EMPLOYMENT TRIBUNALS

Claimant: Mr P O'Brien

Respondent: Levenday Limited

Heard: by video **On:** 7 October 2021

Before: Employment Judge S Jenkins

Representation
Claimant: Not present or represented
Respondent: Mrs E Kerrigan-Stacey (Business Manager

JUDGMENT

1. The Claimant's claims of unfair dismissal, breach of contract and unauthorised deductions from wages were not brought within the period of three months beginning with the effective date of termination, and it had been reasonably practicable for the claims to have been brought within that period. His claims are therefore dismissed.

2. The Claimant's claim of discrimination on the ground of disability was not brought within the period of three months beginning with the date of the act to which his complaint related, and it was not just and equitable to extend time. His claim is therefore dismissed.

REASONS

Background

1. The hearing had been arranged to deal with the issue of whether the Claimant's claims had been brought in time and, if not, whether time should be extended.

2. The hearing was scheduled to take place by video, and to start at 10:00am, the link and log in details having been sent to the parties on 27 September 2021 by email.

3. At the time that the hearing was due to start, Mrs Kerrigan-Stacey was

present on behalf of the Respondent, but the Claimant was not. The Claimant had, on 5 October 2021, sent an email to the Tribunal noting that he had lost his telephone and had a new contact number. The Tribunal had emailed the Claimant later that day, noting the new information and confirming that the case would proceed as listed on 7 October 2021.

4. The Claimant had also sent a similar email, albeit with a different telephone number, to the Manchester Tribunal on the same day. At the time the Claimant submitted his claim, on 12 June 2020, the claim had initially been allocated to the Manchester Tribunal due to an internal systems error, but it had swiftly been transferred to the Wales Tribunal and had been managed there ever since. The Manchester Tribunal forwarded the Claimant's email of 5 October 2021 to the Wales Tribunal on the same day.

5. In view of the absence of the Claimant at the start of the hearing, the Tribunal Clerk telephoned the number given by the Claimant, which turned out to be the number of his manager at his current employer. The manager gave no indication that the Claimant was in the vicinity. The manager gave the Clerk an alternative number, but that was the number for the phone the Claimant had lost. The Clerk tried that number but could not connect, the Claimant presumably having notified his service provider of the loss of the phone.

6. Subsequent to that, at 10:21am, the Clerk sent an email to Mr O'Brien, noting that his arrival was awaited and asking him to let the Tribunal know as soon as possible if he was experiencing any problems in accessing the hearing. The Clerk provided a further link to the hearing.

7. I allowed a further fifteen minutes to elapse to see if the Claimant would join or otherwise make contact with the Tribunal, before joining the hearing at 10:36am.

8. I explained to the Respondent's representative that I had power, under Rule 47 of the Employment Tribunals Rules of Procedure, to dismiss the claim in the absence of the Claimant or to proceed with the hearing in his absence. I also noted that the Rule requires that, before doing so, I should consider any information which was available after any enquiries that may be practicable about the reason for the absence.

9. In that regard, I noted from the Tribunal file that the Claimant had failed to attend two previous preliminary hearings. The first was a telephone hearing on 5 October 2021. The Claimant was not in attendance and could not be contacted. The second was a video hearing on 9 April 2021, which was a hearing which had been scheduled to deal with the time limit issue, when the Claimant again was not in attendance. On that occasion, the Claimant was able to be contacted and did join the hearing, but indicated that he was not aware that it was taking place and was not prepared for it. That hearing did not therefore proceed beyond some case management, and this hearing was then arranged to deal with the time limit issue. Notice of the hearing was sent to the parties on 9 May 2021.

10. I also noted that he Claimant had sent emails to the Tribunal, both of his own volition and in response to emails he had been sent by the Tribunal.

11. In view of the Claimant's previous failures to attend hearings, the emails that had been sent to him, and the attempts to contact him by telephone, I considered it would be appropriate to proceed with the case in the Claimant's absence. I considered that it would be more appropriate for me to do that, rather than simply to dismiss the claim, as there was evidence on the Tribunal file, in the form of a witness statement provided by the Claimant on 15 May 2021, which I could consider for the purposes of resolving the issues being considered at the hearing.

