



EMPLOYMENT TRIBUNALS

Claimants: 1) Mr N Ahmed
2) Mr T Ahmed

Respondents: Next Distribution Ltd

Heard at: Leeds (by CVP video and audio)

On: 15 June 2021

Before: Employment Judge Parkin (sitting alone)

Representation

Claimants: Both in person

Respondent: Mr I Blackwell, Solicitor

JUDGMENT AT A PRELIMINARY HEARING

The Judgment of the Tribunal is that:

- 1) The first claimant's discrimination claims were presented outside the statutory time limit and it is not just and equitable for them to proceed; they are dismissed for want of jurisdiction;
- 2) The first claimant's notice pay and statutory sick pay claims were presented outside the statutory time limit but it was reasonably practicable to present them in time; they are dismissed for want of jurisdiction;
- 3) The second claimant's discrimination claims were presented outside the statutory time limit and it is not just and equitable for them to proceed; they are dismissed for want of jurisdiction; and

4) The second claimant's notice pay and statutory sick pay claims were presented outside the statutory time limit but it was reasonably practicable to present them in time; they are dismissed for want of jurisdiction;

REASONS

1 The claims

- 1.1 The first claimant, Mr Naqqash Ahmed, presented his claim on 26 November 2020, having notified ACAS under the Early Conciliation provisions on 22 July 2019 with his certificate issued on 22 August 2019; he claimed age discrimination, race discrimination, religious discrimination and disability discrimination and also notice pay and statutory sick pay.
- 1.2 In the brief content on his claim form, under details of claim at 8.1, the first claimant stated: "Statutory sick pay- the payroll have refused to pay me for the period that I was ill because I was ill and did not want to pay me statutory sick pay and issue a payment for less than £100.00 and said the statutory sick pay is £20.00 something a week. so I reported the company to HR Revenue and Customs and they have terminated my contract with the company..." and at 8.2: "My manager has ignored my sick notes and has been falsifying information with the HR department and they have not put my statutory sick pay according to what I I'm entitled to and when I contacted them they have told me that the statutory sick pay is £20 something we can I have reported them to HR Revenue and Customs. My manager has told HR department that I have left the job and they have terminated my contract with the company. And I also would like to mention, I also requested a copy of my contract with the company and my manager has refused to provide me with a copy of the contract and told the HR department that I have left the company". In claiming compensation at 9.2, he claimed: "£12,500 for loss of earnings and £12,500 for the suffering of discrimination".
- 1.3 The second claimant, Mr Tanzil Ahmed, also presented his claim on 26 November 2020, likewise claiming age discrimination, race discrimination and religious discrimination together with notice pay and statutory sick pay. He notified ACAS under the Early Conciliation provisions on 13 May 2019 and his certificate was issued on 26 June 2019.
- 1.4 Under 8.1, the second claimant set out: "I have not been paid my statutory sick pay by the company and the company have just terminated my contract with the company" and at 8.2: "I was sick and had notified work I rang my manager to inform him that I won't be in for work and I was not well. My manager has not answered my calls deliberately and has ignored my emails and also my texts and has told the HR department that I have left work and not contacted him at all and the company have terminated my contract with the company. I would also like to mention I have all the texts that I have sent to my manager and emails." In his claim for compensation at 9.2, the second claimant also claimed: "£12,500 for loss of earnings and £12,500 for the suffering of discrimination".

2 The responses

The respondent denied both claimants' claims in each case, denying disability in respect of the first claimant and contending no meaningful particulars of the discrimination claims had been provided by either claimant. It contended that all claims were over a year outside the limitation periods and the Tribunal had no jurisdiction to hear them.

3 Case management

- 3.1 There was a telephone case management hearing before Employment Judge Jones on 11 February 2021, at which the claimants were not in attendance. EJ Jones identified the out of time issues at paragraph 3 of his case management order: "... to determine whether either claimant could establish that the claims were in time. In respect of the claim for notice pay and sick pay, whether it had not been reasonably practicable to present those claims in time and in respect of the discrimination claims whether it was just and equitable to allow them to proceed".
- 3.2 This preliminary hearing was listed on the direction of EJ Jones by letter dated 18 March 2021 following the first claimant's email letter dated 25 February 2021, which showed cause why his claim should not be struck out for failing actively to pursue it. The first claimant wrote: "The claim was submitted three months before the effective date of termination, but no correspondence from the tribunal. I was advised to resend the claim forms to the tribunal recorded delivery. Due to technical error my handset would not let me connect to the call through to the number provided by the tribunal therefore was unable to attend the hearing and I would still like to pursue the claim in court and I would like to apologise for the technical error and that my claim should not be struck out and I would like to request a hearing." Whilst referring only to the first claimant's claim, that was taken as a sufficient reply to the order to show cause in both cases.

