



EMPLOYMENT TRIBUNALS

Claimant: Mr J Nolan

Respondent: Wastetcare Limited

Heard at: Liverpool (by CVP)

On: 16 April 2021

Before: Employment Judge Aspinall
(sitting alone)

REPRESENTATION:

Claimant: Mr L Welsh, Employment Law Consultant

Respondent: Ms K Swann, Solicitor

REASONS

Background

1. By a claim form dated 10 August 2019 the claimant brought claims for unfair dismissal, outstanding holiday pay and bonus payment and disability discrimination. He had worked for the respondent since 1 February 2010 but on 18 August 2017 there had been an unpleasant incident between him and his manager in which his manager told him that he would not be considered for a position he had applied for on the basis that he had applied for it too late, and he alleges his manager swore at him. The manager then cancelled shifts that the claimant had been due to work. The claimant went off sick and lodged a grievance. He complained that the respondent delayed unduly and failed to reasonably adjust the processes for the hearing of his grievance appeal.

2. The respondent defended the claim.

3. The matter came to a case management hearing before Employment Judge Jones in Leeds on 15 October 2019. The case was then transferred to Manchester. The claimant made an application to amend his claim to include additional allegations of discrimination arising out of disability under section 15 Equality Act

2010 and harassment under section 26 Equality Act 2010 in relation to the same events and on the same dates as his existing complaints of discrimination under section 21 Equality Act 2010. In effect, he wanted to add in other section numbers for the same factual allegations.

4. The respondent opposed that application and raised some jurisdictional points on time in its response to the application.

5. The matter was listed for an open preliminary hearing to determine the time and amendment points, initially on 10 December 2020. That hearing was postponed and relisted for 14 April 2021, which hearing itself was postponed and the matter comes before me today, so I should say there has already been considerable delay in this case.

Hearing and Evidence

6. The respondent had prepared a bundle of 99 pages for today's hearing, which included a most helpful skeleton argument. The claimant had had sight of the skeleton argument since shortly before the December hearing and has had the bundle in good time for today's hearing. I am obliged to Mr Welsh for confirming that he had all of those documents and had had time to prepare for today's hearing and was expecting to deal with the out of time point.

7. At the outset of the hearing we agreed to deal with the time issue first as it was a jurisdictional point and then if and when jurisdiction was established to consider the amendment application. Although this was the claimant's application to amend and a time point had arisen in opposition to that application, it was agreed that the sensible way to proceed today was for the respondent to go first in putting its points on time and for Mr Welsh to respond to them.

8. Mr Welsh said at the outset of the hearing that he did not intend to call the claimant to give evidence. This surprised me somewhat given that I might be asked to extend my discretion to extend time. This position was revised during the hearing, in particular when I outlined the provisions contained in section 140B of the Equality Act 2010 and mirrored in section 207B of the Employment Rights Act 1996, as to what was the *matter in respect of which the proceedings are brought* in relation to each of the three early conciliation certificates in this case. The claimant then chose to give evidence.

9. Ms Swann confirmed that she had prepared to cross examine the claimant and did not oppose the claimant being called to give evidence but expressed concern that the Judge having indicated the issue on which evidence was needed. I considered Ms Swann's concern in accordance with the overriding objective and I balanced the prejudice to the parties. I found that the balance of prejudice lay with the claimant, who risked all of his claims being dismissed today. He was here before me, she had expected him to be called and had prepared to cross examine him. The respondent had made an early indication that he would not be called and I found there was no prejudice to the respondent in the claimant changing its mind. I therefore heard evidence from Mr Nolan.

10. Mr Nolan gave his evidence in a straightforward way. He made the frank admission that everything he complained about flowed from the conflict between him and Mr Campbell in August 2017.

Findings of Fact

11. The claimant worked for the respondent from 1 February 2010 until his resignation on 28 March 2019. He had difficulties with his manager about the claimant's union membership and about deductions from bonuses and annual leave that was due to him. There was conflict between them. Then, in August 2017 or thereabouts the claimant applied for a new role within the respondent organisation. On or around 18 August 2017 there was an incident in which the claimant subsequently alleged in his claim form that the manager, Mr Campbell, had told him he would not be considered for the new role and swore at him. The claimant alleged that Mr Campbell subsequently cancelled shifts that the claimant had been due to work. The claimant was distressed by this and went off sick, never to return to work.