Post-hearing events

12. Subsequent to the hearing, which concluded at 11:10am, the Claimant telephoned the Tribunal at around 11:30am. He spoke to the Tribunal Clerk who administered the video hearing and told her that he had received the notice of hearing via post and was aware that the hearing was listed for 7 October by video. The Clerk told the Claimant to write in with his explanation for his non-attendance.

13. The Claimant then subsequently, at 12:18pm, sent an email to the Tribunal. He noted that he had lost his telephone on 2 October 2021, and had contacted a central number to try to update his new contact number. He stated that he had told the been told that his case had been transferred to Manchester. As I have mentioned, the claim had originally, through an error in the Tribunal's central systems, been allocated to Manchester before, almost immediately being transferred to Wales. It appeared to me likely that the Claimant had been referred to the Manchester Tribunal due to the fact that his case number was that originally allocated by the Manchester Tribunal, i.e. starting with "24", the numbers with which the case numbers of all claims in the Manchester Tribunal commence.

14. The Claimant confirmed that he had contacted the Manchester Tribunal on the morning of 5 October 2021, and that he was told to send an email with his changes. As I have noted, the Claimant did indeed send an email to the Manchester tribunal with his contact details, which was forwarded to the Wales Tribunal. As I have also noted, the Claimant also wrote directly to the Wales Tribunal by email on 5 October 2021, noting his change of number, albeit that he seemed to provide his old number. I also noted that the Wales Tribunal had sent an email to the Claimant, on 5 October 2021, noting the content of this email and confirming that the preliminary hearing by video remained listed for Thursday, 7 October 2021 at 10:00am.

15. In his email of 7 October 2021, the Claimant stated that he had not received any emails with the log in details for the hearing, or indeed any emails up to now. However, the log in details had been sent to him on 27 September 2021, and again on the morning of the hearing. The Claimant also noted that he struggled with technology and signing in and out of calls.

16. Ultimately, as the information regarding the Claimant's telephone call and the Claimant's email of 7 October 2021 were brought to my attention before I had completed my written judgement, I took the contents of them into account in relation to my decision to continue in the Claimant's absence. I again noted that this was the third occasion on which the Claimant had not

attended at the start of a scheduled hearing. I noted that he had been able to send and receive emails to and from the Tribunal's administrative staff, and to and from Mrs Kerrigan-Stacey at the Respondent, as I have noted in my Findings below.

17. I also considered that the Claimant would not have been in a position to provide me with any additional evidence beyond that contained in his witness statement in relation to the substantive questions as to whether or not his claims had been brought in time.

18. I therefore concluded that my initial decision to proceed with the case in the Claimant's absence should be maintained.

Issues

19. As I have noted above, the hearing was to deal with the question of whether the Claimant's claims had been brought in time and, if not, whether time should be extended. The Claimant had brought a variety of claims, some of which had been withdrawn. Of those that remained, the Claimant had brought claims of unfair dismissal, breach of contract and unauthorised deductions from wages, and also of disability discrimination.

20. The legislation in respect of the time limits for submitting claims of unfair dismissal, breach of contract and unauthorised deductions from wages is identical, and provides that an Employment Tribunal should not consider a complaint unless it is presented before the end of the period of three months beginning with the effective date of termination, or 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. That three month period is to be extended by virtue of any time spent pursuing early conciliation with ACAS, but, essentially, a claimant must make contact with ACAS for the purposes of early conciliation before the expiry of the primary three month time limit.

21. The provisions of the Equality Act 2010 relating to time limits for bringing claims of disability discrimination are not the same as those relating to unfair dismissal, breach of contract or unauthorised deduction claims. Discrimination claims must be brought within the period of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Again, time spent undergoing early conciliation with ACAS does not count for the purposes of the three month time limit, but again, essentially, a claimant must make contact with ACAS within the period of three months of the date of the act to which the complaint relates.

