



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mr M Gray

Respondent
AND The Chief Constable of Devon and Cornwall Police

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Plymouth **ON**
By Cloud Video Platform

7 December 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr K Zaman of Counsel
For the Respondent: Ms N Gyane of Counsel

JUDGMENT

The judgment of the tribunal is that:

1. This Tribunal does not have jurisdiction to hear the claimant's unfair constructive dismissal claim, and it is hereby dismissed; and
2. The claimant's claim of victimisation was presented out of time, and it is hereby dismissed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine (i) whether this Tribunal has jurisdiction to hear the claimant's unfair constructive dismissal claim on the basis that he was an officeholder and not an employee; and (ii) whether the claimant's claims for constructive unfair dismissal and victimisation were presented within time.
2. I have heard from the claimant, and I have heard from Mr Zaman on behalf of the claimant. I have heard from Ms Gyane on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
3. The Facts:
4. The claimant worked for the respondent as a Police Officer from 4 November 2002 and was promoted to Police Sergeant. He resigned on 19 November 2020 and his engagement with the respondent terminated on 17 December 2020.

5. The claimant has presented two claims to this Tribunal. The first claim was under tribunal reference number 1402356/2020 and is referred to as the First Claim. The claimant alleged direct disability discrimination, discrimination arising from a disability, harassment related to disability, and detriment arising from protected public interest disclosures. The claimant had already first made contact with ACAS under the Early Conciliation provisions in connection with this First Claim on 9 April 2020 (Day A), and this certificate was issued on the same day 9 April 2020 (Day B) ("the First Certificate"). This First Claim was presented on 7 May 2020.
6. This claimant's second claim was presented under reference 1401254/2021. This is referred to as the Second Claim. The claimant alleged victimisation, harassment related to disability, discrimination arising from disability, and unfair constructive dismissal, including on the automatically unfair grounds of having protected public interest disclosures. Before commencing the Second Claim, the claimant made contact with ACAS again on 19 January 2021 (Day A), and the second Early Conciliation certificate was issued on 2 March 2021 (Day B) ("the Second Certificate"). The claimant presented this Second Claim on 30 March 2021.
7. There was a Preliminary Hearing on 28 June 2021 at which the claimant was held not to have been a disabled person at the relevant times. The claims for direct disability discrimination, discrimination arising from disability, and harassment related to disability arising under the First Claim, and harassment related to disability, and discrimination arising from disability under the Second Claim were all accordingly dismissed. The claimant then withdrew his claims for both dismissal and detriment arising from protected public interest disclosures. These claims were also dismissed.
8. This meant that the First Claim had been dismissed in its entirety, but that there were two remaining claims under this Second Claim which the claimant wished to pursue, namely a claim for ordinary unfair constructive dismissal, and for victimisation. This hearing was listed to determine whether this Tribunal has jurisdiction to hear the ordinary unfair constructive dismissal claim, given that the claimant was a Police Officer and apparently excluded from the unfair dismissal provisions, and (if so) whether this claim, and in any event the victimisation claim, were presented out of time, and if so, whether time should be extended.
9. Other relevant background facts are as follows.
10. There was a case management preliminary hearing in connection with the First Claim on 14 January 2021. The claimant was represented by Mr N Smith of Counsel. It became clear that the claimant had recently resigned and wish to present the Second Claim. The hearing was therefore postponed until such time as the Second Claim could be prepared and presented, and it was relisted for 26 March 2021.
11. Meanwhile the claimant was seeking confirmation from his home insurers that he qualified for legal expenses insurance, and that they would appoint solicitors and pay for professional representation. In addition, the claimant wished to retain Mr Smith of Counsel, and was prepared to contribute towards this expense. With effect from mid-February 2021 solicitors already been instructed by the claimant through its legal expenses insurers, and the claimant, his solicitors, and his Counsel were all aware of the potential Second Claim, not least because it had been discussed at the case management preliminary hearing on 14 January 2021. On 24 February 2021 Mr Smith of Counsel gave written advice to the claimant and suggested that his advice was forwarded to the solicitors "Pronto" and made it clear that they would be responsible for drafting the originating application for the Second Claim which needed to happen as soon as possible.
12. The Second Certificate was then issued on 2 March 2021, and on the following day the claimant's solicitor confirmed to the claimant's partner that she would commence drafting the originating application, and that she would advise on limitation. By return email dated 3 March 2021 the claimant's partner confirmed their instructions to the solicitor to present the originating application "as we do not wish to run out of time". They also wished Mr Smith of Counsel to look at the originating application "if that is possible".
13. In advance of the relisted case management preliminary hearing on 26 March 2021, the respondent sent a detailed email letter on that day expressing surprise that the Second

- Claim had not been presented, even though it had been discussed as long ago as 14 January 2021. They also commented that the claim appeared to be out of time.
14. Despite this warning there was still further discussion between the claimant, his solicitors, and Counsel to finalise the originating application, which was eventually presented on 30 March 2021. It is also clear from the correspondence that the claimant's solicitors were relying on an extension of time under the Early Conciliation provisions, based on the Second Certificate.
 15. Having established the above facts, I now apply the law.
 16. The Law:
 17. The first relevant statute is the Employment Rights Act 1996 ("the Act").
 18. Section 200(1) of the Act which relates to Police Officers provides: ... Part X (except sections 100, 103A and 134A ...) ... do not apply to employment under a contract of employment and police service or to persons engaged in such employment.
 19. Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal 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.
 20. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges victimisation under section 27 of the EqA. The protected characteristic relied upon is disability, as set out in sections 4 and 6 of the EqA.
 21. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
 22. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
 23. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
 24. I have considered the following cases, namely: The Commissioners for HM Revenue and Customs v Serra Garau [2017] ICR 1121 EAT; Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT;

- Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23;
25. Jurisdiction - Unfair Constructive Dismissal Claim:
26. It was conceded on behalf of the claimant for the first time at this hearing that this Tribunal does not have jurisdiction to hear his claim for unfair constructive dismissal under sections 94(1) and 95(1)(c) of the Act. This is because the right to bring a claim for unfair dismissal under Part X of the Act specifically excludes Police Officers by virtue of section 200(1) of the Act. I agree with that concession. Accordingly, the claimant's claim for unfair constructive dismissal is hereby dismissed.
27. Jurisdiction - Claims Presented Out of Time:
28. Given that the claimant's unfair constructive dismissal claim has now been dismissed, there is no need to determine whether or not that claim was presented within time.
29. The only remaining issue in connection with these proceedings is therefore whether this Tribunal has jurisdiction to hear the claimant's remaining claim of victimisation. It was conceded today on behalf of the claimant that this claim was presented out of time, and the only live issue therefore is whether it would be just and equitable to allow an extension of time.
30. Victimisation Claim - Presented Out of Time:
31. In this case the claimant resigned his employment on 19 November 2020 and his engagement with the respondent terminated on 17 December 2020. The claimant alleges that this was a constructive dismissal. This is the last act of alleged detriment arising under his victimisation claim as set out in paragraph 84 of his particulars of claim in his Second Claim. The normal time limit of three months therefore expired on 16 March 2021. The claimant had already first made contact with ACAS under the Early Conciliation provisions in connection with his First Claim on 9 April 2020 (Day A), and this certificate was issued on the same day 9 April 2020 (Day B) ("the First Certificate"). Before commencing the Second Claim, the claimant made contact with ACAS again on 19 January 2021 (Day A), and the second Early Conciliation certificate was issued on 2 March 2021 (Day B) ("the Second Certificate"). The claimant presented his Second Claim on 30 March 2021. This Second Claim was issued within one month of Day B under the Second Certificate, and therefore would be in time only if the claimant is entitled to rely on the Second Certificate.
32. However, it is clear from The Commissioners for HM Revenue and Customs v Serra Garau that the claimant is not entitled to rely on the Second Certificate which is in effect voluntary, and the only relevant ACAS Early Conciliation Certificate is the First Certificate. This predated the date of termination of the claimant's engagement on 17 December 2020 and the claimant does not enjoy any extension of time by reason of that First Certificate. The normal time limit of three months therefore expired on 16 March 2021. The claimant presented this Second Claim on 30 March 2021 which was two weeks out of time.
33. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend time for presentation of the claim remain opaque. The claimant says that he was suffering from stress at the relevant times. However, the claimant has adduced no medical evidence to support any contention (if there be one) that he was precluded by illness from presenting the claim within time. I therefore reject any such assertion as giving rise to any reason that it would be just and equitable to extend time.
34. The more likely reason relied upon is the negligent advice of his solicitors to the effect that he was entitled to rely on the Second Certificate as extending the time within which he could present these proceedings, which as noted above, applying The Commissioners for HM Revenue and Customs v Serra Garau, is wrong in law. However, on closer examination of the chronology at the time, the claimant was not precluded from issuing these proceedings within time by any such negligent advice. In the Case Management Hearing dated 14 January 2021 at which the claimant was represented by Counsel it was agreed that the claimant would present the Second Claim which would be fully particularised. On 24 February 2021 Mr Smith of Counsel advised the claimant and his partner that the claimant's solicitors should draft the originating application for the Second Claim as soon as possible. The claimant's solicitors received the Second Certificate on 2 March 2021. On 3 March 2021 the claimant's partner instructed the solicitors to submit the originating

- application “as we do not wish to run out of time”. On 11 March 2021 the claimant and his wife complained to their solicitors that they were becoming concerned about the timescales around the presentation of the claim and asked for an update. All of these events were within the limitation period for the Second Claim and any of the claimant, his solicitors, or his Counsel (if instructed to do so which is by no means clear) could have presented a simple holding originating application in order to preserve time. They did not do so. In addition, the Second Claim had not been presented before the case management preliminary hearing which took place on 26 March 2021, even though it was the relisted hearing which had been postponed from 14 January 2021 to allow the claimant time to do so. It is clear that during the next two weeks or so the Second Claim was prepared and then presented pursuant to the advice of the claimant’s solicitors that the time limit expired on 31 March 2021 (which was of course wrong advice because it relied on the Second Certificate which was ineffective).
35. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.
 36. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: “The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) 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”. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.”
 37. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: “[18] ... It is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list ... [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”
 38. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: “It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule”. These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
 39. In addition, per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.
 40. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how

generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.”

41. It is the case that the delay in issuing proceedings was only about two weeks and the respondent has not made the case that the cogency of its evidence would have been affected by this delay. Nonetheless, the difficulty for the claimant in this case is that there were simply no barriers to this Second Claim being prepared and presented within the relevant limitation period. The claimant had obtained funding for this claim from his home insurers. He had engaged professional representation, both solicitors and Counsel, who were advising him at the time. He was aware of the potential claim because it was discussed at the hearing on 14 January 2021. The claimant had instructed his advisers to prepare and present the claim, and they did not do so in time. Applying Robertson v Bexley Community Service, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule. The burden of so doing is on the claimant, and in this case he has not satisfied me that it would be just and equitable to extend the time for presenting the Second Claim, and accordingly it is dismissed.
42. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 13; a concise identification of the relevant law is at paragraphs 16 to 23; and how that law has been applied to those findings in order to decide the issues is at paragraphs 25 to 41.

Employment Judge N J Roper
Dated: 7 December 2021

Judgment sent to parties: 21 December 2021

FOR THE TRIBUNAL OFFICE