



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4112339/2019

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Preliminary hearing held on 15 September in Edinburgh

Employment Judge A Jones

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Mr O Al Manasrah

**Claimant
In person**

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Scottish Court and Tribunals Service

**Respondent
Represented by
Mr B Nichol, solicitor
Anderson Strathern**

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JUDGMENT

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The Tribunal does not have jurisdiction to consider the claimant's complaints. The claims were lodged out of time and the Tribunal finds that it is not just and equitable to consider the claimant's claims of discrimination and that it was reasonably practicable for the claimant to bring a claim of unfair dismissal within the statutory time limit. In the alternative, the claimant's claim of unfair dismissal is struck out as having no reasonable prospects of success.

Introduction

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1. The claimant lodged a claim at the Employment Tribunal complaining of race discrimination and unfair dismissal. The claim was received on 7 November 2019. The claimant's employment with the respondent had terminated by

reason of the claimant's resignation with notice on 28th February. The claims were resisted by the respondent. Preliminary hearings took place in the case on 14 February and 6 April 2020. At the preliminary hearing on 6 April, the Tribunal made Orders requiring the claimant to provide a witness statement in relation to the question of timebar and in particular answer specific questions which were set out by the Tribunal. The parties were also required to set out in advance their position on an application for strike out which had been made by the respondent in relation to the claimant's claim of unfair dismissal. An agreed statement of facts and a joint bundle of productions was provided to the Tribunal for use at the hearing.

Preliminary matter

2. At the commencement of the hearing the claimant sought to amend his claim to include a claim of constructive dismissal and also a claim of victimisation. The respondent indicated that any such application would be resisted. The claimant was directed to make any such application in writing setting out the specific statutory basis of any amendment and the reasons for making such application at this stage within seven days of a judgment being issued in the case, should the judgment be that the Tribunal had jurisdiction to consider the existing claims.

Issues to be determined

3. It was accepted that the claimant's claims had been lodged more than three months after the termination of his employment. The claim was also lodged more than three months after the date on which the claimant was advised that he would not be re-employed by the respondent, albeit there was no specific allegation in the claimant's claim form that this was an act of race discrimination.

4. In the circumstances, the Tribunal was required to determine the following issues:

- Was the Tribunal satisfied that it was not reasonably practicable for the complaint of unfair dismissal to have been lodged within three months of the date of the termination of the claimant's employment and if so, was

the complaint lodged within such further period as the tribunal considered reasonable?

- In the event that the Tribunal finds that it has jurisdiction to consider the complaint of unfair dismissal, should that complaint be struck out as having no reasonable prospect of success?
- Is it just and equitable to consider the claimant's claim of race discrimination?

Observations on the evidence

5. The Tribunal heard evidence from the claimant about his reasons for delay in lodging his claim, why he chose to lodge his claim when he did and was referred to a bundle of documents and an agreed statement of fact. The Tribunal found the claimant on the whole a credible witness in relation to the circumstances in which he found himself between the period of the termination of his employment and the lodging of his Tribunal claim.
6. However, the Tribunal finds it necessary to record that it was clear from the evidence and submissions of the claimant that in bringing a claim before the Tribunal, the claimant was seeking to highlight circumstances which he believed were in the public interest beyond the particular circumstances of his case. He said on a number of occasions that the respondent and Scottish society more generally was institutionally racist. The Tribunal sought to explain to the claimant that the Tribunal could only determine particular cases before it where it had jurisdiction to do so. The Tribunal was also concerned at the claimant's submission that if his case was not allowed to proceed, it would demonstrate that the tribunal was biased. Therefore while the claimant's evidence in relation to the specific events which took place in relation to his personal life was credible, his evidence beyond those limited facts was vague and involved making sweeping generalisations and allegations against the respondent and others in relation matters which were not relevant to the subject matter of the hearing.

