EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Paul Atkins	**v**	(1) Support 4 Sight (2) Mr Gary Hyams

Heard at: Bury St Edmunds (by CVP) **On:** 09 August 2021

Before: Employment Judge M Warren

Appearances
For the Claimant: Mr Frater (Solicitor).
For the Respondent: Mr N Clarke (Counsel).

RESERVED JUDGMENT

The claimant's claims are dismissed for want of jurisdiction, having been issued out of time.

REASONS

Background

1. Mr Atkins issued these proceedings on 19 August 2020. The case came before Employment Judge Moore at a closed preliminary hearing on 9 April 2021. EJ Moore noted that the date given for the end of Mr Atkins employment in his ET1 was 9 April 2020, that early conciliation certificates for the first respondent were to cover the period 20 May to 4 June 2020 and for Mr Hyams, just on 19 August 2020. On the face of it therefore, both claims seemed to be out of time. She noted Mr Frater's contention that the effective date of termination of Mr Atkins employment was in fact later than 9 April 2020.

2. EJ Moore directed this matter be listed for today's open preliminary hearing, "*To determine whether any of or all of the claims have been brought out of time and, if so, whether the relevant time limits should be extended and/or the tribunal has jurisdiction to hear them.*".

3. EJ Moore granted Mr Atkins leave to amend his claim, *"to bring a claim of victimisation pursuant to s.27 EqA 2010 as pleaded in his amended claim form".*

4. An Agreed List of Issues appended to EJ Moore's preliminary hearing summary identifies that Mr Atkins claims are:

   4.1 Automatic unfair dismissal for having made protected disclosures.

   4.2 Detriment for making protected disclosures.

   4.3 Failure to make reasonable adjustments.

   4.4 Harassment related to disability.

   4.5 Victimisation, (the protected disclosures relied upon also relied upon as protected acts and the same detriments relied upon).

Papers before me today

5. This hearing was conducted remotely and I did not have before me the tribunal file.

6. I had from the respondent a bundle of documents together with witness statements from the second respondent, Mr Gary Hyams and from a trustee of the first respondent, Mr John Thompson.

7. For the claimant, I had a witness statement from Mr Atkins and a skeleton argument from Mr Frater together with some additional documents, including a response to a Freedom of Information Request, an email from a Mr Penrose to a Ms Hayden dated 1 September 2020, an email regarding a payslip dated 23 April 2020 and an email regarding the date of consultation meetings dated 8 August 2021.

8. Mr Clarke for the respondent sought to introduce into evidence a further document, what was said to be a template script for Mr Hyams to read aloud at the final consultation meeting we will hear about in due course, on 14 February 2020. Mr Clarke also told me that a search was underway for a manuscript amended version of that template. Mr Frater objected to those documents being admitted in evidence. The bundle contains a letter written to Mr Atkins dated 18 February 2020, purporting to recite what was said to him at the meeting on the 14th February. It has always been Mr Atkins' case that Mr Hyams read that letter to him at their meeting on 14th February. I had regard to the overriding objective and the need to balance the prejudice between the parties. EJ Moore had given directions for disclosure, (on 14 May 2021) and preparation of the bundle, (to be filed one working day before this hearing). I note she directed sequential exchange of witness statements; Mr Atkins to serve his first. It has always been Mr Atkins' case that the letter was read out to him. It is not in accordance with the overriding objective and not acceptable for the

respondent to seek to produce a document during the hearing which plainly ought to have been sought out and disclosed in accordance with EJ Moore's directions. Mr Frater has no opportunity to challenge the provenance of either of those documents. I determined that it was not in accordance with the overriding objective to allow the documents in evidence. It would cause unreasonable delay if I were to postpone and prejudice if I were to allow them in today.