Findings

22. My findings relate only to the time limit issue I had to consider, and have no bearing on the underlying claims.

23. As I have noted, the Claimant had previously submitted a witness statement. In this, he confirmed that he was dismissed on 12 February

2020, following a disciplinary hearing, and he appealed against that dismissal by email on 17 February 2020. He had, on 11 February 2020, also submitted a grievance to the Respondent. He went on to note that, immediately after the dismissal and his appeal, the Covid-19 pandemic assumed prominence, and that everyone was curtailed by Government restrictions.

24. The Claimant confirmed that he had received an email from the Respondent acknowledging receipt of his grievance and appeal, and informing him that he would be contacted at an appropriate time in accordance with Government regulations. He noted that, during this period, he passed the Respondent's premises and noticed that they were closed, and therefore took it as read that everything would be placed on hold pending resumption of normal business activities. He went on to say that the applications to ACAS and the Tribunal were submitted at the earliest available opportunity after Government restrictions were lifted and after the Claimant became aware that the Respondent's business was operating. He contended that, on that basis, it would be "just and equitable" to allow his claim to proceed to a hearing.

25. I noted in the file, however, that the Claimant had sent an email to the tribunal on 15 June 2020, three days after the submission of his claim form, in which he said that he had recently submitted the online Tribunal form and that he had been told to do that by ACAS as he was "*with a union and they have misguided my case*". He went on to say that his union had told him to wait for the Respondent to reply to him, that he had had no reply, and that when he drove past his ex-employer's premises he saw that it was open, and that he then rang the union only to be told that he was already out of time and there was nothing that he could then do. He had then contacted ACAS by telephone and had subsequently submitted his Tribunal claim online.

26. Also in the Tribunal file was a witness statement from Mrs Kerrigan-Stacey in which she confirmed that the Respondent's office had been closed from the end of March until early September, other than periods where she had gone into the office to collect paperwork.

27. Mrs Kerrigan-Stacey supplemented that evidence in response to questions I asked her, having given an affirmation to tell the truth. The scope of my questions related to the Claimant's claim of disability discrimination. The effective date of termination of the Claimant's employment was agreed by the parties to be 12 February 2020, but it was not clear whether that was also the date to be taken as the date of the act complained of for the purposes of the discrimination claim. The Claimant's claim form suggested that it was not, as the Claimant did not appear to assert that his dismissal was an act of discrimination.

28. Employment Judge Harfield, who dealt with the abortive hearing on 9 April 2021, had recorded, in her Summary of that hearing, her attempt to clarify what the Claimant's claims were about. She noted, in relation to disability discrimination, that the Claimant said that he had dyslexia and struggled to complete webchat entries about his work and would sometimes make mistakes. She went on to say that the Claimant stated that the Respondent

made him put the information in an email at the end of the day, which took a long time to do. He asserted that he was the only employee made to do that, and he said that he felt like the Respondent was trying to push him to make mistakes so that they would have an excuse to dismiss him. Judge Harfield recorded that the Respondent denied any discrimination and said that the requirement to provide emails was only over a one-week period.

29. It seemed to me therefore, that the Claimant's disability discrimination complaint related to something prior to dismissal, and I sought clarification from Mrs Kerrigan-Stacey about when the issue raised by the Claimant before Judge Harfield had occurred. She confirmed that the Respondent, a franchise, operated an electronic system known as "Webchise", which provided details of jobs for the worker carrying them out, enabling them to record the work undertaken and the time spent on it, and to record details of the payments received from customers, most of which were taken by card payment at the customer's premises. The information provided by the workers on their system would then enable the Respondent to produce invoices to send to the customers, and to work out the payments to be made to the workers.

