EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105630/2020

Preliminary Hearing Held by Cloud Video Platform (CVP) on 4 May 2021

Employment Judge J Young

Viacheslav Yakupov	**Claimant: In Person**
John Lewis Plc	**Respondent: Represented by Ms L Gould, Counsel.**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is:-

(1) That under Section 111 of the Employment Rights Act 1996 the Tribunal does not have jurisdiction to hear the claimant's complaints of unfair dismissal; and

(2) That the claims of discrimination are time barred having regard to the provisions of section 123 of the Equality Act 2010.

REASONS

Introduction

1. The claimant presented a claim to the Employment Tribunal on 20 October 2020 complaining that he had been unfairly dismissed and discriminated against on the grounds of the protected characteristics of race and disability. He arrived in the UK from Russia in 2007 and is now a British citizen. The claimed disability is depression. His claim of unfair dismissal included the claim that the principal reason for dismissal was because he had made a protected disclosure ("whistleblowing claim").

2. In their response, the respondent admitted dismissal of the claimant on 9 March 2020 but denied that it was unfair stating that dismissal was by reason of capability/ill health and that a proper process had been followed. The claim of race discrimination was denied. While it was acknowledged that the claimant suffered from depression it was not accepted that he was a disabled person as that is defined in section 6 of the Equality Act 2010. In any event disability discrimination was denied. The Respondent also stated that they would require further information to understand the "whistleblowing claim" prior to making any response and denied there was any basis for that claim. As a preliminary matter it was maintained that in any event the claims presented were out of time and the Tribunal had no jurisdiction to hear them.

3. At a preliminary hearing of 20 January 2021, the claimant accepted that the claims had been presented on 20 October 2020 and on the face of matters were time barred. At that time, it was ordered that a preliminary hearing be heard on the issues of :-

   (a) whether it was not reasonably practicable for the unfair dismissal complaint to be presented within the three-month time limit under Section 111(2)(a) of the Employment Rights Act 1996, and if so, was it presented within such further period as the Employment Tribunal consider reasonable, pursuant to Section 111(2)(b) of the 1996 Act?

(b) whether the claims of disability or race discrimination (including harassment) were presented within such other period as the Tribunal regarded as just and equitable pursuant to Section 123(1)(b) of the 2010 Act.

4. Additionally in the Note of the preliminary hearing issued on 4 February 2021, the claimant was ordered to provide further and better particulars of his discrimination claim and reasons why he had not presented his various claims within three months of the acts complained of; when he became aware of the Employment Tribunal; ACAS early conciliation and time limits; whether he took advice; why he had delayed between contacting ACAS on early conciliation and submitting his ET1; and why he had not brought his harassment claims sooner as they appeared to relate to incidents in 2017/2018.

5. On 14 February 2021 the claimant sought to provide further and better particulars as requested including information on delay in the submission of his claims. The respondents acknowledged that information on 24 February 2021 but noted that there were still concerns on the particulars given on issues within the claims made. In response the claimant gave further information on 28 February 2021.

6. It was noted in correspondence from the Tribunal that issues around the further and better particulars provided could be discussed at the preliminary hearing on time bar.

Documentation

7. For the hearing, the respondent provided a bundle of productions separated into (A) Pleadings and Tribunal Correspondence and (B) Documents and Correspondence. The Bundle was paginated 1-144 which numbering is used in reference to documents produced.

Hearing

8. At the hearing the claimant gave evidence and answered questions in cross-examination.

9. From the relevant evidence provided, documents produced and admissions made I was able to make findings in fact on the issue of time bar.

Findings in Facts

10. The claimant had continuous service with the respondent in the period between 3 August 2012 and 9 March 2020. Initially he was employed within the Mill Hill branch in London and in November 2014 moved to the branch in Byres Road, Glasgow. He was employed as a supermarket assistant.

11. His condition of depression commenced due to workplace issues in Glasgow in 2015/2016. He consulted with his GP from 2015 who prescribed medication of Citalopram (20mg and then 40mg) and from 2018 Sertraline (150mg). He had periods of absence. To the date of the hearing he continued to take that medication for depression which had assisted him with "less breakdown and anxiety – not so stressful – I can cope". The last appointment with his G.P was in January 2020. As a consequence of "a big issue at work" resulting in a "panic attack" in November 2019 he had attended his G.P who signed him off work from 8 December 2019. The return visit in January 2020 resulted in him again receiving a Fitness to Work statement indicating he was not fit to work.