4 The hearing

- 4.1 Although the hearing had been listed to be held by CVP video, the claimants were unable to join by video and took part by audio connection on the telephone. On two occasions during the evidence of Tanzil Ahmed, their telephone connection was lost; this was immediately apparent and the Tribunal waited for them to rejoin. Having concluded the claimants' closing submissions at just after 12.40, the Judge explained that he would give judgment at 12.55 which both claimants and the respondent's representatives confirmed was convenient. In the event, there was no rejoining by the claimants at 12.55. The Judge waited until 13.00, and then gave judgment briefly in the presence of the respondent only, explaining that the judgment and reasons would be sent out to the parties in writing thereafter. Accordingly, whilst the judgment was announced briefly at the hearing, these are the full reasons for it.
- 4.2 At the outset, the Judge explained the basis for the preliminary hearing, as directed by EJ Jones by letter dated 18 March 2021. The respondent provided a bundle (1-169)

which the claimants had with them at the hearing. Neither claimant sought to rely upon any additional documents and the respondent did not refer extensively to documents.

- 4.3 At their request, the Judge heard oral evidence from both claimants although no witness statements had been directed or prepared; this meant both were cross-examined in detail, in particular as to their familiarity with ACAS and the employment tribunal, opportunity to research employment claims, circumstances of their assertion that they had presented earlier claims and of the delay before November 2020.
- 4.4 Regrettably, the Judge found the evidence of both claimants vague and unsatisfactory and, at times internally inconsistent and contradictory with each other. Both explained their impecuniosity in not being able to afford a solicitor for legal advice and both relied heavily upon the Coronavirus pandemic to explain the months of delay; the Judge accepted the former but took account of the fact that the latter factor could only partially explain some of the delay, that from March 2020 onwards.
- 4.5 The first claimant, Naqqash Ahmed, gave evidence that he thought his brother's claim was sent off first and confirmed that this was the case. He was wholly unable to explain when his own claim was sent. Of course, if the claims were sent separately, it makes his evidence - that he sent his claim by post as a paper ET1 claim form in 2019 but apparently it was never received at the Employment Tribunal central office - the less credible if it was not sent together with Tanzil's, since it would have meant a second claim sent separately by post was also never received in the same circumstances. He believed he had contacted his father's solicitor somewhere near November 2020 perhaps in September 2020 and received advice to send his claim form again.
- 4.6 The second claimant, his brother Tanzil Ahmed, later gave evidence that the claims were dealt with separately although he posted them together (without telling his brother this). He sought to convey that they had not been concerned with each other's claims but the Judge could not accept that the brothers did not discuss the content of their claims together given the similarity of content; save for Naqqash's disability discrimination claim, the claims were virtually identical. Tanzil gave evidence of some familiarity with ACAS having heard of its role when he studied Accounting and Finance at university. His evidence to the effect: "I do believe the forms were sent off at the beginning of June 2019" made no sense at all, having regard to the Early Conciliation provisions and requirement to follow those before commencing proceedings; his certificate was issued on 26 June 2019.

5. The parties' representations

- 5.1 The respondent contended that, even on the most favourable interpretation, applying the 3-month primary limitation period with Early Conciliation extensions, the first claimant should have presented his claim by the end of September 2019 and the second claimant should have done so by the end of July 2019. Both claims were well over a year out of time and the burden was on the claimants to satisfy the Tribunal it had jurisdiction to hear the claims. However, their case was such that no exercise of discretion or determination that it was not reasonably practicable to present the claim in time was

possible; their explanation was difficult to follow, not straightforward and they contradicted each other. Both had access to the Internet and information about tribunal claims was widely available on ACAS's and the Tribunal's own website. It would not have been difficult to contact the Tribunal and check whether claims had been received. The Tribunal should not find it just and equitable to consider the claims or that it was not reasonably practicable to have presented them in time.