12. The claimant contacted his legal representative Mr Welsh and started to take legal advice. He wanted the conflict to be resolved so that he could return to work. He brought a grievance, which he wrote himself with help from Mr Welsh. The grievance was lodged at the end of August 2017.

13. On 15 March 2018 the claimant contacted ACAS and entered early conciliation.

14. On 9 April 2018 the claimant had his grievance hearing. On 15 April 2018 he achieved certificate number R225273/18/40, that is EC1 in this case.

15. On 20 June 2018 the claimant's representative contacted ACAS on his behalf. On 25 June 2018 the claimant was informed that his grievance had not been successful. He remained off sick and on 11 July 2018 he submitted an appeal against the grievance outcome. The second ACAS certificate, EC2 was issued on 20 July 2018 numbered R274791/18/93. The claimant continued to be represented by Mr Welsh.

16. On 14 December 2018 the claimant's grievance appeal was heard.

17. I should say at this point that prior to the grievance appeal hearing the claimant had twice requested reasonable adjustments to be made to the format of that hearing. The claimant wished the hearing to be held by telephone rather than Skype and the respondent was insisting that the hearing take place in person. On 22 October 2018 the claimant had made a written request for a reasonable adjustment, and on 25 October 2018 there had been a written request for a reasonable adjustment. There had also been previous written requests for reasonable adjustment in relation to the grievance hearing itself. Those had been on 15 January 2018 and 22 February 2018. In the event the grievance appeal hearing went ahead on 14 December 2018.

18. On 25 February 2019 the claimant was informed that his grievance appeal had upheld the decision to dismiss the grievance at first instance. Just over a month later, on 28 March 2019, the claimant resigned.

19. On 8 May 2019 the claimant's representative on his behalf contacted ACAS to enter early conciliation for a third time. EC3, R155214/19/68, was issued on 21 June 2019. On this occasion the early conciliation period had been extended by the statutory additional 14 days. On 10 August 2019 the claimant, still represented by Mr Welsh, lodged his claim.

The Relevant Law

20. The time limits for bringing Employment Tribunals are set out in section 123 Equality Act 2010 and section 111 of the Employment Rights Act 1996. Those sections contain complicated provisions, and I am going to try to attempt to explain the law using clear English.

21. Claims for unfair dismissal, breach of contract, outstanding holiday pay and unpaid wages or unauthorised deductions from wages must be brought within three months of the effective termination date of employment, or in relation to the payment claims three months of the last date upon which payment could have been made.

22. The same provisions are mirrored in the Equality Act 2010, so in discrimination cases it is three months from the date of the last act of discrimination complained of.

23. The way the three months is worked out is to say jump forward three calendar months and back one day from the date of termination or last act complained of, and the date then arrived at is called the primary limitation date.

24. There is a requirement, in section 18A of the Employment Tribunals Act 1996, that before a prospective claimant can bring Tribunal proceedings for those kinds of claims he must provide certain information about that matter to ACAS. ACAS then sends the information to a conciliation officer who endeavours to promote a settlement between the people who would otherwise be involved in litigation. If a settlement is not reached or the period of a month sometimes (as we have seen here) extended by a further 14 days is reached, then the conciliation officer issues a certificate. A person who wants to bring a Tribunal claim, which remember must be brought within three months less one day, may not do so without an ACAS certificate.

25. Under section 140B Equality Act 2010 and section 207B Employment Rights Act 1996 that three month period for bringing the claim is extended to facilitate conciliation before proceedings have started. The idea is that you should not be penalised in time for having entered early conciliation and tried to settle your claim.

26. The extension provisions are commonly known as the "stop the clock" provisions, so the three month clock stops ticking for the number of days that you are involved in conciliation with ACAS. Under section 140B the clock stops on Day A,

which is the day on which the complainant contacts ACAS, and it remains stopped until Day B which is the day on which the certificate is issued. In working out the number of days spent in early conciliation (that is the number of days to add to the primary limitation date) we count from the period beginning with the day after day A and ending with day B. That number of days is then added onto the primary limitation date to give the new deadline for bringing a Tribunal claim. Claims brought outside of that period are out of time.