30. Mrs Kerrigan-Stacey explained that she had constantly had to chase the Claimant about the payments he had taken, which made it difficult for the Respondent to process invoices and to work out the payments to be made to the Claimant. She confirmed that she sent an email on 5 September 2019 to the Claimant, noting that, in order to get round the difficulties the Claimant seemed to have in completing the Webchise information, he should, at the end of each day, send a short email to the Respondent setting out the names and postcodes of the customers he had visited and the amounts taken from them in payment. Mrs Kerrigan-Stacey confirmed that the Claimant sent two emails that week, but not after that that, and that he had subsequently use the Webchise process and, although there were times when the Respondent had to chase him for the detail, the process was able to be operated thereafter.

31. I had no reason to doubt Mrs Kerrigan-Stacey's evidence, and my conclusion from that evidence was that the act complained of in respect of the Claimant's disability discrimination claim occurred on 5 September 2019, i.e. the date on which Mrs Kerrigan-Stacey had sent her email.

32. The only other relevant finding I made, from Mrs Kerrigan-Stacey's oral evidence before me, which I had no reason to doubt, was that, over the course of the eighteen months or so that had elapsed since the Claimant's dismissal, she had received over 450 emails from him.

Law

33. With regard to unfair dismissal, section 111(2) of the Employment Rights Act 1996 notes that an employment tribunal shall not consider a complaint unless presented before the end of the period of three months beginning with the effective date of termination, or 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 have been presented before the end of the period of three months. The legislation dealing with breach of

contract claims and unauthorised deductions from wages claims is identical.

34. There has been a considerable amount of case law on this point over the years and one point that has been made clear is that it is a strict test. It is certainly for the Claimant to justify the conclusion that the claim was not able to be reasonably practicably brought within time or that then it was brought within a reasonable time thereafter.

35. The House of Lords, in Dedman -v- British Building and Engineering Appliances Limited [1974] ICR 53, noted that where any delay arises through ignorance or fault of a skilled adviser, it will have been reasonably practicable for the claims to have been brought in time. A skilled adviser includes solicitors, but also can include trade union representatives.

36. Turning to the discrimination claim, section 123(1) of the Equality Act 2010 notes that proceedings on a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.

37. Again, there has been quite a lot of case law on this over the years, with the Court of Appeal, in Robertson v Bexley Community Centre [2003] IRLR 434, noting that, whilst the test is not as strict as that for the reasonable practicability test for unfair dismissal, there is nevertheless no presumption in favour of extending time in discrimination claims and it is for the Claimant to convince the tribunal that it is indeed just and equitable to extend time.

38. The case of British Coal Corporation v Keeble [1997] IRLR 336 noted that the provisions of section 33 of the Limitation Act 1980, which apply to civil claims, should also be applied in relation to tribunal claims. That involves an assessment of the prejudice to each party and an assessment of all the circumstances of the case which include: the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected, the extent to which the party sued has cooperated with requests for information, the promptness with which the Claimant acted once he knew of the facts and the steps taken by the Claimant to obtain advice. It is clear however that an assessment of all the circumstances is to be undertaken.

39. I also noted the recent guidance provided by the Court of Appeal in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, that the guidance provided in the Keeble case should not be treated as a checklist, as that would lead to a mechanistic approach to what is meant to be a very broad general discretion. The Court of Appeal's guidance was that the best approach for a Tribunal in considering the exercise of its discretion is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including, in particular, the length of, and the reasons for, the delay.

Conclusions

40. It was clear to me that all the claims brought by the Claimant were, on the face of them, out of time. The effective date of termination was 12 February 2020, which meant that contact with ACAS for the purposes of the

Claimant's claims of unfair dismissal, breach of contract and unauthorised deductions of wages had to be made by 11 May 2020. The act complained of for the purposes of the disability discrimination claim took place on 5 September 2019, which meant that contact with ACAS should have been made by 4 December 2019. Instead, contact with ACAS was made on 12 June 2020, the ACAS early conciliation certificate was issued that day, and the Claimant submitted his claim on that day.

41. With regard to the Claimant's claims of unfair dismissal, breach of contract and unauthorised deductions from wages, the primary question for me to consider therefore, was whether it had been reasonably practicable for the claim to have been brought in time.