Findings in fact

7. On the basis of the evidence, both oral and written, the Tribunal made the following finds in fact:
8. The claimant commenced employment with the respondent as a Court Officer on 10 August 2015.
9. The claimant gave notice of his resignation of his employment by letter dated 11 January 2019.
10. On 20 February, the claimant contacted the respondent and requested to withdraw his resignation.
11. On 27 February, the claimant applied for reappointment to employment with the respondent through the respondent's reappointment policy.
12. The claimant's employment with the respondent terminated on 28 February 2019.
13. The claimant was a member of the PCS union.
14. The claimant was advised by email of 15 May 2019 that his application for reappointment had been refused.
15. The claimant was declared homeless on 11 June 2019 and was advised by letter dated 18 June 2019 that the City of Edinburgh Council had a duty to find him permanent accommodation.
16. The claimant worked at the Citizen's Advice Bureau for four weeks from the end of June in St Andrews. This work was paid. Thereafter the claimant volunteered at the Citizen's Advice Bureau until just before Christmas 2019.
17. The claimant was engaged in voluntary work at the Byre Theatre in St Andrews in August 2019.
18. The claimant was interviewed for a role at Perth Sheriff Court around the beginning of July 2019, but was unsuccessful in his application.
19. The claimant sought to appeal the decision to refuse reappointment by email dated 5 July 2019.

20. The claimant was advised by the respondent by email dated 11 July that there was no right to appeal a refusal to reemploy under the respondent's policy.
21. The claimant first contacted ACAS in relation to the possibility of making a claim in early July 2019, following being advised that his application for a role at Perth Sheriff Court had been unsuccessful.
22. The claimant was aware at least from the beginning of July that an Employment Tribunal claim had to be lodged within three months of the acts complained of. The claimant was also aware at this time that any claim in relation to his employment with the respondent ought to have been lodged by around 29 May.
23. The claimant sought advice from the Citizen's Advice Bureau in relation to a possible claim and other matters in August 2019.
24. The claimant was referred to a solicitor in Dundee following his consultation at the Citizen's Advice Bureau. The claimant had a consultation with a solicitor in Dundee at the end of August 2019 during which the issue of time limits was discussed.
25. The claimant visited his GP practice in Edinburgh on several occasions between February and October 2019. The claimant was prescribed fluoxetine in April 2019 and that medication was increased in August 2019, as he benefitted from that medication. The claimant was suffering from mental health issues during this period.
26. The claimant sent lengthy email correspondence (running to around 7 pages) to the respondent on 23 July which was copied to various Members of Parliament setting out issues in relation to his treatment while employed by the respondent.
27. The claimant sent a further email which was similar in terms to that sent on 23 July to the First Minister's office on 28 September 2019. The claimant received a response to this correspondence by email dated 29 October 2019.
28. The claimant contacted ACAS for a second time on 6 November 2019.
29. The claimant lodged a claim with the employment tribunal on 7 November 2019.

Relevant law

30. Section 123 Equality Act 2010 states that proceedings for a complaint in terms of part 5 (work) may not be brought after the end of “the period of 3 months starting with the date of the act to which the complaint relates, or such other
5 period as the employment tribunal thinks just and equitable.”

31. Section 111 Employment Rights Act 1996 states that an employment tribunal shall not consider a complaint of unfair dismissal 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
10 considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the of that period of three months.

32. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 states that at any stage of the proceedings,
15 either on its own initiative or on the application of a part, a Tribunal may strike out all or part of a claim or response on various grounds including that it has no reasonable prospect of success.

Submissions

33. The claimant in his submissions made reference to two authorities, Norbert Logistics Limited v Hutton EATS/001/13 and Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 EWCA Civ 640. In particular, the claimant made reference to paragraphs 35 and 37 of the EAT decision in Hutton as supportive of his position that his mental health made it not
20 reasonably practicable to lodge his claim of unfair dismissal in time. The claimant submitted that his condition meant that he could not plan ahead and that he dealt with the claim as soon as he was able to, similar to the
25 circumstances of the claimant in the case of Hutton.