9. There were problems with the bundle. Mr Atkins is visually impaired. The respondent has produced a bundle which is not compatible with his document reading software known as JAWS. The respondent knows that he relies upon that software. Given the nature of the charity, it is surprising the respondent did not ensure the bundle was compatible with JAWS. I understand that had the document been provided with optical character recognition, that would have provided a solution. As it happens, both the President's Directions relating to preparation of the bundles for CVP and this tribunal's local directions, ask that the parties prepare bundles with optical character recognition. It is therefore all the more disappointing that was not done in this case.

10. We overcame this difficulty because Mr Atkins had somebody sitting with him who was able to read documents to him as was necessary from time to time during the evidence. Both Mr Atkins and Mr Frater were happy with this arrangement, on the understanding I would review that arrangement if difficulties emerged during the hearing. Fortunately, the hearing proceeded smoothly, (from that perspective) and the arrangement worked well.

Facts

11. Mr Atkins had been employed by the respondent since 3 July 2003. His job title was Resource Centre and Volunteer Manager. He is visually impaired. As its name suggests, the first respondent is a registered charity seeking to provide support to the visually impaired. At the material time, Mr Hyams was the first respondent's Chief Executive Officer.

12. At a meeting on 23 January 2020, Mr Atkins was informed that he was at risk of redundancy.

13. Mr Atkins and Mr Hyams had a first consultation meeting with regard to that possible redundancy on 23 January 2020. What was discussed at that meeting is as summarised in a letter from Mr Hyams to Mr Atkins dated 29 January 2020. It includes the following:

> "For the purposes of the restructure, you will be asked to work some or all of your notice, which if the restructure and closure goes ahead, I would anticipate to be up to approximately 9 April 2020. Any remaining notice would be paid in lieu. Please note that any balance of notice pay in lieu is subject to normal Tax and National Insurance contributions."

14. Mr Atkins had the benefit of written terms and conditions of employment. Clause 17 dealt with the arrangements for termination of employment and includes the following:

> "In some circumstances it may be possible to receive pay in lieu of notice."

15. A second consultation meeting between Mr Hyams and Mr Atkins took place on 6 February 2020. What was discussed at that meeting was confirmed by Mr Hyams in a letter dated 10 February 2020, which includes the following:

> "Your employment with the charity would be likely to cease on the 14th February 2020 by reason of redundancy."

16. The third and final consultation meeting took place on 14 February 2020. What was said to Mr Atkins by Mr Hyams at this meeting was confirmed in a letter dated 18 February 2020 which includes:

> "I gave you formal notice that your role as Resource Centre and Volunteer Manager will cease on 14 February 2020 by reason of redundancy but that I am requiring you to work part of your 12 week notice period, at this point up to and including the 9th April 2020.
>
> Please note that should there not be a requirement for you to work notice due to lack of tasks or if you secure employment during your notice period your end date will be brought forward and you will be paid the balance of any notice in lieu.
>
> This means that your employment as Resource Centre and Volunteer Manager was terminated on 14 February 2020 and you are entitled to the following:
>
> 1. You will continue be paid normally up to the last date that you work.
>
> 2. After your last date of employment, you will be paid the balance of any notice remaining in lieu. Please note this is subject to normal Tax and NI contributions.
>
> 3. Your terms and conditions entitle you to 12 weeks' notice.
>
> 4. Redundancy payments are calculated by a formula using your age and length of service and you will receive your redundancy payment in the next payroll run after your end date of employment, which is expected to be April 2020.
>
> 5. You will receive any payment in lieu of any holidays accrued but not taken up to your last day of employment and this is expected to be paid in April 2020."

17. Mr Atkins continued to work up until the 9th April 2020.

18. On 9 April 2020 Mr Atkins sent to Mr Hyams an email which included confirmation that he had:

18.1 Removed all his personal items from the premises;

18.2 Returned his laptop and charger;

18.3 Expressed the expectation that his passwords will be cancelled;

18.4 Returned his iPhone and charger;

18.5 Put his keys in an envelope through the door;

18.6 Left a credit card on the desk cut up and cancelled;

18.7 Withdrawn permission for any photographs or videos of himself and his guide dog being used for publicity purposes by the respondent;

18.8 Returned his ID badge and fleece, and

18.9 He wrote, *"Please can you confirm when all payments will be made to my account and that my P45 will be sent.".*

19. On or about 25 April 2020 Mr Atkins received through the post his P45 which stated that his leaving date was 9 April 2020.