12. His GP had made a referral to Adult Mental Health Services on 31 December 2019 and a telephone assessment on 23 January 2020 recommended a course of Cognitive Behaviour Therapy (CBT). The waiting times were lengthy due to Covid. (65)

13. Following a meeting in February 2020 the claimant attended a fitness to work meeting with the respondent on 6 March 2020 at which time he was accompanied by John Todd of the USDAW Union. At a further meeting of 9 March 2020 the respondent took a decision to dismiss the claimant. The letter from the respondent of 9 March 2020 (130) confirming the claimant's dismissal provided a right of appeal.

14. When dismissed the claimant had contacted Mr Todd who advised him of the appeal procedure and that he should be in touch with ACAS. The claimant initiated an appeal.

15. The claimant was somewhat diffident in advising when it was that he first was aware of the time limits in presenting a claim to the Employment Tribunal but it became clear that he was aware of the time limits just after his dismissal when he approached ACAS to register early conciliation. There was no early conciliation certificate produced in respect of that approach to ACAS in March 2020 but the claimant did confirm that he had made that approach and in discussion had learned of the three-month time limit. He stated he took no action to progress matters as he awaited his appeal.

16. Shortly after dismissal he commenced enquiry with other supermarkets for alternative employment but had not been successful. He considered that the supermarkets were somewhat overwhelmed by the consequences of the Covid pandemic.

17. His appeal request was confirmed by email from the respondent on 25 March 2020 and he made a subject access request on 25 March 2020 which was responded to on 22 April 2020 (63). His Appeal was heard on 27 April 2020 by telephone due to Covid. Mr Todd again assisted the claimant in that discussion. The claimant prepared a detailed statement for the appeal (15/23).

18. Following the appeal the claimant was emailed a copy of the notes taken by the Appeal Manager to which he made corrections and the final version was emailed to him on 28 April 2020 (outcome letter at 136). As stated in the outcome letter issued to the claimant on 15 May 2020 (136/144) the appeal was not upheld. That letter referred to concerns of the claimant in incidents which took place in 2017 and 2018.

19. After the appeal outcome was intimated the claimant spoke with Mr Todd about "options" and was advised that he could proceed to a Tribunal. He also stated that he "called CAB and they gave advice" and that he "did some research" and received "help from my partner". He intimated his early conciliation application to ACAS on 18 May 2020 and the E C Certificate was issued 17 June 2020.

20. He stated that he was "depressed after he read the outcome of the appeal" and "could not believe what was written as the outcome". He was also awaiting at that time an appointment for CBT and the situation was "confusing for him-zoned out and not able to make decisions".

21. His CBT appointment was listed for 27 August 2020 (65). Prior to that time around end July/beginning August 2020 the claimant sought representation from solicitors. He had read that he was entitled to Legal Aid and made various enquiries but was unable to obtain assistance. While at that time had spoken with his partner about lodging a claim he was not sure what to do until he received CBT.

22. He stated that "I wanted to go ahead but not sure exactly what I could do. I was not native to the country and I did not know how the whole system would work and it took me a while to come up with a decision due to my mental state".

23. Subsequent to his CBT appointment on 27 August 2020 he felt more encouraged that "all was not lost" and so he pursued a claim. The note from the Mental Health Practicioner of 24 November 2020 (65) confirmed that the claimant was seen on 27 August 2020 to help him with his "low mood" and he would "suggest that (the claimant's) mental health problems contributed to the delay in his making application for an Employment Tribunal".

24. He claimant made enquiry of the Strathclyde Law Clinic. They advised him of time bar problems but that he should submit a claim to the Employment Tribunal. He then prepared his ET1 Application. He attached by way of statement of case the statement that he had prepared for the appeal on 27 April 2020(15-23) and presented his ET1 on 20 October 2020.

25. There was no dispute that given the date of termination of employment; notification of early conciliation to ACAS and issue of their certificate; the three-month time limit expired (taking into account early conciliation) 17 July 2020.

Submissions

For the claimant

26. The claimant submitted that the main issue for the delay was his mental state decreasing after the outcome of the appeal and rejection of his whistleblowing claims. He lost confidence in himself and was "left in the dark". The pandemic increased stress and anxiety with "nothing working as it should". He tried to gain help but was unsuccessful. The whole situation was worsened by the outcome received.

