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EMPLOYMENT TRIBUNALS

Claimant: Mr L Sapsford
Respondent: Fulcrum Engineering and Technical Limited
Heard at: East London Hearing Centre
On: 10 May 2021
Before: Employment Judge Burgher

Appearances

For the Claimant: In person
For the Respondent: Mr T Vince, Director

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

- 1 The Tribunal does not have jurisdiction to consider the Claimant's complaints that have been presented out of time.
- 2 The full merits hearing listed for 15 and 16 July 2021 is vacated.

REASONS

- 1 The Claimant claims indirect discrimination, age and/or disability, failure to make reasonable adjustments, unauthorised deductions and a failure to provide rest breaks pursuant to the Working Time regulations.
- 2 The Claimant gave evidence under oath and referred to his email and attachments dated 6 January 2021.

- 3 The Claimant stated that he worked on three separate occasions for the Respondent on its line at Nestlé. The final occasion was the 21 - 24 September 2019 (the Respondent disputes this and asserts that the last date was the week before 30 August 2019).
- 4 The Claimant had significant concerns about the working conditions he was required to work under including excessive heat, heavy lifting and long hours. He sent Jason Ring of the Respondent a grievance regarding the working conditions on 6 August 2019. He did not get a response to this and chased this up on 16 September 2019. Mr Ring responded on 17 September 2019 saying he would look into it and get back to the Claimant as soon as possible.
- 5 Meanwhile, the Claimant contacted ACAS on 16 September 2019 and was issued with an ACAS certificate on 1 October 2019 permitting him to proceed with Employment Tribunal complaints.
- 6 On 21 October 2019 the Claimant sent Mr Ring an email entitled 'grievance email before action' setting out details of concern. Mr Ring responded on 22 October 2019 expressing concern that the Claimant was trying to get him into trouble.
- 7 The Claimant sent an email to his agency on 30 October 2019 raising concerns about payments. Presumably any unlawful deduction of wages claim should be against the Claymore Contracting Services the agency who was paying him.
- 8 The Claimant commenced work with an alternative organisation. He worked until 27 November 2019 and apparently there were difficulty in how this placement ended.
- 9 The Claimant has a history of depression and diabetes. He has suffered for over 10 years and has had counselling and medication. The Claimant's wife has a serious lung condition he has been required to care for her.
- 10 The Claimant's medical information states on 2 December 2019 he attended for an annual diabetic review. It is recorded that the Claimant is not taking good care of himself and says he is depressed. An appointment was booked for a mental health nurse. A medical letter dated 15 January 2020 states that the Claimant had worsening symptoms of depressive disorder necessitating an increase in dose of his anti-depressant medication.
- 11 The Claimant stated that he felt that Mr Ring was stringing him along between August to January 2020 and he gave up and brought his claim on 20 February 2020. However, there is no email evidence of contact that the Claimant had with Mr Ring or the Respondent since 21 October 2019 grievance email before action.

- 12 The Claimant stated that he initially sought to bring his claim in December 2019, but he did not complete the ET1 form. When he went back a week later he saw that he had to complete it from scratch and did not do so.
- 13 The time limit, extended by the ACAS conciliation process, expired on 7 January 2020. The Claimant stated he was depressed, trying to get money to live and paid bills through charities and was looking after his wife as carer. He presented the ET claim on 20 February 2020, despite his wife's objections. This was over 6 weeks outside of the specified time limits.

Time limits

- 14 In respect of the discrimination complaints section 123 Equality Act 2010 states:

Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

- 15 In respect of the unlawful deduction of wages claim section 23 (2) - (4) of the Employment Rights Act 1996 states:

Subject to subsection (4), an employment tribunal shall not consider a complaint under this section 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, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

- 16 In respect of the rest breaks claim Regulation 30 of the Working Time Regulations 1998 states:

30.—(1) A worker may present a complaint to an employment tribunal that his employer—

(a) has refused to permit him to exercise any right he has under—

(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4) or 13(1);

(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded; or

(iii) regulation 25(3) or 27(2); or

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(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 or, as the case may be, six months.