34. The claimant made reference to paragraph 19 and 25 of the Morgan case. Paragraph 19 made reference to factors which are almost always relevant to
30 consider when exercising any discretion whether to extend time as being (a) the length of, and reasons for, the delay and (b) whether the delay has

prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). Paragraph 25 makes reference to discretion afforded to an employment tribunal in terms of section 123(1) of the Equality Act as being broad and unfettered. The claimant submitted that while in that case, the court found that there was no requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The claimant's position was in fact he had a good reason for the delay in presenting his complaint, which included the fact he was homeless, his medical condition and the question of geography. The claimant had given evidence that from around July 2019, he was living in Fife. He said that if he had raised a claim at that stage then although he appreciated the claim itself could be raised online (which he acknowledged when he was cross examined on the point), he would have been required to travel to Edinburgh to attend hearings and he would not have been able to meet the associated travel costs. The claimant submitted that on that basis he had lodged the claims as soon as possible.

35. The claimant then addressed the issues before the Tribunal more generally. In relation to the question of whether it had been reasonably practicable for him to have presented his unfair dismissal claim in time, the claimant submitted that the question of time bar was not a hard and fast rule. The claimant submitted that there were other circumstances which had impacted on his ability to present his case. He also submitted that his case was very important because of the harassment he suffered and that there was a wider public interest in his case going forward as there was huge racial inequality in Scotland. The claimant submitted that he had followed advice which had been that time bar can be disregarded depending on the merits of the case. He indicated he had not known his rights and that when he wrote the long letter to his employer and the First Minister, he had wanted to find a way to make change but that his concerns had been brushed under the carpet. He said that he had been deceived by his employer who had told him to pursue reemployment but had silenced him when he sought to raise issues about racial microaggressions. He

said that he had been bullied and harassed all throughout his career with the respondent.

36. Turning to the question of how the Tribunal should approach the question of what was just and equitable, the claimant submitted that this what was fair and just. The claimant claimed that the Tribunal's role was to change society to
5 make it better and that if his case was dismissed then the Tribunal was not impartial as people must know what is going on. The claimant went on to suggest that his employer was a very racist body full of racial microaggressions and tokenism. He concluded by submitting that there was a huge amount of
10 injustice in Scotland and if his case was dismissed, it would be unfair, unjust and not impartial.

37. The respondent invited the Tribunal to strike out the claimant's claim of unfair dismissal, to find that the claim of unfair dismissal was in any event timebarred and that the claim of discrimination was also timebarred. The respondent
15 submitted that even if it had not been reasonably practicable for the claimant to have lodged his unfair dismissal claim within 3 months, then he had still delayed too long and the further period before lodging the claim was not reasonable.

38. The respondent sought to distinguish the case of Norbert and said that the
20 facts of that case were very different, where the Tribunal had found that the claimant was not able to bring a complaint.

39. The case of Bexley Community Centre v Robertson 2003 WL 1823029 was cited as authority for the proposition that time limits are exercised strictly in
25 employment cases and there is no presumption in favour of an extension of time.

40. The respondent then addressed the particular factors advanced by the claimant as causing the delay in lodging his claim. It was noted that the claimant waited until June before taking advice at all, which was many months after the termination of his employment. Further, it was submitted that this was not a
30 case where the claimant had acted promptly when he became aware of the time limits. While the claimant had given evidence that he was homeless and unwell, during that period he was able to do many other things, such as write a

7000 word email, and undertake paid and voluntary work at the Citizen's Advice Bureau and the Byre Theatre. It was also suggested that the letter from the claimant's GP made clear that he was getting better from August.

5 41. In relation to the question of geography as a barrier to the claimant lodging a claim, the respondent highlighted that claims are lodged online.

42. In relation to the question of prejudice to the respondent, should the Tribunal determine it had jurisdiction to consider the claim of discrimination, the respondent highlighted that the claimant was still seeking to bring further claims given his application at the commencement of the hearing while it was not at all clear what his claims were on the pleadings before the Tribunal.

43. The respondent then submitted that even if the Tribunal had jurisdiction to consider the claimant's claim of unfair dismissal, it should be struck out as having no reasonable prospect of success. In particular, the respondent made reference to the evidence of the claimant where conceded that he had resigned and had not been dismissed. It was submitted that as the claimant had then sought to withdraw his resignation and then applied for reemployment and that, in his ET1 form he indicated that he wished re-engagement as a remedy, all of these factors were entirely inconsistent with a claim of constructive dismissal even if that claim was included in his claim form.