27. He was not legally trained and English was his second language. This meant that he was not always able to act in accordance with prescribed guidance. When his mental state was down he was not able to take to make decisions at all and he could "close down". He suggested that he seemed to get different information regarding time limits with some suggesting that he had five years to go to a Tribunal.

28. He was in a new area and this was not easy for him to navigate. It would be just and equitable to give him a chance to stand up for himself and proceed with his claim.

For the Respondent

29. On the issue of reasonable practicability, it was submitted that the evidence was clear that it was reasonably practicable for the claimant to have presented his claim for unfair dismissal within the time limit. It seemed clear from evidence that the claimant was not going to raise a claim and then decided he should. He knew of the time limits. He was aware of the role of ACAS. He had made application for early conciliation. He had all the means available to make that claim and it was reasonably practicable for him to have done so.

30. In so far as the discrimination claims were concerned then again the time limit had passed and the issue was whether it was just equitable to extend time. In that connection reference was made to *Adedji -v- University Hospitals Birmingham NHS Trust [2021] EWCA civ 23* and in particular paragraph 37 where Lord Underhill had identified that a Tribunal should assess all factors in the particular case which it considers relevant including in particular the length of and reasons for the delay. Accordingly, the issue was not really about prejudice.

31. There was significant delay in presenting the ET1 when the claimant had been aware in March of the necessary time limit. It was submitted that the claimant had been evasive in identifying when it was that he was aware of the time limit but it became clear this was in March 2020 and an approach to ACAS had been made by the claimant at that time.

32. He then approached ACAS again and had in his possession by June 2020 the EC Certificate which would enable him to put in his claim.

33. By that time, he had prepared a lengthy appeal statement and attended an Appeal hearing; made a Subject Access Request; made applications for other jobs; and had advice from his union representative.

34. By the end of July, he had decided to get legal advice but still made no application until October 2020.

35. He had not seen his G.P since January 2020 and so there was no evidence of a deterioration in his mental health. The reason for delay did not justify an extension. The time limits were there to protect evidence and inevitably there would be a deterioration in witness recollection and cogency of evidence as time passed. In this case the claimant made complaints of matters in 2018.

36. In the circumstances it was not just and equitable to allow the discrimination claims to proceed.

Conclusions

37. The statutory provision regarding time limits for presentation of claims for unfair dismissal is found at Section 111(2)(a) of the Employment Rights Act 1996. That applies to "ordinary" unfair dismissal claims as well as "whistleblowing claims" and provides that such claims require to be presented within a period of three months running from the effective date of termination. Allowing for the intervention of early conciliation there was no dispute that the time limit would expire 17 July 2020 and the claims having been presented on 20 October 2020 was well out of time. There is an escape clause where the Tribunal considers that a claim was presented "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 the period of three months".

38. The burden of proof in that respect lies with the claimant. If a claimant succeeds in showing that it was not reasonably practicable to present the claim in time then the Tribunal must then be satisfied that the time within which the claim was in fact presented was reasonable.

39. The Court of Appeal has considered the correct approach to the test of reasonable practicability (*Lowri Beck Services -v- Brophy [2009] EWCA civ 2490).* There the essential points were summarised as:-

(1) The test should be given a "liberal interpretation in favour of the employee".

(2) The statutory language is not to be taken as referring to physical impracticability and for that reason might be paraphrased as whether it was" reasonably feasible" for the claimant to present his or her claim on time.

(3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit or mistaken about when it expires in their case the question is whether ignorance or mistaken belief is reasonable. If it is then it will not have been reasonably practicable for them to bring the claim on time. However, it is important that in assessing whether ignorance or mistake are reasonable to take into account any enquiries which the claimant or their advisor should have made.

(4) If the employee retains a skilled advisor any unreasonable ignorance or mistake attributable to the employee.

(5) A test of reasonable practicability is one of fact and not law.

40. In this case there was no ignorance or mistaken belief by the claimant of the time limit. He was aware of the three-month time limit shortly after the termination of his employment. He had approached ACAS and it would appear at least he made enquiry about early conciliation at that time if not made application. He also had advice from his union representative.

41. Thereafter he made a Subject Access Request on or around 25 March 2020 and prepared a lengthy statement for his appeal on 27 April 2020. He subsequently received an outcome of that appeal on 15 May 2020 within the time limit. He then made application for early conciliation with ACAS and was issued with a Certificate on 17 June 2020.

