



EMPLOYMENT TRIBUNALS

Claimant: Mr Ayodele Martin

Respondent: London Borough of Southwark

OPEN PRELIMINARY HEARING

Heard at: London South (by video)

On: 4 May 2021

Before: Employment Judge Beckett

Representation

Claimant: Mr R Kohanzad - counsel

Respondent: Mr P Linstead - counsel

RESERVED JUDGMENT

1. The Claim is dismissed.
2. The Tribunal does not have jurisdiction to hear the Claimant's claim.
3. The Claim was presented out of time, and it was reasonably practicable for the Claimant to present the claim within the time limit.

REASONS

Background and Issues

4. This Hearing was listed to determine whether or not the Tribunal had jurisdiction to hear the Claimant's claim of constructive unfair dismissal, on the basis that it may be out of time.
5. The Claimant had been employed as a teacher, until his resignation in December 2019. This Tribunal previously heard argument in respect of the effective date of termination (hearing on 12 February 2021 in front of EJ O'Rourke). EJ O'Rourke determined that the relevant EDT was 17 December 2019.

6. The Claimant contacted ACAS on 18 December 2019 and the certificate was issued the following day.
7. The Claimant presented his ET1 on 18 March 2020. The claim was therefore presented out of time.
8. This matter had previously been listed, alongside a hearing to determine whether or not the protected disclosure claims brought by the Claimant amounted to *res judicata*/an abuse of process. At that hearing, on 12 February 2021, the Judge agreed with Mr Kohanzad's submission that the Claimant was unable to give evidence on that date, as due to depression and anxiety he required proper notice. This hearing was therefore fixed for the evidence to be given, and for submissions to be made.
9. Having previously refused the argument that the Claimant made in respect of the EDT, the Claimant's argument was that it was not reasonably practicable for him to submit the claim in time.
10. The Claimant gave evidence. He had provided a detailed statement amounting to 7 pages. He was cross examined by Mr Linstead for the Respondent.
11. The essence of the Claimant's position was that he was not in the proper frame of mind to be able to start the claim form until he had dealt with other important and time sensitive matters. Those other matters included a grievance, responding to divorce petition and another claim. It was submitted that the Claimant was simply in no fit state to deal with the claim until March 2020.
12. The Claimant gave evidence that he started drafting his ET/1 on 5 March 2020. He was unable to focus for lengthy periods of time and it took him several days to complete the form. The form was sent into the Tribunal on 18 March 2020.

The Law

13. Section 111(2) ERA provides that an employment tribunal "shall not consider a complaint under this section 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".

14. Section 111(2)(b) ERA should be given a 'liberal construction in favour of the employee' (*Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53, CA).
15. It is a matter for the Tribunal to decide what was reasonably practicable, or feasible, for the Claimant to have done within the three month time limit.
16. The burden of proof rests on the Claimant. The duty is upon the Claimant to show precisely why it was that he did not present his complaint within the required time (*Porter v Bandridge Ltd* 1978 ICR 943, CA).
17. The Tribunal must look at what was reasonably feasible. The test was considered by Lady Smith in *Asda Stores Ltd v Kauser* EAT 0165/07: "the relevant test is not simply a matter at looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to be done".

Relevant dates prior to the claim

18. The Claimant cited his mental health and referred to a number of Occupational Health reports in support of his submissions (pages 81 to 92 of the Bundle). Each report is a one page document in the form of a letter to the school, signed by an OH specialist registrar.
19. Dealing with the OH reports first of all, in May 2018 the Claimant was found to be unfit for work for 2 or 3 months, following a breakdown in his relationship. He was noted to be under the care of his GP at that time (page 81 of the Bundle).
20. In July 2018 he was found to be fit to work on a phased return, and had in fact returned to work for 3 days per week (page 83 of the Bundle). In August 2018 the report writer, Dr Emma Giblin, submitted that the Claimant should not return to his teaching post for the first week of term as he was awaiting a hearing regarding bullying and harassment. It was "foreseen" that he would be fit to return to work following the hearing when there would be less pressure (page 85 of the Bundle).
21. At that time the Claimant was prescribed an anti anxiety medication, Sertraline, at 50mg daily, which was subsequently increased to 100mg daily.
22. In September 2018 the OH report writer Dr Giblin stated that the Claimant's symptoms had deteriorated. She found that it was highly

unlikely that he would be fit to return to work until the grievance procedure had been completed (page 87 of the Bundle).

