



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100439/2021 (V)

Hearing held by Cloud Based Video Platform on 28th of June 2021

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Employment Judge Hendry

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Mr J Brogan

**Claimant
Represented by:
Mr Gerry Loughery -
Solicitor**

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Personal Hygiene Services Ltd

**Respondent
Represented by:
Mr Gareth Kennedy
accompanied by
Mr M Winstone**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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(One) The claimant having submitted his application to the Tribunal out of time and not having shown that it was not reasonably practicable to do so, the Tribunal has no jurisdiction to hear the claim and it is dismissed.

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(Two) The claim for disability discrimination having been submitted out of time and the Tribunal finding that it was not just and equitable to extend the time limit the Tribunal has no jurisdiction to hear the claim and it is dismissed.

REASONS

1. The claimant in his ET1 made 2 claims. The first was for unfair (constructive) dismissal and the second was for disability discrimination arising out of events some months before his resignation. The respondent company opposed the claims and also argued that they were time barred.
2. The case proceeded to a Preliminary hearing on time bar.

Issues

3. There were 2 different tests that the Tribunal had to apply. The first was whether or not the application to the Employment Tribunal for constructive dismissal was time barred and whether it had been not reasonably practicable for the claimant to lodge his claim (section 111(2)(b) of the Employment Rights Act 1996) and secondly whether or not the Tribunal should exercise its just and equitable power under section 123 of the Equality Act 2010 to allow the disability discrimination claims to proceed although out of time.

Evidence

4. The Tribunal heard evidence from Mr Brogan as to the relevant background. A joint bundle of documents had been prepared by parties and the Tribunal had regard to this.

Facts

5. The claimant is a 38 year old man who lives in Glasgow. He has children
6. The claimant started work for the respondent company on 27 March 2017 as a Service Driver. He resigned on 25 August 2020. His resignation was accepted on 26 August 2020. The effective date of termination was the 25 August 2020.

7. The claimant is disabled having suffered an injury to his left hand in 2016.
8. He felt aggrieved at the way he had been treated by his line manager Mr Crozier for some time in particular about an incident in February 2020 when he had suggested that the claimant should use his Blue Badge to park his van. The claimant believed he had been made fun of because of his disability. He was scared that if he raised the matter he might be sacked so decided to put up with Mr Crozier's behaviour.
9. On the 12 August the claimant was called a 'liar' by Mr Crozier. He decided to resign.
10. Following his resignation the claimant was upset that no one from the company appeared interested in why he resigned. He contacted the HR Department in September and said that he would be lodging a grievance. In November he emailed advising that he felt he had no option to resign because of the effect Mr Crozier's behaviour was having on his mental health. He complained about his 'belittling' behaviours". The respondent's HR Adviser Kerry Notley told him she would investigate the matter. She emailed the claimant with details of her findings on the 5 January 2021. It recorded that Mr Crozier had left the business.
11. The claimant was not in a Trade Union and had no source of ready advice. He had never been involved in an employment dispute with an employer in the past. He was unaware of the timescales that applied to lodging claims.
12. The claimant has access to a computer and to the internet. He has a "smart phone" he did not think about looking up his rights on the internet or checking if time limits applied.
13. In November the claimant spoke to a friend who had been involved in a claim over holiday pay with their employer and suggested that the claimant contact ACAS. The claimant had not previously been aware of ACAS or their role.

14. The claimant contacted ACAS on 16 November 2020 (JB1). He spoke to an adviser. He believed he had made his claim on time. The adviser did not discuss time limits with him. An ACAS Certificate was issued on the same date.
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15. The ACAS Certificate contained a covering email (JB2) which recorded: "*It is your responsibility to ensure that any Tribunal claim is submitted on time. ACAS can't advise you about whether a Tribunal claim should be submitted*".
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16. The claimant was disappointed at the response from the company he received in January. He also felt better able to progress matters. He attempted to obtain legal advice. This was difficult because of the covid pandemic. He contacted a number of lawyers in January. He eventually received some legal advice from Quantum Claims on 1 February. They advised him that his claim was out of time and that he should submit it immediately. The claim was submitted on line by the claimant that day.
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17. The claimant had difficulties in his personal life just before and after his resignation.
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18. The claimant's sister had been badly injured in a hit and run accident on 12 July 2020 and was in a coma for some weeks. She remained in hospital until about 14 December when she was allowed out of hospital for short periods. She was left with difficulty walking. The claimant provided support and assistance to her and he family.
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19. In about August the claimant's mother-in-law was diagnosed with cancer. She had an emergency operation four or five weeks after the diagnosis. She was told that the operation was successful but shortly after this was told that she only had a few months to live. She died on the 11 December.
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20. The claimant found this period of his life stressful and he put aside his dispute with his former employers until he felt better able to deal with the matter and

until they had responded to his grievance. He thought that once he had started the initial process his claim would be on time.