42. As I have noted, the Claimant provided conflicting reasons for not submitting the claim in time. The first was that he had been misguided by his trade union, whereas the second, and much more recent, evidence in his witness statement was that he had understood that matters would be placed on hold due to the impact of the pandemic.

43. Bearing in mind that that the information set out in the Claimant's witness statement came through much later than the Claimant's initial email, I considered that its content more accurately reflected his reasons for not submitting the claim in time. In passing however, I observed that, if the state of affairs had been as the Claimant asserted in his original email to the tribunal, i.e. that he had been misguided by his union, then, as a trade union can be considered to be categorised as a "skilled adviser", any delay which arose through ignorance due to the fault of that adviser would have been imputed to the Claimant such that it would have been reasonably practicable for the claims to have been brought in time. However, I focused on the Claimant's contentions regarding the effect of the Covid-19 pandemic, and the subsequent Government restrictions, as being the reason that the Claimant advanced for not progressing his claim within time.

44. In that regard, I noted that the Claimant's grievance and his appeal against dismissal had been sent to the Respondent by 17 February 2020, i.e. over a month before any Government restrictions were imposed. In addition, whilst a lockdown was imposed by the Government in March 2020, that did not mean that there was any other restriction on business activities. Indeed, the Employment Tribunals remained open at all times. Furthermore, the methods of contacting ACAS are stipulated to be either by telephone or by email, both of which remained available to the Claimant notwithstanding the lockdown. I noted that the Claimant ultimately did make contact with ACAS, by telephone, and did ultimately submit his Tribunal claim form online.

45. There was nothing to suggest that the Claimant was in any way ignorant of his right to pursue his claims, or of the time limits within which to do so, or of the process by which to do so. In my view therefore it was reasonably practicable for the Claimant to have progressed his claims by making contact with ACAS on or before 11 May 2020 and, as he had not pursued his claims within that period, then they felt to be dismissed.

46. Turning to the discrimination claim, the Court of Appeal in the Robertson case noted that, although the just and equitable test is not as strict as the

reasonable practicability test, there is nevertheless no presumption in favour of extending time in discrimination claims. I also noted the guidance provided by the Keeble case as to how the just and equitable extension in discrimination claims should be applied, and the further clarification provided in the Adedeji case.

47. In that regard, I noted that the primary time limit, within which the Claimant needed to make contact with ACAS for the purpose of his discrimination claim, expired in December 2019, and yet contact with ACAS was not made until May 2020. In my view, a delay of some six months is significant. In this case, bearing in mind that the expiry of the primary time limit occurred whilst the Claimant was in employment, his explanation for not submitting his claim in his witness statement, i.e. the state of affairs which prevailed from March 2020 onwards, had no relevance. The Claimant, in his statement made no reference to any reason as to why his discrimination claim was not pursued at an earlier date.

48. I also took into account the potential prospects of success of any disability discrimination claim. Proceeding on the presumption that the Claimant could establish that he was disabled, it did not seem to me, bearing in mind Mrs Kerrigan-Stacey's evidence, that he would be likely to able to establish that he was treated less favourably or unfavourably by reason of that disability. It seemed to me, in fact, that the request by Mrs Kerrigan-Stacey that the Claimant provide an email every day, confirming the work undertaken, was a suggestion by her to enable the Claimant to overcome any difficulties he was experiencing in operating the web-based system. Furthermore, it seemed to me, from Mrs Kerrigan-Stacey's evidence, that the Claimant reacted well to the suggestion, not in fact by providing the required email beyond two occasions, but by operating the web-based system in a broadly satisfactory way.

49. Overall therefore, taking into account the length of, and the reasons for the delay, and the likely lack of prospects of success of any disability discrimination claim, I considered that it would not be just and equitable to extend time to accept the disability discrimination claim and that it therefore also should be dismissed.

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Employment Judge S Jenkins

Date: 8 October 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON 8 October 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche