a right not to suffer unauthorised deductions. Section 23 of the Employment Rights Act 1996 provides that in such cases an Employment Tribunal will not consider a complaint unless it is presented before the end of the period of three months beginning with:

- “(a) In the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made...
 - (iii) where a complaint is brought under this section in respect of (a) a series of deductions or payments...the references in subsection (2) of the deduction or payment are to the last deduction or payment in the series.”

9. Subsection (4) provides that where a Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of three months, the Tribunal may consider the claim if it is presented in such further period as the Tribunal considers reasonable.

10. The claimant also brings a complaint of detriment because of a protected disclosure contrary to the right not to be subject to such a detriment because of a protected disclosure prohibited by section 47B of the Employment Rights Act 1996.

11. Section 48 provides that an Employment Tribunal shall not consider such a complaint unless:

“(a) it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where the act or failure is part of a series of similar acts or failures, the last of them; 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 the period of three months.”

12. Section 207B of the Employment Rights Act 1996 provides the period, starting with the day after early conciliation began and ending with the day on which a claimant receives the early conciliation certificate, will not be counted when working out the time limit for submitting a claim.

13. In **Schultz v Esso Petroleum Co Ltd (1999) IRLR 488** the Court of Appeal determined that a claimant should not be penalised for not lodging a claim whilst pursuing an internal appeal during the earlier part of the primary time limit, despite becoming too ill to lodge the claim in the latter part of the primary time limit. A claimant was entitled to focus his/her efforts on internal resolution before resorting to litigation.

14. In **University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12** the Employment Appeals Tribunal determined that a Tribunal must assess whether a claim was submitted within a reasonable further time period after the expiry of the original time limit. The test is different to the standard required for compliance with the original time limit which demands the Tribunal assess what was reasonably practicable.

15. In **Locke v Tabfine Ltd t/a Hands Music Centre EAT 0517/10** the Employment Appeals Tribunal reiterated that the Tribunal must focus on what was reasonable for the claimant to do in the circumstances, once the primary time limit had expired.

The Issues

16. The issues for the Tribunal to determine are as follows:

- (1) Were the claims brought within three months of the acts complained of?
- (2) If not, was it reasonably practicable for the claimant to bring the claims within the three month time limit?
- (3) If not, did the claimant bring his claims within such further period as the Tribunal considers reasonable?

Relevant Findings of Fact

Claimant's employment

17. The claimant was employed by the respondent company from **31** January 1987 until 21 November 2018 when he was dismissed for gross misconduct.

18. On 24 November 2018 the claimant appealed against dismissal. The claimant attended an appeal hearing on 6 December 2018. The claimant was informed of the appeal outcome, which was unsuccessful, on 17 December 2018.

Medical records

19. On 24 September 2018 the claimant was diagnosed by his GP as suffering from stress at work following his suspension from work on 17 September 2018.

20. On 5 October 2018 the claimant was prescribed antidepressants which were changed on 19 October 2018 because the claimant was suffering from severe tiredness. By 16 November 2018 the claimant's dosage had been doubled.

21. On 14 December 2018 the claimant's GP recorded that the claimant was doing well, had a new job and maintained his medication.

22. On 29 October 2018 the claimant started the first of five courses of psychological therapy.

23. On 9 January 2019 the claimant **commenced** his second course of psychological therapy.

24. On 31 January 2019 the claimant's GP recorded that the claimant was struggling with his new job and increased the dosage of his antidepressants. It is noted that the claimant was awaiting counselling.

25. On 12 February 2019 the GP recorded that the claimant had a new job but had stopped his medication because he felt dizzy. The GP prescribed different medication. By 21 February 2019 the GP recorded that the claimant was feeling a little better but had been tearful at work and was working his notice. The medication was maintained.