- 5.2 The first claimant contended that after trying to resolve matters with the respondent he contacted ACAS in time, completed his claim form and sent it on time but it had not been received due to unexpected circumstances. He could not say whose fault this was but could not be liable for Royal Mail deliveries. He had done what he needed to do within a reasonable time. Having suffered discrimination in employment, if the claims did not proceed he would not be able to go elsewhere to ask for justice.
- 5.3 The second claimant contended he had completed and sent his claim form at the earlier stage. He could not be responsible for the failure in delivery. When they had not heard from the Tribunal he and his brother had to repeat their claims, sending them by recorded delivery. He felt he had done everything the respondent required to communicate with it whilst in its employment.

6 Fact-finding at the Preliminary Hearing

The Judge made the following key findings of fact for the purpose of determining the preliminary issues, on the balance of probabilities.

- 6.1 Although each claimant disagreed with the circumstances and fact of the termination of their employment, they were both clear that the respondent had told them that their contract of employment had been terminated. The first claimant identified 1 May 2019 as the end of his employment and notified ACAS on 22 July 2019 (1). The second claimant identified 12 February 2019 as the end date of his employment, and notified ACAS on 13 May 2019 (23), just outside the 3-month period.
- 6.2 Both claimants lacked funds to pay for legal advice about their position. Both lacked knowledge of employment law and procedures, although the second claimant had some awareness of the role of ACAS from his earlier studies. The first claimant was pointed towards ACAS for advice by a friend he talked with.
- 6.3 The brothers lived at the same address and both had access to the internet. They were able to send emails and familiar with making use of the internet for searches and making telephone calls, although at times Naqqash could not top up his mobile phone account through shortage of funds.
- 6.4 Acknowledging this finding is difficult to reconcile with the Early Conciliation notification in each case, the Tribunal was unable to conclude on the balance of probabilities that each claimant had tried to present a claim by post on a paper ET1 form in summer/late summer 2019. Although the first claimant gave evidence that he printed off a paper copy of the ET1 form for himself and his brother (with different versions given by them as to

whether they sent claims together or separately in 2019), the Judge did not accept that each had done so and that both forms had simply never been received or acknowledged by the Tribunal central office. On their own evidence (about what happened after they said they had each made such a claim), neither made any attempt to contact the Employment Tribunal to check whether the claim had been received in the ensuing 14-15 months or more, although both said they expected to be contacted by the Tribunal after making a claim. Despite being told by his friend that the Tribunal would contact him once he made a claim, the first claimant made no attempt to contact the Tribunal to check if his had been received. Although the second claimant insisted in evidence that he had twice telephoned ACAS in about September 2019 to query the lack of response from the Tribunal, he accepted that, having been unable to get through, he had made no further enquiry of ACAS but “waited patiently” for some response from the Tribunal.

- 6.5 Neither claimant showed that he had given any sense of priority to Employment Tribunal proceedings and to pursuing those vigorously against his former employer.
- 6.6 The first claimant was restricted in his movements and especially needed to stay at home during the Coronavirus lockdown. While the full nature of his disability was not clearly established, he stated that the chronic nature of the pain he suffered prevented him using email or the phone; this contradicted his earlier evidence that he had found the ET1 claim form on the website, printed it off for himself and his brother and filled in his own claim form, having “googled” how to make an Employment Tribunal claim.
- 6.7 The actual presentation of claims in late November 2020 was made at the first claimant’s instigation, after he sought some advice from a firm of solicitors which his father instructed; this was in September 2020 or thereabouts and he had no difficulty in presenting claims relatively quickly when that advice was sought and given to “resubmit” the claims. He presented the paper ET1 claim forms for both claimants by recorded delivery post and they were acknowledged promptly by the Tribunal administration.

7 The applicable Law and the Tribunal’s approach

- 7.1 On time limits for discrimination claims, Section 123 of the Equality Act 2010 sets out:
- (1) Subject to section 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...
- (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.

Section 140B of the 2010 Act provides for "extensions" of the time limits resulting from the Early Conciliation provisions.

7.2 The burden of proof is upon the claimant to show that the claim was in time or that it is just and equitable for the tribunal to consider it nonetheless. In the case of Robertson v Bexley Community Centre [2003] IRLR 434, Lord Justice Auld giving the judgment of the Court of Appeal stated:

"It is also of importance to note that the 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 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 discretion is the exception rather than the rule."

7.3 The notice pay claim is a contract claim within the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. Article 7 of the 1994 Order sets out provides:

"An employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable."

Regulation 8B provides for similar extensions of time for contract claims.

7.4 For the statutory sick pay claim, Section 23 of the Employment Rights Act 1996 sets out:

"(2) 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.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(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.”

7.5 Once again, in respect of the claims under the 1994 Order and the 1996 Act, the burden rests upon the claimants to establish that their claims were in time or otherwise that the tribunal has jurisdiction to hear them. The first stage: whether it was not reasonably practicable to present it in time is a question of fact for the tribunal as confirmed in Palmer v Southend-on-Sea Borough Council (CA) [1984] ICR 372, where Lord Justice May explained that test as meaning "was it reasonably feasible to present the complaint to the (employment) tribunal within the relevant three months?". If the claimant establishes that it was not reasonably practicable to present the claim in time for whatever reason, the tribunal then looks at the "further period" after the expiry of the primary time limit in order to determine whether it was presented within such further period of time as was reasonable.

7.6 The tribunal's overriding objective at Rule 2 of the Employment Tribunals Rules of Procedure 2013 means that it seeks to deal with cases fairly and justly, including ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility, avoiding delay, so far as is compatible with proper consideration of the issues and saving expense. No full case management of these proceedings has yet taken place and the tribunal therefore took the claimants' cases at their highest this stage and assumed that their different discrimination and other claims

had some merit notwithstanding the sparseness of their allegations in the ET1 claim forms.

8 Conclusions

- 8.1 Whilst this was difficult to understand given that each claimant had notified ACAS under the Early Conciliation provisions (in the first claimant's case definitely in time and in the second claimant's case a little out of time), the Judge did not accept that they sent paper ET1 claims to the Tribunal central office in early June 2019 or indeed within the next few months after that time, ie by late September 2019. Although the Judge was fully satisfied that the first claimant sought legal advice in late 2020, which resulted in both paper ET1 claims then being sent by recorded delivery and presented at the Tribunal office on 26 November 2020, it could not find on the balance of probabilities that they had both sent earlier claims. Their evidence that they had done so lacked cohesion and credibility. Accordingly, both claimants' claims were very many months out of time when presented in November 2020, but it had been evidently been reasonably practicable, ie reasonably feasible, for their notice pay and statutory sick pay claims each to be presented in time.
- 8.2 Their discrimination claims were also presented out of time but the claimants simply did not establish that it was just and equitable for those claims to be considered by the tribunal at a final hearing although the burden of proving this was firmly upon them. As the principles in Robertson show, the statutory time limits govern the Tribunal's primary approach to the bringing of claims and it is only in exceptional cases and for good reason where the claimants have missed the time limit that discrimination claims are permitted to proceed; that was not the case here. The quality of the evidence both on their part and on the part of the respondent's witnesses seeking to deal with and answer the claims must necessarily be affected by such a long delay, almost certainly to the disadvantage of the respondent.
- 8.3 In the event that the Judge's robust determination on the claimants' credibility and primary fact-finding is incorrect in not finding that they did each send a paper ET1 in summer/late summer 2019, he concludes in the alternative that this does not undermine the overall decision that the Tribunal lacks jurisdiction to hear the claims. Having regard to the Early Conciliation provisions and extensions of time, the first claimant's time for presenting his claim would have expired in late September 2019. If it was not reasonably practicable for him to present it within that time because he sent it (but it was not received or was in some way lost or mislaid by the Tribunal), it certainly was not a reasonable further period to have waited another 14 months before presenting the claim. Similarly, he has wholly failed to establish that it is just and equitable here for the Tribunal to consider his discrimination claims over 14 months late.
- 8.4 Strictly, the second claimant did not commence Early Conciliation notification within the primary 3-month time limit, but was already just outside it in doing so. Disregarding that aspect, his claim should have been presented by late July 2019 but was about 16 months late, which certainly was not a reasonable further period. The second claimant too wholly failed to establish that it is just and equitable for the Tribunal to consider his discrimination claims when presented so late.

- 8.5 Accordingly, having regard to both the Judge's main conclusions on all claims but also to the alternative conclusions, each of the claimant's claims against the respondent is dismissed for lack of jurisdiction.

Employment Judge Parkin

Date: 17 June 2021