23. In December 2018 the Respondent heard the Claimant's grievance and it was not upheld.
24. The next OH report was undertaken in March 2019. Dr Giblin stated that the Claimant "reported a deterioration in his symptoms". By that stage it was found that the Claimant was highly unlikely to be fit to return to his current role as a result of the upcoming court hearing (an Employment Tribunal claim which I deal with further below). He was found to be fit to attend formal meetings (page 89 of the Bundle).
25. In March 2019 the Claimant's wife informed him that she wanted to divorce him. There were discussions regarding the divorce at weekends from that period onwards.
26. One of the Claimant's daughters became suicidal at around the same time. This affected the Claimant's own mental health. The Claimant was also concerned about his elderly mother.
27. In July 2019 the Claimant remained unfit to work as no changes in his symptoms were reported. At that stage it was submitted by the OH report writer that the Claimant was unlikely to be fit to return to his current role in the short and long term (page 92 of the Bundle).
28. In September 2019 the Claimant represented himself at the Employment Tribunal in a 5 day hearing against the Respondent.
29. The Claimant stated that as a result of preparing for the hearing, and the hearing itself, the Claimant suffered from deep vein thrombosis having spent too much time sitting in front of his computer preparing the case.
30. The Claimant's daughter started to have appointments with a psychiatrist at the end of November 2019. The Claimant took her to the first appointment, and to subsequent appointments on 10 January 2020, 7 February 2020 and March 2020.
31. The Claimant received the divorce petition on 2 December 2019 (letter at page 98 of the Bundle).
32. On 2 December the Claimant wrote a formal email to the Strategic Director for Children and Adults, copying in a number of others. He advised that he could not continue in his employment as he was not being paid. He submitted that his mental health injuries amounted to a workplace

injury, and cited his contract of employment and an authority stating that the Respondent was in breach of that contract.

33. The Claimant gave the Respondent a deadline of 16 December 2019 to deal with the “pay issue”. He added “the pressure of not being paid will cause me to leave”. This sentence was in bold script.
34. The Claimant resigned on 17 December 2019. This is dealt with in more detail below.
35. On 23 December 2019 he received an email from the Respondent indicating that his grievance regarding his sick pay would be heard in January 2020. He replied to the Respondent regarding his ongoing grievance.
36. In December 2019 the Claimant attended the Employment Tribunal Litigant In Person Support (ELIPS) centre for advice regarding his closing submissions.
37. In January 2020 the Respondent heard the Claimant’s grievance. It was not upheld.
38. The Claimant also had to submit his closing submissions for his ongoing Tribunal claim, which he did on 24 January 2020.
39. The Claimant attended the ELIPS centre for further advice in February 2020.
40. The Claimant then filed a response to the school’s submissions, which he did on 9 February 2020.
41. In respect of that grievance, it was rejected on 5 February 2020. The Claimant submitted an appeal on 6 March regarding that decision.
42. By the time of the final OH report in February 2020, the Claimant had resigned and was applying for retirement on the grounds of ill health. The report noted that the Claimant had mild to severe depression, anxiety and possible symptoms of PTSD.
43. The Claimant was seen by a psychiatrist in March 2020. The report appears at page 101 onwards of the Bundle.
44. Dr Parsonage found that the Claimant presented with a moderate to severe depressive episode, which had been ongoing since he raised his grievance at work (paragraph 71). He found that the Claimant presented

as severely depressed and was totally preoccupied by his work situation (paragraph 75).

45. Dr Parsonage recommended that the Claimant change his medication from sertraline to a stronger antidepressant medication, namely venlafaxine.
46. The recommendation made by Dr Parsonage was that the Claimant be considered for early retirement on medical grounds.
47. The Claimant started working on the claim in respect of his unfair dismissal on 5 March and he presented it on 18 March 2020. His ET/1 had a 15 page appendix providing a history and narrative of the various complaints made at that time.

