



EMPLOYMENT TRIBUNALS

Claimant: Mr Mahboob Ahmed Sharif

Respondent: HM Prison Service

Heard at: Manchester by CVP

On: 11 August 2021

Before: Employment Judge Humble

REPRESENTATION:

Claimant: In person

Respondent: Ms Masood, Counsel

JUDGMENT having been given orally at the hearing of 11 August 2021 and sent to the parties on 16 August 2021, and written reasons having been requested by way of an email from the claimant of 26 August 2021 (copied to the Judge on 18 September 2021), in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 the following reasons are provided:

REASONS

The Hearing and the Issues

- 1 This was a preliminary hearing to determine the matters which were identified at the earlier preliminary hearing of 21 June 2021 as follows: (1) whether the claim or any part of it is in time and, if not, whether the claim or any part of it may nevertheless proceed if time may be extended; (2) whether the claim or any part of it shall be struck out as having no reasonable prospect of success; and (3) whether the claim or any part of it has little reasonable prospect of success and therefore shall be subject to a deposit order.
- 2 The tribunal was referred to an agreed bundle of documents which extended to 181 pages. Evidence was taken from the claimant who relied upon the documents at pages 35 to 43, 55 to 59 of the bundle, and to an email sent to the tribunal on 3 August 2021 as his evidence in chief. The tribunal heard evidence from Mrs Critchley on behalf of the respondent. The tribunal was also referred to witness statements from Mrs Kirkpatrick and Mr Knight on behalf of the respondent which were read but very little weight was attached to them

since the witnesses did not attend the tribunal and therefore the claimant did not have the benefit of cross examining them.

- 3 The claimant confirmed at the outset of the hearing that his claims were for unfair dismissal relating to the termination of his employment on 11 July 2018 by reason of capability or “medical inefficiency” to adopt the terminology used by the respondent; age discrimination in relation to that dismissal, he contended that he was replaced by a younger employee; and breach of contract in respect of compensation which was payable to him by the respondent under the terms of the medical inefficiency termination. The claimant’s case was that compensation due to him under the terms of the medical inefficiency termination should have been paid at the end of May 2018 but was not in fact received until the end of August 2019, over a year after the effective date of termination.
- 4 The cause of action in the unfair dismissal and age discrimination claims arose on the effective date of termination, 11 July 2018. That was also the case with the breach of contract claim since, while the claimant said that the payment should have been made to him in May 2018, the cause of action did not arise until the termination of his employment. In accordance with Article 3 of the Employment Tribunal’s Extension of Jurisdiction Order 1994 the cause of action in a breach of contract claim before an employment tribunal can only arise when and where the alleged breach “*arises or is outstanding on the termination of the employee’s employment*” which was 11 July 2018.

The Law

- 5 In respect of the unfair dismissal claim section 111 (2) Employment Rights Act 1996 states:

“...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.”*

- 6 In relation to the breach of contract claim, Article 7 (a) and (b) of the Employment Tribunal’s Extension of Jurisdiction Order 1994 mirrors the provisions in section 111 (2) of the Employment Rights Act.

- 7 In respect of the age discrimination claim Section 120 (1) (a) of the Equality Act 2010 states that:

“An employment tribunal has...jurisdiction to determine a complaint relating to a contravention of Part 5 (work)...”

And at Section 123 (1):

“Proceedings on a complaint within section 120 may not be brought after the end of-

- (a) *the period of three months starting with the date of the act to which the complaint relates, or*
- (b) *such other period as the employment tribunal thinks just and equitable.”*

- 8 The tribunal had reference to Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23. In written and oral submissions from the respondent, the tribunal was also referred to the cases of Northamptonshire County Council v Entwistle [2010] IRLR 740; Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119, CA; Porter v Bandridge Limited [1978] 1 WLR 1145; Howlett Marine Services v Bowlam [2001] ICR 595; Thompson v Northumberland County Council [2007] All ER (D) 95; Robertson v Bexley Community Centre [2003] IRLR 434 CA; Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298; and Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640.

Findings of Fact

The Employment Tribunal made the following findings on the balance of probabilities (the Tribunal did not make findings upon all the evidence presented but made material findings of fact upon those matters relevant to the issues to be determined):

- 9 The claimant was employed by the respondent between November 1995 and 11 July 2018 when his employment was terminated by reason of “medical inefficiency”.
- 10 During the course of his evidence the claimant confirmed that the principal reasons upon which his claims were based were known to him at the time of his dismissal. These were, in essence: that he was forced into making an application for ill-health retirement; that the answers he gave on an application form for ill-health retirement were dictated to him by a manager, Mrs Critchley, because she was under pressure from the the prison governor to “rush through” an ill-health or medical inefficiency dismissal; and also, in a nutshell, that his dismissal was pre-determined.
- 11 The claimant notified ACAS of his claim on 25 November 2020, over two years after the termination of his employment. The ACAS certificate was issued on 30 November 2020 and the claim was eventually presented to the tribunal on 7 December 2020. The claimant’s main explanation for the delay was, in essence, that he had received documents in August 2020 which led him to the view that the respondent did not follow a correct procedure in relation to his dismissal (those documents were presented in the bundle at pages 179 to 181). In particular, the claimant submitted that the procedure required that he should have had a capability hearing with the governor before a decision was taken upon termination.
- 12 The claimant accepted in his evidence, during questioning from the tribunal, that there was a formal attendance review meeting on 11 July 2018 with Mr Knight, who was the governor at that time, and at which the claimant’s condition was discussed (page 124 of the bundle). The notes from the meeting show that there was a question put to the claimant in the following terms, “*So you are*

confirming that you'd rather be dismissed under medical inefficiency than be re-graded and this is because you're legible and approved for the 100% compensation?" to which the claimant replied, "Yes, I'll go". The claimant confirmed that those aspects of the minutes were correct, although he disputed the accuracy of some other aspects of the minutes.