20. At about the same time he received a payslip for the month ending 30 April 2020 itemised payments as follows:

> "Monthly pay £846.77;
>
> Redundancy Pay £15,067.44;
>
> Notice Pay £2,363.52."

21. The total amount payable was expressed to be £17,487.32 and to be transferred on 30 April 2020.

22. Mr Atkins consulted Mr Frater on 2 May 2020. He agrees that then and subsequently, he was able to speak to Mr Frater on the telephone for consultations, that they exchanged emails and that he had been able to send Mr Frater documents relating to the case, including the correspondence.

23. Mr Atkins commenced early conciliation through ACAS, initiating this himself, with regard to the first respondent, on 20 May 2020.

24. Mr Atkins commenced early conciliation with regard to the second respondent, again initiating this himself, on 19 August 2020.

25. These proceedings were issued on 19 August 2020. Mr Atkins completed the ET1 online himself. At 5.1 of the ET1 he stated that his employment ended on 9 April 2020.

26. Appended to the ET1 were particulars of claim prepared by Mr Frater. Despite their length and detail, they do not contain an express statement as to when his employment terminated, other than the following at paragraph 76:

> "In addition, Mr Lovell confirmed that he had been placed on furlough despite his being "at risk" and due to be terminated at the same time as Mr Atkins on 9 April 2020."

27. During lockdown Mr Atkins resided with two friends, forming a support bubble as all of them were clinically vulnerable. Throughout the pandemic they have not socialised with other people, have avoided going out and contact with the outside world in physical terms.

28. Sadly, Mr Atkins mother died on 24 December 2019 and his father died on 22 January 2020.

29. Mr Atkins and Mr Frater physically met at Mr Atkin's home with precautions taken, on 7 August 2020.

The Law

30. Section 111(2) of the Employment Rights Act 1996 (ERA) provides that:

> [Subject to the following provisions of this section], an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal—
>
> (a) before the end of the period of three months beginning with the effective date of termination, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

31. Similarly, Section s48 (3) (a) and (b) of the Employment Rights Act 1996 provides in relation to a complaint of having been subjected to detriment for having made a protected disclosure:

> (3) An [employment tribunal] shall not consider a complaint under this section unless it is presented—
>
> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

32. Section 123 of the Equality Act 2010 (EqA) requires that any complaint of discrimination must be brought within 3 months of the date of the act to which the complaint relates, or such further period as the Tribunal thinks just and equitable.

33. I am therefore potentially concerned with two different tests if I find that the claims are out of time; in respect of the unfair dismissal and whistleblowing claims, I will have to ask myself whether it was reasonably practicable for the claims to have been brought in time and if not, were they brought within such further period as I consider reasonable. In respect of the discrimination claim, the question will be whether I consider it just and equitable to extend time.

34. In a claim of discrimination where the act complained of is dismissal, time runs from the date dismissal took effect, (not the date of notice) see Lupetti v Wrens Old House Limited [1984] ICR 348 EAT.

35. In respect of unfair dismissal, time runs from, "the effective date of termination". That is defined at s.97 as:

> "(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires.
>
> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect …"

Effective Date of Termination

36. In determining the effective date of termination one should approach the words used to convey dismissal in a non-technical sense and they should be construed in light of the facts known to the employee at the time of notification, see Chapman v Letheby & Christopher Limited [1981] IRLR 440. Where an employee has been dismissed orally, followed by written confirmation, the oral and written words should be read and construed together, see Leech v Preston [1984] ICR 192.

37. Where there is ambiguity in the effect of a dismissal letter, it should be construed in the way most favourable to the employee, see Slapp v Shaftsbury Society [1982] IRLR 326 CA.