Submissions

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21. Mr Loughery had lodged written submissions. He was at pains to point out there were 2 aspects to the claims raised which had different legal tests and had to be considered separately. The position was that because of his ignorance of the time limit it wasn't reasonably practical for the claimant to lodge a claim for unfair dismissal in time. In relation to the claim for disability discrimination the respondents would not be prejudiced in his view and it was just and equitable to allow the claim to proceed although late.

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22. Mr Kennedy was also brief in his submissions. The claimant had accepted in evidence that he was responsible for lodging the proceedings himself and that it was his sole responsibility. He had not been misled by any adviser. He had ample time to lodge the claims and had not done so timeously.

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23. I raised the wording of the email from ACAS expressing a little surprise that it didn't give a more explicit warning about time limits or mention the three month time limit that applies to most claims. I asked parties if there was any more recent authority than the case of ***John Lewis Partnership v Charman*** to which they wanted to refer. I said that I had recently read that case and it contained a review of the well known authorities on late unfair dismissal claims. Neither solicitor indicated that I should have regard to any other legal authorities.

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24. I observed that in relation to unfair dismissal the issue was whether or not the claimant's ignorance of time limits was said to be reasonable on the facts I also observed that the Tribunal was a "creature of statute" and had to have regard to the statutory basis for allowing late claims. I also made reference to the case of ***Robertson v Bexley Community Council*** a case dealing with the exercise of the equitable discretion in discrimination cases. My musings

did not prompt any additional representations. I advised that I would reserve my Judgment.

Discussion and Decision

5 **General Observations**

25. I have now had the opportunity of considering matters. My sympathy goes out to the claimant who had a particularly difficult and fraught period in his life from the time of his sisters accident in July until December of that year when
10 his mother -in-law died. This period overlapped the ending of his employment with the respondent company.

26. The claimant had explained that he had a smartphone and access to a computer. He hadn't thought of "Googling" Employment Tribunals or time
15 limits but could have done so if he had wanted to.

Unfair Dismissal

27. The primary time limit under section 111 (2) (a) of the **Employment Rights Act 1996** (ERA) expired January Section 111 (2) is (so far as material) as
20 follows:

25 **"...[A]n 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

30 **(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."**

28. The principal issue here that is said to have rendered it impracticable for the claimant to bring proceedings in time was his ignorance of the time limit and whether this was reasonable. As stated by he then President Mt Justice Underhill in **Charman** at paragraph 9:

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“The starting-point is that if an employee is reasonably ignorant of the relevant time limits it cannot be said to be reasonably practicable for him to comply with them. Brandon LJ said this in terms in Wall's Meat Co. Ltd v Khan [1979] ICR 52, at page 61, and the passage in question was explicitly endorsed by Lord Phillips in Williams-Ryan: see paragraph 21 (page 1300 F-H). In the present case the Claimant was unquestionably ignorant of the time limits, whether one considers his own knowledge or that of himself and his father. The question is whether that ignorance was reasonable. I accept that it would not be reasonable if he ought reasonably to have made inquiries about how to bring an employment tribunal claim, which would inevitably have put him on notice of the time limits. The question thus comes down to whether the Claimant should have made such inquiries immediately following his dismissal.”

And later

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“It has repeatedly been emphasised that the question of reasonable practicability is a question of fact (subject to one point about the effect of third party advice, which does not arise here - see Northamptonshire County Council v Entwistle [2010] IRLR 740)”

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29. In the **Charman** case a claimant awaited the end of a grievance process before considering legal recourse and his ignorance the time limit (and that of his father) were held by the Tribunal on the facts (and upheld by the EAT) to demonstrate that it was not reasonably practicable to raise the claim on time. The claimant here is not in the same position. He was able to get in contact with ACAS and there was a warning in their email (although I accept

it could have been more explicit) that put the claimant on notice that time limits existed. It was not reasonable in my view not to have looked into the matter and checked the time limits. I am driven to the conclusion that his ignorance was in effect not reasonable and the application must fail as he is
5 unable to show that it was not reasonably practicable to comply with them.