(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

(5) Where on a complaint under paragraph (1)(b) an employment tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) or 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him.

- 17 The Tribunal's discretion to extend time is wide but Auld LJ observed in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 at [25]:

“there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of the discretion is the exception rather than the rule”.

- 18 Sedley LJ's remarked in Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 at [31] and [32] that there is “no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised” and that whether to grant an extension “is not a question of either policy or law” but “of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it”.

- 19 I also considered the balance of prejudice between the parties when considering whether it is just and equitable to extend time and the factors in the case of British Coal Corp v Keeble where Mrs Justice Smith held:

“The EAT also advised that the Industrial Tribunal should adopt as a check list the factors mentioned in Section 33 of the Limitation Act 1980. That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action. The decision of the EAT was not appealed; nor has it been suggested to us that the guidance given in respect of the consideration of the factors mentioned in Section 33 was erroneous.”

- 20 In relation to the time provisions under the Working Time Regulations and Employment Rights Act complaints, the issue is whether it was reasonably practicable to have presented the claim in time.
- 21 I considered the guidance in the case of Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119, CA per May LJ at paragraph 35 in respect of the test of reasonable practicability. This is also construed as assessing what is reasonably feasible or what is reasonably capable of being done. I am aware that there are numerous factors that a Tribunal can properly consider when determining whether it is reasonably feasible.
- 22 When considering whether it is reasonably feasible to have been done, modern methods of obtaining information and communication mean ignorance of the law is no excuse.

Conclusions

- 23 Having considered the evidence and the law in respect of the discrimination claims I conclude the Claimant has not convinced me that it was just and equitable to extend time. The information before me is that Mr Ring stopped communicating with the Claimant on 22 October 2019, the Claimant worked elsewhere and did not pursue matters further with the Respondent.
- 24 The Claimant was aware of the time limits having contacted ACAS and having been issued with an ACAS certificate on 1 October 2019. The Claimant sought to bring a claim in December 2019 and when he reviewed it he did not proceed. I accept that the Claimant had a lot to manage including caring for his wife and managing his own deteriorating health. He sought medical help and increased

medication to cope. Apart from being busy tending to other pressing matters he provided no justifiable explanation why the Claimant did not bring the claim sooner. This was not a delay of a few days or weeks, over 6 weeks elapsed. I do not accept that the Respondent contributed to this delay as the ACAS certificate was issued on 1 October 2019 clearly specifying that a claim would be required.

- 25 Having regard to the Keeble principles I conclude that the prejudice to the Respondent in having to consider the claims outweighs the prejudice to the Claimant in not being able to proceed with his claims. The internal grievances that the Claimant was pursuing related to health and safety matters, not disability discrimination complaints or failures to make reasonable adjustments and there has been lengthy delay and a lack of promptness by the Claimant to present a complaint. His email of 21 October 2019 entitled 'grievance email before action' demonstrated that he knew some further action should be taken. I have considered the Claimant's health problems which worsened at the end of the time limit as weak as the fact that he was caring for his wife. However, I do not conclude that this explains the 6-week delay in presenting the complaint. In these circumstances the Claimant's discrimination complaints have been presented out of time and the Tribunal does not have jurisdiction to consider them.
- 26 In relation to the unlawful deduction of wages complaint and the failure to provide working time rest breaks, the time limit provisions are far more restrictive. Given the above analysis, it necessarily follows that it was reasonably feasible or reasonably capable for the Claimant to bring his claim within three-month period. Whilst the Claimant's health deteriorated near the end of the time limit he could undertake daily tasks and care for his wife. The Claimant did not present his claims in time and therefore the Tribunal does not have jurisdiction to consider these claims either.

Employment Judge Burgher

10 May 2021