27. The Employment Tribunal only has jurisdiction to deal with claims if they are brought within the statutory time limits. However, the law does provide for the Tribunal to have a discretion to extend time in exceptional circumstances where, in relation to unfair dismissal type claims and the other payment claims, those claims are brought 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 initial three month plus early conciliation time deadline. In cases for discrimination, the discretion is exercised on a just and equitable basis. There are two different tests or ways of applying the law in relation to the exceptional exercise of the discretion for the different types of claims. The unfair dismissal test is commonly called “the reasonably practicable test”, and the discrimination test known as “just and equitable test”.

Submissions

28. I had the benefit of good submissions from both representatives. They agreed that the dates of the early conciliation certificates were as follows:

EC1 – day A: 15 March 2018 day B: 15 April 2018

EC2 – day A: 20 June 2018 day B: 20 July 2018

EC3 – day A: 8 May 2019 day B: 21 June 2019

29. They agreed the chronology of events as set out in my findings of fact above. They agreed the length of time spent in early conciliation, that is the number of days to be added to the primary limitation date for the purposes of section 140B and section 207B for EC3 was 44 days. We counted those days together.

30. The representatives also agreed in principle, in relation to the unfair dismissal and money claims, that with an effective date of termination of 28 March 2019 and a primary limitation date of 27 June 2019, adding 44 days would give 10 August 2019, and they agreed that the claim in this case was commenced on 10 August 2019.

31. There was disagreement about the time calculations for the discrimination complaints. The respondent says the last act complained of was the failure to reasonably adjust the Skype hearing on 14 December 2018 to a telephone hearing, giving a primary limitation (remember, jumping ahead three months and back one day) of 13 March 2020. It was agreed that early conciliation in relation to that complaint could not have taken place under EC1 or EC2 as they predated the factual matters complained of.

32. EC3 took place from 8 May 2019 until 21 June 2019, more than three months after the date of discrimination complained of. This was the submission of the respondent.

33. The claimant made no detailed submission on that time point in relation to the date of the last act of discrimination complained of, and there was no suggestion at all from the claimant that the acts of discrimination were in any way part of a course of conduct extending over a period of time.

34. Each representative made a submission in relation to the point within section 140B and section 207B about the requirement for the complainant to conciliate “**in relation to the matter in respect of which the proceedings are brought**”, that is a quotation from the relevant line of the statute.

35. It was the respondent’s submission on the unfair dismissal and money claims that early conciliation had been entered into in relation to the matters in respect of which the proceedings were brought under EC1, between 15 March 2018 and 15 April 2018, and the respondent relied on the case of **H M Revenue and Customs v Serra Garau UKEAT 348/16** in that proposition. It was the claimant’s submission that new matters emerged and were first conciliated under EC3.

36. It was the respondent’s submission on the discrimination complaint that the claimant entered early conciliation on 8 May 2019 which was more than three months after the failure to reasonably adjust and that therefore the discrimination complaint was out of time.

Application of Law

37. I turn now to my application of the law on the issue for me to decide which is the time in relation to each of the separate elements of complaint.

38. The claimant told me that all of his complaints flowed from the conflict between him and Mr Campbell which came to a head on or around 18 August 2017, and caused him to go off sick. What happened after that was that he brought a grievance. He says there was a delay in the respondent’s handling of the grievance. He disagreed with the grievance outcome, which was to dismiss it. He appealed it, and he sought a reasonable adjustment in the conduct of both the grievance hearing and the grievance appeal hearing which was denied to him. He awaited the outcome of the grievance appeal hearing, which came to him in February 2019. He resigned on 28 March 2019 and he had Mr Welsh acting for him from August 2017.

Strict Application of the Law

39. I will deal with each complaint separately. I think of the claim as the umbrella and sitting under it the separate complaints of unfair dismissal, breach of contract/notice pay, holiday pay and then the discrimination complaint.

40. The requirement to bring Tribunal claims within time limits is strict because this gives certainty to the parties involved in litigation. I am satisfied, on the evidence

I have heard today, that the claimant must have known, shortly after the incidents on 18 August 2017 when he instructed Mr Welsh, that there were time limits involved in bringing claims.