38. Nothing after the event aids interpreting the terms of dismissal, (and will not therefore rectify any ambiguity) but such may be evidence that a party well understood the position, see for example Mehta v Mayor and Burgeresses of the London Borough of Harringay EAT/063/05. I note that on the facts of Mehta, the claimant worked for part of his notice period and was paid in lieu in respect of the balance. The effective date of termination was found to be the end of the period that he served and not at the end of the overall notice period.

39. It is not permissible to seek to discern the meaning and effect of words of dismissal in order to determine the effective date of termination from earlier correspondence, see Clews v Hadfield's Limited EAT/0585/80.

40. The effect of pay in lieu of notice on determining the effective date of termination will depend upon what is communicated to the employee. In Locke v Candy & Candy Ltd [2011] ICR 769 Jackson LJ identified four non-exhaustive examples of situations in which the expression, "payment in lieu of notice" may be used and its effect. Two are pertinent in this case:

> "(2) The contract of employment provides expressly that the employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract provided that he makes the payment in lieu. …
>
> (4) Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice. This is by far the most common type of payment in lieu … the employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract."

41. In both instances, the contract comes to an end immediately, the termination takes effect immediately. Jackson LJ explained at paragraphs 34 & 35, payment in lieu is compensation because the claimant suddenly finds himself unemployed.

Reasonably Practicable

42. The question of whether it was reasonably practicable to bring a claim in time is a question of fact for the Tribunal. The onus is on the claimant to show that it was not reasonably practicable, (Porter v Bandridge Ltd [1978] ICR 943 CA).

43. The expression, "reasonably practicable" means, "reasonably feasible", see Palmer v Southend Borough Council 1984 IRLR 119 CA.

44. In Marks and Spencer v Williams-Ryan 2005 IRLR 565 the Court of Appeal held that regard should be had to what, if anything, the employee knew about the right to complain and of the time limit. Ignorance of either does not necessarily render it not, "reasonably practicable" to issue a claim in time. One should also ask what the claimant ought to have known if he had acted reasonably in the circumstances.

45. If a claimant is using a professional advisor, then generally speaking, the claim should be brought in time. The primary authority for that is Dedman v British Building and Engineering Appliances Limited [1974] ICR 53. What Lord Denning said in that case, is:

> "If a man engages skilled advisors to act for him and they mistake the time limit and present it too late, he is out. His remedy is against them."

46. In the case of Northamptonshire County Council v Mr Entwhistle UKEAT 0540/09/ZT, the then President of the EAT, Mr Justice Underhill, reviewed the case of Dedman and some subsequent authorities which may have been thought to bring its *ratio* into question. He confirmed that the principle of Dedman is still very much good law, but with the caveat that one must bear in mind the question is, was it reasonably practicable to bring the claim in time? We are reminded that it is possible to conceive of circumstances where a skilled advisor may have given incorrect advice, but nevertheless it was not reasonably practicable for the claim to have been brought in time. That said, in general terms, the principle remains that if a claim is late because of a professional advisor's negligence, that will not render it not reasonably practicable for the claim to have been brought in time.

Just and Equitable

47. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the EAT has said in the case of Cohan v Derby Law Centre [2004] IRLR 685 that a Tribunal should have regard to the Limitation Act checklist as modified in the case of British Coal Corporation v Keeble [1997] IRLR 336 which is as follows:

    (1) The Tribunal should have regard to the prejudice to each party.
    (2) The Tribunal should have regard to all the circumstances of the case which would include:

        (a) Length and reason for any delay
        (b) The extent to which cogency of evidence is likely to be affected
        (c) The cooperation of the Respondent in the provision of information requested
        (d) The promptness with which the Claimant acted once he knew of facts giving rise to the cause of action
        (e) Steps taken by the Claimant to obtain advice once he knew of the possibility of taking action.

48. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded tribunals by s123(1), but that it was often useful to do so. The only requirement is not to leave a significant factor out of account, (paragraph 18). Further, there is no requirement that the tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account, (paragraph 25).

49. In the case of Robertson v Bexley Community Services [2003] IRLR 434 the Court of Appeal stated that time limits are exercised strictly in

Employment Law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion.

50. That has to be tempered with the comments of the Court of Appeal in Chief Constable of Lincolnshire v Caston [2010] IRLR 327 where it was observed that although Lord Justice Auld in Robertson had noted that time limits are to be enforced strictly, his judgment had also emphasised the wide discretion afforded to Employment Tribunals. Lord Justice Sedley had noted that in certain fields such as the lodging of notices of appeal in the EAT, policy has led to a consistently sparing use of the power to extend time limits. However, this has not happened and ought not to happen in relation to the discretion to extend time in which to bring Tribunal proceedings which had remained a question of fact and judgment for the individual Tribunals.

Effect of Early Conciliation

51. Anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim, (s18A of the Employment Tribunals Act 1996). In doing so, time stops running for the purposes of calculating time limits within which proceedings must be issued, from, (and including) the date the matter is referred to ACAS to, (and including) the date a certificate issued by ACAS to the effect that settlement was not possible was received, (or was deemed to have been received) by the claimant. Further, (and sequentially) if the certificate is received within one month of the time limit expiring, time expires one month after the date the claimant receives, (or is deemed to receive) the certificate. See s140B of the Equality Act 2010 and Luton Borough Council v Haque [2018] UKEAT/0180/17.

Conclusions

52. There is no ambiguity in the wording of the letter dated 18 February 2020, which was read to Mr Atkins on 14 February 2020. If there is ambiguity in the words, *"I am requiring you to work part of your 12 week notice period, at this point up to and including the 9th April 2020"* that ambiguity is removed by:

    52.1 The next paragraph, which states clearly that if there is no requirement to work, the employment end date will be brought forward;

    52.2 On the following page where it reads at point 2, *"After your last date of employment, you will be paid the balance of any notice remaining in lieu …"* ;

    52.3 At point 4, *"You will receive your redundancy payment in the next payroll run after your end date of employment, which is expected to be April 2020",* and

52.4 At point 5, *"…your last day of employment and this expected to be paid in April 2020".*

Those words are clear: in the context in which the letter is written, Mr Atkins was informed that he would be required to work part of his 12 week notice period, until 9 April 2020 when his employment would terminate and he would receive pay in lieu of the balance of his notice.

53. The effect of the provision for pay in lieu of notice in the contract is that the employer has the right to make a payment in lieu of notice, therefore this case falls into category (2) as quoted above from the Judgment of Jackson LJ in the case of Locke and the employment therefore came to an end on the date stipulated.

54. If I had decided differently and concluded that the provision for pay in lieu of notice in the contract of employment did not give the employer the right to make a payment in lieu of notice, in any event the case would then have fallen within the fourth category of Locke; the termination would still have taken effect on 9 April 2020.

55. There is no reason why it should not be the case that an employee works part of his or her notice period and then receives pay in lieu of the balance of that notice period, the employment terminating at the point the employee ceases to work. Mr Frater's reference to the case of Wedgewood v Minstergate Hull Ltd UKEAT/0137/10 was unhelpful. In that case, the claimant was given notice to 1 December and paid to 1 December, but during the notice period there was agreement to release the claimant from his obligations to work, earlier. That is not what has happened here. I refer to the case of Mehta cited above and Palfry v Transco Plc UKEAT/0990/03 [2004] IRLR 916 referred to by Mr Clarke where the parties agreed after notice had been served, that the claimant's employment would end during the notice period and payment in lieu would be made in respect of the balance of the notice period; the tribunal was held to be right to have concluded the effective date of termination was the subsequently agreed end date and not the end of the contractual notice period.