20 44. In responding to the submission of the respondent in relation to strike out, the claimant accepted that the factors raised were inconsistent with a claim of constructive dismissal. In answer to a question from the Tribunal, the claimant confirmed that he still wished to be re-employed by the respondent.

25 45. The claimant also submitted that while he was working and volunteering, he was not functioning well and that his transport costs in relation to the roles he was undertaking had all been covered. The claimant also denied that he had recovered from his condition and submitted that the letter from his GP had merely confirmed that he was engaging with the counselling which had been offered to him.

Discussion and decision

Was it reasonably practicable for the claimant to present a claim of unfair dismissal within 3 months of the termination of his employment?

5 46. The Tribunal was mindful that the question of whether it was reasonably practicable for the claimant to present his complaint timeously will depend largely on the particular facts of the case. The Tribunal considered carefully the claimant's circumstances between the date of termination of his employment and 27 May 2019. The Tribunal noted the terms of the letter from the claimant's GP, that he had presented in March expressing depressive symptoms of low mood, poor sleep and variable appetite, that he was prescribed medication and that he was engaging with counselling at this time. The Tribunal also accepted that the claimant was declared homeless on 11 June and that he had experienced difficulties in finding stable accommodation in the period prior to being declared homeless.

15 47. The Tribunal also took into account that the claimant had submitted an application for reinstatement by email on 27 February and was advised that his application was unsuccessful by email dated 15 May. The Tribunal accepted the claimant's evidence that he was in contact with the respondent regularly during this period to ascertain whether his application had been successful, albeit he did not receive anything in writing until 15 May.

20 48. The Tribunal also took into account that the claimant was employed in the court service. The claimant gave evidence that he was not aware of the time limits to bring a claim before the Employment Tribunal until he contacted ACAS in June or July 2019. The Tribunal found it difficult to accept his evidence in this regard. 25 The Tribunal also could not accept it was reasonable of the claimant, were that the case, not to take any steps to determine the position until June or July. The claimant was certainly aware by that stage at the latest the relevant time period in which to present a claim.

30 49. The Tribunal also bore in mind that the claimant had resigned with rather than without notice. He knew his employment was likely to terminate from 11 January, although the Tribunal accepted that there was then a period between 20 February and 15 May, when he may have been reemployed.

50. While the claimant no doubt had mental health issues between the submission of his resignation and 27 May, and had issues in relation to stable accommodation, the tribunal could not accept that it was not reasonably practicable for him to have presented a claim during this period. The burden of proof in this regard is firmly on the claimant (Porter v Bandridge Ltd 1978 IRLR 271). The claimant was a court officer, he is clearly highly intelligent and articulate and was a member of a professional association, the PCS. If the claimant was not aware of the time limit applicable to a claim of unfair dismissal, he could have taken advice to clarify the position. The claimant accepted that a simple google search of 'employment tribunal claim', brought up information that any claim must be lodged within three months. While the claimant had difficulties during the relevant period, the Tribunal could not accept that these rendered it not reasonably practicable to present a claim timeously.

51. Notwithstanding this finding, the Tribunal went on to consider whether if had not been reasonably practicable for the claimant to present his claim timeously, the further period which elapsed before the claimant did present his claim was reasonable.

52. The claimant was aware from June/July 2019 that his claim was already out of time. He was in paid work in June and undertook voluntary work until Christmas 2019 at the Citizens Advice Bureau. He had advice from the Citizens Advice Bureau and a solicitor around August 2019 during which the fact that a claim was out of time was discussed with him. Nonetheless, the claimant did not present his claim until 7 November. The Tribunal had no hesitation whatsoever in concluding that the delay in lodging the claim was not reasonable.