Previous claims

48. It is important to note that the claim as to unlawful dismissal is the fifth claim the Claimant has brought against the Respondents.
49. The Claimant dealt with his first claim, which was for unlawful deductions from wages, entirely himself. He made that claim in March 2018. That claim was struck out, in May 2019, as having no reasonable prospects of success.
50. Subsequently the Claimant accessed advice at the Employment Tribunal Litigant in Person Scheme (ELIPS) in Holborn. The second, third and fourth claims related to alleged protected disclosures and those claims were made in June 2018, October 2018 and December 2018. Those claims were dismissed, following a final hearing in September 2019, with judgment sent to the parties on 20 March 2020 (therefore two days after he had presented this claim to the Tribunal).
51. The Claimant has subsequently appealed that latter judgment (in May 2020) and that appeal is currently before the Employment Appeal Tribunal, awaiting full hearing, on a date yet to be determined.
52. The Claimant can properly be described as someone who has had experience of starting claims in the Employment Tribunal, accessing legal advice to support such claims, and indeed representing himself at hearings.

Resignation and claim

53. On 17 December 2019 the Claimant sent the email in which he resigned at 13.38. The email stated the following:

'On 2 December 2019 I sent an email complaining about the fact that I had not been paid wages that I am owed. I explained this was making it difficult for me to continue in this employment because of my financial situation, which has made my mental health worse.

I stated that my mental health difficulties are a workplace injury and that sufficient medical evidence was provided to support that claim. I drew your attention to the definition of injury at work as defined by paragraph 9.1 of the 'Burgundy Book' (the collective agreement which is incorporated into my contract of employment) and by failing to pay me my wages under that provision, you are in fundamental breach of my contract (per Roberts v Whitecross School).

I explained that from the 11 February 2019 I was put on half pay for 100 days and after that my pay completely stopped. According to the 'Burgundy Book' my full pay should have continued for 6 months because of my injury at work, follow by 100 days at half pay. The unpaid wages I am asking for is the difference between my full pay and the pay I have received from you for the six months starting 11 February 2019, then after the six months, the half pay up to 17 December 2019.

I am resigning in response to a series of serious breaches of contract including the breakdown of mutual trust and confidence, the last straw is the decision of: Ann Mullins; Maarten Crommelin; David Freeman; Kate Bennet; David Quirke-Thornton; the Governing Board of EHS and Southwark Council not to pay wages owed to me for injury at work.

I gave you until the 16 December 2019 to deal with my pay issue, which is causing me extreme financial pressure and mental stress. This you have not done. I regard your behaviour in not paying my wages a fundamental breach of my contract.

In these circumstances as the last straw, the pressure of not being paid has caused me to leave. I have no alternative but to resign.'

54. The email was sent to the Respondent and copied to numerous others.
55. The resignation was accepted the following day (18 December 2019) by the Headteacher. She released him from his notice requirement within that response and cited that his termination date would be brought forward to the 17 December 2019.

56. On 18 December the Claimant started the ACAS early conciliation process. He accepted in evidence that he had done so in order to make a claim, rather than to engage in the process of conciliation. The Claimant stated that the Respondent had already had six weeks to answer his emails by that time and had not done so. It was agreed that the contact with ACAS was made solely with a view to making a claim in the Tribunal.
57. The Claimant received his ACAS certificate on 19 December 2019.
58. The Claimant had further correspondence with the Respondent by email on 24 December 2019, as there had been an attempt to clarify his last day of service. He was able to respond on the same date with a clear confirmation that his last day of service was 16 December 2019.
59. The Claimant's evidence was that he was aware of the existence time limits for claims to be made. He confirmed that he had previously submitted four claims against the Respondent, as a result of what he described as a sustained campaign of bullying that started in 2018.
60. However, he stated that although he had submitted four previous claims, he was not "operating well" at the end of 2019 into 2020. He said that he felt suicidal, his daughter was suicidal, his marriage had broken down and he was living in an attic room alone. He also had to draft closing submissions for his ongoing Tribunal case.
61. His evidence was that he knew that a time limit existed, and indeed that it was a three month period, but that he had not been thinking logically during those months and was "blinkered". The Claimant clarified that by blinkered he meant that he had to focus on one thing at a time, as everything was happening all at once. He said that he was overwhelmed and did not have the headspace to think straight or to see the big picture.
62. During the three month period, the Claimant accepted that he had been to take advice at the ELIPS offices in Holborn on two occasions. However, he said that the purpose of those visits, and the topics of discussion, were therefore limited to his ongoing case. The Claimant had to draft submissions by the 9th or 10th February 2020. The Claimant's evidence was that he was so worn down by that document, and could only deal with one thing.
63. In his witness statement, he does state that he "had been told at a previous drop-in session that if you are pushed into a position where you have to resign, this is constructive dismissal" (paragraph 18).
64. I find that the Claimant was planning upon making a claim to the Tribunal at the time of his resignation. He contacted ACAS the day after his resignation was accepted, only with a view to obtain the certificate needed

for such a claim. He knew that the certificate was a pre-requisite to making a claim. It is proper in this case, therefore, to consider the whole three month period, rather than to focus on any particular part. The claim was anticipated prior to the resignation.