- 13 The outcome of this meeting was confirmed by Mr Knight in writing on 12 July 2018 (page 127-128) which stated, among other things, "*Based on our discussion and your express wish to leave the Prison Service I regret to confirm that you will be dismissed on the grounds of medical inefficiency with effect from 11 July 2018.*" The letter advised of a right to appeal but the claimant did not appeal the outcome. The tribunal was satisfied therefore that a review meeting was held with the prison governor and, even if it were not formally entitled as a "capability hearing" that was its essential purpose. The tribunal also accepted Mrs Critchley's evidence that the documents relating to the procedure (at pages 179-181) were accessible to the claimant through an intranet system operated by the respondent. The claimant did not attempt to access that procedure or request any documents relating to the procedure at the time of his dismissal or shortly thereafter.
- 14 The claimant also advanced an argument that the delay was due to him seeking to "*resolve matters internally*" rather than pursuing an employment tribunal claim. This was done initially by way of correspondence between himself and the Civil Service Pensions Cabinet Office and subsequently in letters sent directly to the respondent, the most pertinent of which a letter of 15 September 2020 to Mr Allen (page 161) in which he sets out the basis of his complaint, which reflects the basis of his claim before this tribunal, and seeks reinstatement. Mr Allen responded on 17 October (page 165) and stated that the respondent was unable to reinstate the claimant or to grant his request to return to work since his request was out of time. There were various items of earlier correspondence in which the claimant had outlined the basis of his claims and to which the tribunal were referred (pages 138, 142, 149, and 152-156), these covered the period from May 2019 to 22 March 2020.
- 15 In oral evidence, the claimant's explanation for seeking to deal with matters through correspondence with the respondent rather than presenting a tribunal claim more quickly was, "*I was trying to do things as quietly as possible*", and he said, "*I did not want to make a big thing of it*" which did not assist him. The only other coherent explanation for the delay advanced by the claimant was that he was "*fearful*" of proceeding and lacked the "*ability*" to do so. The tribunal's view was that neither of these explanations was not borne out by the correspondence in which he had engaged over a fairly protracted period both with the pensions administrator and his employer, and in which he put his case in an assertive manner with a reasonable degree of clarity.
- 16 The fact that the claimant was self-represented was a relevant factor but it was noted that there was a Solicitor acting for the claimant in June 2019 and his lawyer made representations to the respondent in correspondence which related directly to the claimant's dismissal. There was therefore ample opportunity for the claimant to seek advice at that stage upon time limits even if it were not properly proffered by Solicitor acting for him at that time, which it ought to have been.

- 17 Having considered all the circumstances of the case, the tribunal were of the view that it was reasonably practicable for the claimant's to bring the claim within the initial three month time limit. The claimant was aware of the relevant aspects of his claim at the time of the dismissal in July 2018, and the disclosure of August 2020 added little, if anything, to the facts already known to him. Even if it had done then the claim was not brought within such further period as this tribunal deemed to be reasonable given that there was a delay of in excess of a further three months. No other credible explanation was provided for the delay. The claims of unfair dismissal and breach of contract are therefore out of time and are dismissed.
- 18 The relevant test for discrimination claim is different and where a claim is outside of the normal time limit, the tribunal can extend that time limit where it is considered to be just and equitable to do so. However, the key considerations relating to the length of delay and the lack of any convincing reason for that delay apply here as with the unfair dismissal and breach of contract claims. The length of delay in this case is substantial and the tribunal was persuaded that it was likely to have an impact on the fairness of the hearing since we are already over three years removed from the relevant events which relate to the issues to be determined. Having considered all the relevant circumstances, and applied the principles enunciated in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the tribunal find that the discrimination claim was out of time and, for the reasons outlined, it is not just and equitable to extend time. It follows therefore that the tribunal does not have jurisdiction to hear the claims.
- 19 The tribunal had some concerns in relation to the merits of the case. Although the parties touched only lightly upon this in the evidence before us, there was an admission by the claimant that he had agreed to the termination of his employment by reason of medical inefficiency at the meeting of 11 July 2018, albeit he says he was put under some pressure and he believed that the decision to dismiss had already been taken before that date. It was also noted that the claimant received a significant sum by way of compensation in respect of the medical inefficiency termination which may well have had some bearing upon his agreement to take that course of action rather than opt for the re-grading which was suggested. The tribunal make no formal findings upon whether the claims had no or little reasonable prospect of success but observed that it was likely, prima facie, to fall in the latter category.
- 20 The claims are dismissed.

Employment Judge Humble
30th September 2021

REASONS SENT TO THE PARTIES ON
18 October 2021

FOR THE TRIBUNAL OFFICE

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