41. In March 2018 when the claimant contacted ACAS for early conciliation I am satisfied that he knew that he was going to ACAS and that that was a prerequisite first step in bringing Tribunal proceedings, and that he took that step because he was himself at that time considering bringing proceedings. I reject the claimant's evidence that he went to ACAS to try and get the respondent to hurry up in giving him his grievance outcome.

42. In June 2018 the claimant instructed Mr Welsh to contact ACAS a second time on his behalf, again I find because he was considering bringing proceedings.

43. Turning then to each of the complaints.

44. In relation to the complaint of unfair dismissal, the effective date of termination of employment, the date from which we count to establish the primary limitation date, was 28 March 2019. I find that the primary limitation date was 27 June 2019. The claimant was required to contact ACAS before instituting proceedings relating to any matter. The matter in question was the conflict between him and Mr Campbell on 18 August. He first contacted ACAS in relation to that matter (the conflict with Mr Campbell) on 15 March 2018 and achieved an ACAS certificate on 15 April 2018. That certificate (R225273/18/40 – what I am calling EC1) is “the certificate issued” within the meaning of the statutory language in section 140B, when excluding time spent on early conciliation for limitation purposes. The section does not refer to any purely voluntary second or third certificates, and since the first certificate in this case did not affect the running of the limitation period, as it was issued before the claimant's resignation on 28 March 2019, and given that the second and third certificates do not fall within the definition of “the certificate issued” within the statutory scheme, none of the certificates have any impact on the running of time. I accept the respondent's submission that the authority of **H M Customs and Revenue v Serra Garau** is the correct authority for that principle. I therefore find that the claimant's claim for unfair dismissal was presented outside the limitation period.

45. The claimant's claim for outstanding holiday pay brought under the Working Time Regulations is brought under regulation 30, and under regulation 30 the claim runs from the date from which the employer has either failed to allow the employee to take the annual or failed to pay them for the statutory annual leave entitlement that was outstanding. The entitlement to be paid for outstanding annual leave crystallises as at the date of termination of employment, so I count three months forward and one day back from 28 March 2019, giving a primary limitation date for this complaint of 27 June 2019. The requirement to contact ACAS, set out in section 18A, also applies to this complaint. The claimant could not be aware that he was not going to be paid the outstanding leave to which he says he was entitled until the last date upon which it could have been paid to him, either 28 March or sometime shortly thereafter following his resignation, and therefore he could not

have entered early conciliation about this matter until after the effective date of termination. In fact, he contacted ACAS about this relevant matter on 8 May 2019, which I find to be day A, within the primary limitation period, and he achieved his certificate on day B, 21 June 2019. We therefore add 44 days to the primary limitation date of 27 June, and give a deadline for bringing proceedings for outstanding holiday pay of 10 August 2019. I therefore find that the holiday pay part of the claimant's claim is brought in time.

46. Turning now to his other money claims, there is a claim for bonus whether by breach of contract or unauthorised deduction from wages. Those claims also have to be brought within three months less one day of the last date upon which they could be paid to the claimant, and I find this to be 28 March 2019, again giving the primary limitation date of 27 June 2019. However, the claimant had entered early conciliation in relation to this matter on 15 March 2018 under EC1 achieved on 15 April 2018. EC1 is the certificate issued within the meaning of the statutory language in section 140B when excluding time spent on early conciliation for limitation purposes. This section does not refer to a purely voluntary second or third certificate, and since the first certificate does not affect the running of the limitation period in this case as it was issued well before the claimant's resignation, and given that the second and third certificates do not fall within the scheme, I find that none of the certificates have any impact on the running of time in the other money claims, and again I accept the respondent's submission that the case of **Serra Garau** is authority for that principle. I therefore find that the claimant's claims for bonus or any deductions from wages are out of time.

47. Accordingly, this Tribunal has no jurisdiction to hear complaints of unfair dismissal, breach of contract and unauthorised deduction from wages, and I must turn to the exercise of my discretion now to see if it is appropriate to extend time.

48. Section 111 of the Employment Rights Act 1996 provides that a Tribunal may extend time provided that the claim was brought 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 further period of three months.

49. In this case I find that the claim was not brought within such further period as the Tribunal considers reasonable, and that is because the claim ought to have been commenced by 27 June 2019 but was not commenced until 10 August 2019, and the claimant gave me no evidence (therefore there was no good reason before me) as to why the claim was not commenced sooner.