26. On 26 February 2019 the claimant **was referred for** his third course of psychological therapy.

27. On 14 March 2019 the GP recorded that the claimant was doing better and was starting a new job. The GP also recorded that the claimant was going sailing in the Lake District and maintained his medication. On 4 April 2018 the GP noted that the claimant had started his new role but that it was not what he thought it would be. The claimant was still awaiting therapy and his medication was maintained. The claimant had a telephone consultation on 29 May 2019 in which he reported that he wasn't good, but remained at work.

28. On 14 May 2019 the claimant **attended the third** course of psychological therapy.

29. On 3 June 2019 the claimant's GP changed the diagnosis to anxiousness and recorded that things at work were getting worse and the claimant had again stopped his medication. By this date the claimant had received two sessions of counselling and the GP re-prescribed the medication.

30. On 24 June 2019 the GP recorded that the claimant was still working and was going on a cruise. The claimant's medication was maintained.

31. The claimant completed his psychological therapy on 13 August 2019.

32. On 22 August 2019 the GP recorded that the claimant was feeling better but had doubled the medication himself. The GP recorded that the claimant had left his job and was trying to set up his own business. The GP recorded that it was the best the claimant had been for some time.

Subsequent employment

33. On 6 December 2018 the claimant was offered employment with a component firm. The claimant started his new employment on 2 January 2019 as Assistant General Manager.

34. On 13 February 2019 the claimant resigned from the component company.

35. The claimant had secured a new role in a signage firm on 5 February 2019 and commenced this role on 18 March 2019.

36. On 26 June 2019 the claimant resigned from his role with the signage company.

37. On 2 August 2019 the claimant set up a property maintenance company.

Legal Proceedings

38. On 12 December 2018 the claimant met with a solicitor for an initial consultation. On 15 February 2019 the solicitor informed the claimant that he had commenced early conciliation on the claimant's behalf. On the same day, ACAS acknowledged receipt of the early conciliation process.

39. On 15 March 2019 ACAS provided the claimant with an early conciliation certificate.

40. On 10 May 2019 the claimant's wife lodged a claim against the respondent at the Employment Tribunal. From this date up to the claimant's wife's Employment Tribunal hearing in October 2019, emails were sent from the claimant's email account to the respondent's solicitors making representations on behalf of the claimant's wife.

41. On 25 September 2019 the claimant provided a signed witness statement in support of his wife's claim.

42. On 9 October 2019 the claimant attended at his wife's Employment Tribunal hearing and gave evidence on her behalf.

43. On 11 December 2019 the respondent amended the company Articles of Association, which meant the claimant was no longer entitled to payment of a dividend.

44. On 18 January 2020 the claimant wrote to the Tribunal seeking permission to submit his claim form.

45. On 29 January 2020 the claimant submitted his claim form.

Submissions

Claimant's Submission

46. The claimant submits that this is a fact sensitive decision for the Tribunal. The Tribunal was asked to note that the witnesses were subject to heavy cross examination, and both witnesses were accused of lying and despite threats to the claimant's wife's profession, she has maintained her story.

47. It is submitted that the claimant relies upon his illness as the reason for his failure to submit the Tribunal claim. The claimant relies on the case of **Schultz v Esso Petroleum Company Limited [1999] IRLR 488** in which he says the Court of Appeal determined that the reasonably practicable test amounted to what could be done, not whether it was reasonable not to do what could be done.

48. It is submitted that the claimant was a highly functioning individual until he was suspended and ultimately dismissed from his employment. The claimant contends that whilst he was able to obtain legal advice and new jobs - once in employment he was unable to cope.

49. The claimant submits that the Tribunal should have regard to his state of mind. The claimant submits that his evidence should be accepted that he was only fit enough to draft a complicated claim when he did. It is the claimant's case that prior to this date, he was suicidal and his fragile health is borne out by the fact that since he has submitted the claim, his health has declined.

Respondent's Submissions

50. The respondent agreed that this was a fact-finding role for the Tribunal. The respondent submits that the claimant is not as ill as he claims. It is the respondent's case that the claimant was capable of submitting an appeal and attending the appeal hearing, that the claimant had knowledge of Employment Tribunals and knew about time limits.