30. One issue here is whether or not the claimant's ignorance of the time limit was reasonable. In my view the very latest email from ACAS on the 16 December put the claimant on notice that there might be a time limit and that
10 he should have regard to that. He was warned that ACAS would not give advice about time limits. He did not clarify what this meant. He did not at that point carry out the research which should have led him to discover the Employment Tribunal time limit of 3 months. I accept that he might have delayed while the respondent investigated his grievance but he had already
15 contacted ACAS and been warned of the existence of time limits.

31. The issue is whether or not the claimant's ignorance of the time limit was reasonable. The claimant had made no enquiries during this period. At the very latest the claimant had following the 5 January and the disposal of his
20 grievances to decide whether or not to proceed. Whilst I can understand he wanted to obtain legal advice and to try to contact solicitors and can accept even prior to the Covid pandemic it was a very difficult and time consuming exercise, time limits are ubiquitous in our society and the claimant would still have had 10 or so days to lodge his claim which he finally did on his own and
25 without assistance on 1 February.

32. The question of reasonable practicability is a question of fact and depends on the facts and circumstances of any individual case and whilst anyone would have sympathy for the difficulties the claimant was experiencing matters had,
30 in his words, settled down by January 2020 and there was no bar to him proceeding.

33. I don't minimise the difficulties that the claimant had. He was not in a Trade Union. He could not turn to a Trade Union for advice. He was a relatively

young man with children. There is no doubt he had many things to occupy (preoccupy) his mind. Nevertheless, in relation to the reasonably practicable test I cannot find that it was not reasonably practicable for him to lodge the claim in time.

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Disability Discrimination

34. Section 123 of the Equality Act, 2010 is in the following terms:

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“123 Time limits

(1) ...Proceedings on a complaint [of discrimination in employment] 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...”

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35. In relation to the matter of disability discrimination. That claim arose in February 2020. I can understand the claimant’s fear for his job if he made a complaint. He paints an unflattering picture of his line manager who has now left the respondent’s employment. The respondent company in their response to the claimant’s better and further particulars write that: “Whilst it is accepted that employers should be sensitive to the hurt that can be caused by offensive comments it is submitted that the Respondent Company cannot be responsible for the imposition of legal liability in respect of every unfortunate and disparaging phrase made by Mr Crozier”. I do not believe that that is a correct statement of the law. Unless an employer can vail themselves of the statutory defence they are responsible for their managers actions. I accept that in practice without employees taking grievances higher management may be unaware of such problems but that does not affect the legal position.

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36. The claimant took no action at that point about the matter although believing that the way he had been treated was wrong. The claimant’s lawyer indicated that there were no intervening acts that he relied upon. The claimant did not

lodge a grievance or try to raise the issue informally with the line manager's superior or the HR department.

37. The leading case that provides guidance to the approach a Tribunal should take is that of **Robertson v Bexley Community Centre** [2003] EWCA Civ 576. In which Lord Justice Auld in the English Court of Appeal stated:

24. The Tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision. If authority is needed for that proposition, it is to be found in Daniel and Homerton Hospital Trust (unreported, 9th July 1999, CA) in the judgment of Gibson LJ at page 3, where he said:

"The discretion of the tribunal under section 68(6) is a wide one. This court will not interfere with the exercise of discretion unless we can see that the tribunal erred in principle or was otherwise plainly wrong."

25. 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.

38. I regret that I am not convinced that the claim should be allowed late. The claimant knew that the behaviour was wrong and it clearly rankled with him for some time. He took no steps to consider raising the matter internally either formally or in formally and no steps to find out his exact legal rights including the protections against dismissal that exist for an employee raising such matters. He could have checked his rights rather than make a conscious

decision to forego taking any action. If allowed the employer would now be faced with a claim that is considerably out of time. In these circumstances I am of the view that it wouldn't be just and equitable to allow the claim to proceed.

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10 Employment Judge: James Hendry
Date of Judgment: 30 June 2021
Entered in register: 01 July 2021
and copied to parties