53. For completeness, the Tribunal also considered the respondent's application to strike out the claim of unfair dismissal in the event that the tribunal found it did in fact have jurisdiction to consider it. The claimant accepted that his actions in seeking to withdraw his resignation, in applying for reemployment and in seeking reengagement as a remedy for his claims was inconsistent with the argument that he had been constructively dismissed and that there was a breakdown in the relationship between him and the respondent. While the claimant had not explicitly set out in his claim form that his claim was

constructive dismissal, the Tribunal accepted that this could be inferred from the content of his claim. On this basis, the Tribunal found that the claim of unfair dismissal had no reasonable prospects of success and would have been struck the claim out had the Tribunal had jurisdiction to consider the claim.

5 54. The Tribunal went on to consider whether it was just and equitable to consider
the claimant's claim of race discrimination. It is well accepted that the discretion
afforded to the tribunal in this regard is broader than that in terms of the 'not
reasonably practicable' test. As highlighted by the respondent in reference to
the case of Bexley, there is no presumption that a tribunal should exercise its
10 discretion to extend time and the exercise of discretion is the exception rather
than the rule. However, the question of whether it is just and equitable to grant
an extension is essential a question of fact and judgment to be answered by a
tribunal having considered all the relevant facts and circumstances of a
particular case. While not exhaustive, relevant factors can include: the length
15 and reasons for the delay; the extent to which the cogency of the evidence is
likely to be affected by the delay; the extent to which the party sued had co-
operated with any requests for information; the promptness with which the
claimant acted once he knew of the facts giving rise to the cause of action and
the steps taken by the claimant to obtain appropriate professional advice once
20 he knew of the possibility of taking action.

55. The claimant's reasons for the delay in lodging his claim were taken into
account by the Tribunal in considering whether it was just and equitable to
extend the time. The claimant claimed that his mental health, his issues with
accommodation, the requirements that would have to travel in order to attend
25 hearings and that he was not aware of the time limits initially at least were all
considered.

56. While the Tribunal noted the reference by the claimant to the case of Hutton,
the tribunal was of the view that the facts of the present case were very
different. The claimant was clearly functioning during the period between
30 February and May as he was engaging with medical practitioners, and
corresponding with the respondent. The Tribunal found the length of the delay
to be a significant factor. The claimant was aware that any claim was already
out of time by June/July at the latest. It was not at all clear to the Tribunal why

the claimant continued to delay in lodging a claim. The Tribunal had no doubt that the claimant was capable of lodging a claim during this period. He wrote lengthy detailed correspondence both to the respondent and the First Minister and was working and volunteering.

5 57. The Tribunal could not accept the claimant's evidence that the question of geography was a valid reason for not presenting his claim. The claimant was aware that a claim was lodged online, which did not incur any costs. His evidence about a subsequent requirement to travel as being a relevant factor was not accepted by the Tribunal.

10 58. The Tribunal also took into account that the claimant's claim which was presented was not at all particularised. While an email bearing to be further particulars were provided by the claimant by email dated 24 February 2020, the respondent was concerned that it still did not understand what claims the claimant was making. The Tribunal had considerable sympathy with the
15 respondent's position in this regard. In addition, the claimant was now seeking to amend these claims. The Tribunal was mindful that the vague and generalised allegations which had been outlined by the claimant would cause the respondent considerable difficulty in seeking to defend the claim. The Tribunal was of the view that the respondent would be prejudiced in that the
20 memory of relevant witnesses would be impacted by the delay.

59. Moreover, the claimant took advice in June/July and then again in August and knew that his claim was out of time from June/July but still did not present his claim until November. There appeared to be no reason at all for deciding to lodge a claim in November rather than earlier. While the Tribunal was mindful
25 that there did not have to be a good reason for the delay, the Tribunal was of the view that the delay was not caused by the claimant's ill health or his housing issues, but was a conscious decision on his part not to lodge a claim within time, or at least as soon as possible thereafter once he was aware that his claim was out of time.

30 60. Taking into account all the facts and circumstances of the particular case, the Tribunal was not persuaded that it was just and equitable to consider the

claimant's claims of race discrimination. Therefore, the tribunal does not have jurisdiction to consider the claim.

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Employment Judge: Amanda Jones
Date of Judgment: 22 September 2020
Entered in register: 28 September 2020

10 and copied to parties