50. In the alternative, if it had been brought within a reasonable period, I have to be satisfied that it was also not reasonably practicable for the complaint to have been presented in time. I heard oral evidence from the claimant today that he had instructed Mr Welsh from August 2017 and that he was advised by him and supported in the presentation of his grievance at the end of August 2017, at the grievance hearing and throughout the grievance appeal. I find it was therefore reasonably practicable for the claimant to have brought his claim for unfair dismissal,

breach of contract and his unauthorised deduction claims within time. I do not extend my discretion in Mr Nolan's favour today on the reasonably practicable test.

51. I turn now to the discrimination complaint. The claimant complained that the respondent failed to reasonably adjust the way in which the grievance hearing and the grievance appeal hearing were conducted. The claimant made requests for a reasonable adjustment on 15 January 2018 and 22 February 2018 in relation to the grievance hearing itself, and on 22 October 2018 and 25 October 2018 in relation to the grievance appeal hearing. Both his hearings on 9 April 2018 and 14 December 2018 were in the event conducted by Skype. The respondent submitted that the last possible date upon which the claimant complained of an act of discrimination is 14 December 2018. The claimant has not argued that there was any ongoing failure to reasonably adjust beyond that date. I therefore accept the respondent's submission that the primary limitation date for the section 21 discrimination complaint was 13 March 2019. Here, however, I differ from her in the application of the early conciliation certificate provisions.

52. In relation to the failure to reasonably adjust at the grievance hearing on 9 April I find that the claimant had entered early conciliation about that matter under EC1, which was achieved on 15 April 2018. EC1 is "the certificate issued" within the meaning of the statutory language in section 140B when excluding time spent on early conciliation limitation purposes, and as that section does not refer to a voluntary second or third certificate, and since the first certificate does not affect the running of the limitation period as it was issued before the claimant's resignation on 28 March 2019, and given that the second and third certificates do not fall within the statutory scheme, none of the certificates here have any impact on the running of time, and I accept **Serra Garau** as the authority for that principle. The claim was therefore presented outside the limitation period in relation to the failure to reasonably adjust at the grievance hearing. It should have been presented by 13 March 2019 and was not presented until 10 August 2019.

53. I comment also that the claimant has been given a generous interpretation on time here, because I have counted the limitation period from 28 March 2019 from the resignation date. There might have been (but this was not put to me) an argument here that time for failure to reasonably adjust at the grievance hearing itself ran from 9 April 2018.

54. Turning now to the complaint about failure to reasonably adjust at the appeal hearing, I accept the respondent's submission that the primary limitation date for that was 13 March 2019 and that the claimant was already out of time when approaching ACAS conciliation about that matter. The claimant could not have approached them for conciliation about that matter under EC1 or EC2, as that matter (failure to reasonably adjust at the appeal hearing) had not arisen at the time of EC1 or EC2. Only EC3 could be relevant, and for EC3 day A was 8 May 2019, which itself fell outside the primary limitation period. Accordingly, the claimant's complaints for discrimination are brought out of time.

55. I now turn to whether or not it would be just and equitable to extend time for the claimant's discrimination complaints in this case. I refer to the oral evidence from the claimant, that he was represented by Mr Welsh again from August 2017 all the way to the date of this hearing, and I note that he has not provided me with any other evidence to suggest that he was in any way, medically or otherwise, incapacitated during that period. Referring to case law on this point I am reminded that the exercise of a discretion should be the exception and not the rule, and therefore in this case where I have a claimant who was legally represented throughout, a claimant who had contacted ACAS on no fewer than three occasions for early conciliation and who, by his own frank admission, was from the second occasion considering bringing proceedings, I do not extend the exercise of my discretion. Accordingly, the claimant's discrimination complaint falls outside the jurisdiction of this Tribunal.

56. By way of summing up, I have found (for different reasons) that each of the complaints is out of time, save for the complaint in relation to outstanding holiday pay, and I now convert this hearing to a preliminary hearing for case management to discuss the amendment application and how to proceed with the holiday pay complaint.

Employment Judge Aspinall

Date 20 April 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
22 April 2021

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