56. Mr Frater's reference to Geys v Societe Generale, London Branch [2013] 1 AC 523 was also unhelpful. In that case the respondent made a payment in lieu into the claimant's bank account without telling him. In this case, Mr Atkins had been informed that a payment in lieu of notice would be made.

57. Whilst having no bearing on my construction of the letter dated 18 February 2020, I am reassured in my conclusion by the fact that no protest was raised by Mr Atkins when he received a P45 stating that his employment ended on 9 April 2020, nor when he received a payslip setting out pay and notice pay calculated on that basis. I am reassured and find that Mr Atkins interpreted the letter of 18 February just as I have, as confirmed by the actions which he took on 9 April 2020 as set out in his email to Mr Hyams of that date, by the fact that he stated on his ET1 his

employment came to an end on the 9th April 2020 and that his solicitor in his particulars of claim, albeit somewhat obtusely, referred to his employment terminating on 9 April 2020.

58. The effective date of termination was 9 April 2020. Three months from that date is 8 July 2020 and that is the expiry of the primary limitation period. Early conciliation for the first respondent was for a period of 15 days between 20 May and 4 June. Adding 15 days to the limitation period meant that time expired on 23 July 2020. The claims were therefore issued 4 weeks late.

59. The claim against the second respondent does not benefit from any extension of time as early conciliation was commenced after the primary 3 month time limit had expired.

60. Was it reasonably practicable for the unfair dismissal and whistleblowing detriment claims to have been issued in time? Mr Atkins confirmed in evidence that he had been researching his legal rights on the internet; that in itself would render it reasonably practicable for the claim to have been issued in time, for such research would have revealed the 3 month time limit and that a claim can readily be submitted online.

61. In any event, Mr Atkins consulted with his solicitor on 2 May 2020. Plainly from that point, it was reasonably practicable for the claim to have been issued in time.

62. Is it just and equitable to extend time in relation to the discrimination claims? Mr Atkins had the benefit of legal advice from an early stage and on that basis there must be an expectation that the claims would be issued in time. I have had regard to Mr Atkins' bereavements, his domestic circumstances in light of the pandemic and his disability, including his reliance upon screen reader technology. Mr Atkins acknowledged that he was in telephone conversations with Mr Frater and that they were exchanging emails, including Mr Atkins providing copy documents. It seems to me I am afraid that there really is no reason or excuse at all why Mr Atkins legal advisor could not have ensured that his claim was issued in time.

63. Mr Atkins has sought advice promptly but unfortunately, he did not issue proceedings promptly.

64. I acknowledge there is probably little impact on cogency of evidence by the delay.

65. I acknowledge the significant prejudice to Mr Atkins by making a finding that it is not just and equitable to extend time, for he will lose his right to claim that he has been subjected to discrimination. On the other hand, Parliament saw fit to impose a 3 month time limit and those time limits are to be taken seriously. There will be significant prejudice to the respondent if it is required to respond to a claim which has been made against it

outside the limitation period prescribed by Parliament, in circumstances where the claimant has had the benefit of legal advice and for whatever reason, there has been failure to recognise the need to issue the claim within the statutory time limit.

66. I find that it is not just and equitable to extend time.

67. Before I conclude, I should deal with Mr Frater's submission that because EJ Moore granted leave to amend the claim to include victimisation, that claim must survive in any event. As I indicated in closing submissions, there is no doctrine of relation back in employment tribunals, see Galilee v Commissioner of Police for the Metropolis UKEAT/0207/16. As Judge Hand QC made clear in that case, granting an amendment does not deprive the respondent of limitation arguments. In this case, EJ Moore clearly identified that the claims, that is all of the claims including the victimisation claim, were potentially out of time and directed that the time issue should be determined at the open preliminary hearing which came before me. My determination is that the claims, that is all of the claims including the victimisation claim, are out of time. The Tribunal does not have jurisdiction to consider them.

Employment Judge M Warren

Date: 12 August 2021

Sent to the parties on: ...31 August 2021
THY
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For the Tribunal Office