42. All was ready for him to present his claim to the Employment Tribunal. He complained that he was of low mood as the appeal outcome had affected his mental condition. However, the evidence was that he continued on the same medication throughout the period through to 17 July 2020 and that his last GP appointment was in January 2020 which appeared to relate to an incident at work around November 2019 affecting his mood. There was no evidence that there was such deterioration in the claimant's mental state that it was not "reasonably feasible" for him to have presented his claim. He was well aware of the time limit and the need to put that claim to the Tribunal. He had made the necessary application for early conciliation and already prepared a statement for the appeal which was the one which he annexed to the ET1 presented in October 2020.

43. I considered that it was "reasonably practicable" for him to have presented his claims for unfair dismissal within the three-month time limit.

44. Additionally, even if it had been not reasonably practicable to present the claims in time there was a further three-month delay before presentation to the Tribunal on 20 October 2020. By that stage he had decided he wished to go ahead with his claim by making a search for suitable legal advice around end July 2020. Given his determination to proceed with the claim it was not presented within a reasonable time of the expiry of the time limit when it was eventually made on 20 October 2020.

45. In those circumstances therefore, I consider that the complaints of unfair dismissal are out of time and the Tribunal does not have any jurisdiction to hear the claim of "ordinary" unfair dismissal or that arising from the "whistleblowing claim".

Discrimination Claims

46. With regard to discrimination claims (other than equal pay claims) the Equality Act 2010 provides that the relevant time limit for starting employment tribunal proceedings runs from the "date of the act to which the complaint relates". – Section 123(1)(a). Here the latest date from which the acts complained of relate is the date of dismissal namely 9 March 2020. Again, taking account of early conciliation, the claims should have been lodged by 17 July 2020.

47. Tribunals have a discretion to hear out of time discrimination claims where they consider it "just and equitable" to do so – S123(1)(b) Equality Act 2010. That allows employment tribunals a wide discretion to have an extension of time but it does not follow that the exercise of that discretion is a foregone conclusion. It has been said that a claimant requires to "convince the Tribunal that it is just and equitable to extend the time limit" (*Robertson -v- Bexley Community Centre, t/a Leisure Link [2003] IRLR 434)*.

48. In exercising that discretion attention has been drawn to factors which it may be relevant to consider being the extent to which the cogency of the evidence is likely to be affected by delay; whether the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken to obtain appropriate advice. However the essential ingredients have been stressed as being the length of and reasons for the delay and whether the delay has prejudiced the respondent for example by preventing or inhibiting it from investigating the claim while matters were fresh. (*Adedji -v- University Hospital Birmingham NHS Trust [2021] ECWA civ 23)*.

49. As indicated I consider that it was "reasonably practicable" for the claimant to have intimated his claim on time. The essential question is whether the low mood that affected him was sufficient to allow the discriminations claims to proceed on a "just and equitable" basis.

50. I was not convinced that the claimant's mental state was such that he was unable to make this claim. His last appointment with his GP was in January 2020 and the medication that he was on and which he considered had helped him to cope did continue unaffected throughout the relevant period. His evidence was that he was able to commence a search for alternative employment. He had the support of a Trade Union Representative at the appeal stage and he had been capable of preparing for that appeal a lengthy statement which was the one that he had attached to his ET1 by way of explanation of his claim. Little then required to be done to make the presentation of this claim.

51. He had also followed the necessary procedures for early conciliation with ACAS by middle June 2020. He well knew that there was a time limit and was not mistaken in that respect.

52. It did appear to me that he had decided not to proceed with his claim but then changed his mind. But even when he changed his mind he did not make presentation of the claim. He sought legal advice toward end July and was unsuccessful but yet it was not until 20 October 2020 when he presented this claim.

53. There is always sensitivity in respect of those who advise of depressive conditions. I was conscious of the suggestion in the letter form Adult Mental Health services that the claimant's low mood may have contributed to delay but in this case and given the steps he was able to take in the period from 9 March to 20 July 2020 I did not consider that was a sufficient reason to allow an extension on a just and equitable basis.

54. It was a salient point that the claims made by the claimant related at least in part to incidents in 2017/18. The time limits on claims being made are there for a reason namely to allow investigation of matters to be made when reasonably fresh. The investigation of stale issues is undesirable and that is a factor that comes into play as regards certain elements of this claim.

55. In those circumstances I would not allow time to be extended on a just and equitable basis.

Employment Judge: Jim Young
Date of Judgment: 21 May 2021
Entered in register: 26 May 2021
and copied to parties