51. It is the respondent's case that the claimant's participation in his appeal is fatal to the reasonably practicable test. The respondent submits that the content of the claimant's appeal was that which ended up in his claim and therefore the claimant was capable of submitting the claim on time.

52. The respondent submits that there is evidence within the bundle to show that the claimant was in fact representing his wife during her litigation. The respondent submits the claimant was capable of speaking to a solicitor, gaining new employment, travelling and assisting his wife. The respondent contends that neither the claimant nor his wife were honest and credible witnesses and that there is social media evidence which contradicts the claimant's claims of ill health. It is the respondent's case that if the claimant was able to participate in his wife's claim, he was capable of lodging his own claim sooner than he did, particularly between 25 September to 9 October 2019.

Discussion and Conclusions

Time limit

53. The claimant's employment ended on 21 November 2018. The primary time limit therefore expired on 20 February 2019. However, that time limit was extended as a result of the early conciliation period in accordance with section 207B of the Employment Rights Act 1996.

54. It was necessary for a claimant to enter into ACAS early conciliation in order to bring a claim. The claimant started early conciliation on 15 February 2019.

55. An early conciliation certificate was issued by ACAS on 15 March 2019. In accordance with section 207B of the Employment Rights Act 1996, the time limit for lodging the claim was extended to 15 April 2019. Therefore, by 29 January 2020, all claims were out of time by approximately nine months.

Reasonably practicable

56. The burden of proof is upon the claimant to establish that it was not reasonably practicable for him to submit his claim within the extended time limit. It is clear from the GP records that the claimant's health deteriorated between September 2018 until August 2019 after which time the claimant's condition stabilised.

57. Whilst the claimant was able to submit his appeal and take part in the appeal hearing, by the time he was aware of the appeal hearing outcome, the dosage of his medication had trebled.

58. The claimant did gain employment but resigned within six weeks as he was unable to cope. The claimant's second period of employment lasted approximately three months. I accept the claimant's evidence that during this period he was struggling to cope.

59. I also accept the claimant's wife's evidence that during this period she had real concerns about the claimant's health. The claimant's wife was concerned that should she raise the issue of lodging his own Employment Tribunal claim and the effort that would be required to do that, it would have a serious impact on his failing health. There was no question that the claimant and his wife knew about time limits for lodging a claim, and in fact the claimant's wife was able to lodge her own claim in May 2019.

60. I conclude that it was not reasonably practicable for the claimant to lodge his Employment Tribunal claim within the extended period. The claimant may well have been able to deal with his appeal after his dismissal but clearly, the outcome of the appeal had an impact upon his mental health. Early conciliation was started on his behalf by a lawyer. The claimant was able to obtain lower paid employment but had difficulty maintaining that employment which led to the starting of his own business in August 2019 with which he could cope.

Reasonable further period

61. By August 2019 the claimant's health was improving. The claimant admitted in evidence, as did his wife, that he did have knowledge of his wife's claim, was named as the representative and would have had some input into the emails that

were being sent on her behalf. The claimant was able to set up a business and drive over 100 miles to the Lake District and perform jobs. The claimant was then able to market his work by taking pictures of his work and post on social media.

62. By August 2019 an application to strike out the respondent's response in his wife's claim was made, allegedly in his name. The claimant admitted that he would have had knowledge and participation in these proceedings. The claimant was capable of signing a witness statement and attend at the Employment Tribunal in October 2019 to undergo cross examination of his evidence.

63. The GP records reveal a deterioration in the claimant's health in **February 2020**. It would however, have been reasonable for the claimant to lodge his claim between August 2019 – January 2020 before the subsequent decline in his health.

64. All of the claims submitted by the claimant are out of time and are dismissed.

Employment Judge Ainscough

Date: 11 January 2021

REASONS SENT TO THE PARTIES ON

14 January 2021

FOR THE TRIBUNAL OFFICE

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