65. In his witness statement regarding this point, the Claimant said the following (paragraph 19): "After I resigned I contacted Acas. I knew I had to contact Acas in order to bring a claim because I had issued claims before. Acas asked me if I wanted to negotiate with the school and I said I didn't, because they don't respond to me. I just asked for the certificate".
66. The Claimant was aware that strict time limits existed to submit claims. He was also aware that the relevant period was three months.
67. The Claimant stated that although he was aware of the relevant three month period, he did not know that his resignation would trigger the time limit. He said that he did not know when the period would start or end. However, this was a Claimant who had received some legal advice, and knew where he could obtain further advice. He had made 4 claims against the same Respondent in the months preceding this claim.
68. The medical evidence available to the Tribunal shows a decline in the Claimant's mental health from March 2019. However, there was no evidence of any appreciable difference between December 2019 and March 2020.
69. The Claimant had to deal with a number of distressing family issues during the relevant period. He had to deal with an impending divorce, was concerned about his mother's failing health, his daughter's mental health and his own mental health.
70. The Claimant had time-sensitive issues of importance to deal with within the relevant period. These issues, of course, included this claim. However, he chose to prioritise those other issues, despite knowing that there was a strict time limit in respect of Tribunal claims.
71. Whilst I accept that the Claimant had numerous personal issues to deal with, and that his mental health was a factor in how he chose to deal with those issues, the factual situation of this case is particularly fact-specific. This Claimant had made four recent claims against the Respondent. He was aware of the time limits and where to obtain advice. He had represented himself during a five day Tribunal hearing.

Conclusions

72. According to section 111(2) ERA, an employment tribunal shall not consider a complaint unless it is presented to the tribunal 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.
73. It is a matter for the Tribunal to decide what was reasonably practicable, or feasible, for this Claimant to have done within the three month time limit.
74. I find that it was reasonably practicable for this Claimant to have presented his claim within the required three months.
75. Whilst the Tribunal acknowledges the various personal and professional issues which the Claimant was dealing with at the time, his first action after his resignation was accepted was to contact ACAS to obtain the certificate to claim for unfair dismissal. The fact of a claim was in his mind from the very start of the three month period. This is not a case in which the Claimant found out about a possible claim part way into the period.
76. I have considered the case of *Schulz v Esso Petroleum Ltd* [1999] ICR 1202 which provides that, "in assessing whether or not something could or should have been done within the limitation period, while looking at the period as a whole, attention will in the ordinary way focus on the closing rather than the early stages". I find that in this particular case, in light of the facts as I have found them to be, the whole period falls to be considered.
77. Having received the certificate, and with the issues keenly in his mind, the Claimant could have drafted and presented his claim
78. The Claimant had used advisory services in respect of other claims, and was in fact doing so during the relevant period. He knew how to access further advice in respect of employment claims and could have done so.
79. The Claimant was aware of the time limit of three months. He was also aware that the Tribunal had strict time limits, as this was his fifth claim against the Respondent.

80. The ET/1 did not have to be drafted in the detail in which it was by this Claimant. It was reasonable to have expected him to draft and present a claim setting out the facts upon which he relied, within the relevant period.
81. The Claimant argued that although he was aware of time limits when functioning at a normal level, he was not in a fit state to deal with the claim or to recognise the time limits in force due to his mental state and other issues as outlined above. I find that he was able to present his claim in time, either at the very outset when he resigned, or during any part of the three months.
82. In light of all of the above findings of fact, I find that it was reasonably feasible for the Claimant to submit his claim within the three month period.
83. The Tribunal therefore does not have jurisdiction to hear the Claim, which is therefore dismissed.

Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

Employment Judge Beckett

Dated: **4 June 2021**

Sent to the parties on:

Dated: **18 June 2021**

For the Tribunal