



EMPLOYMENT TRIBUNALS

Claimant: Craig Stephens

Respondent: The Department for Work and Pensions

Heard at: Bristol Employment Tribunal (via CVP) **On:** Thursday, December 2, 2021

Before: Employment Judge Mr. M. Salter

Representation:
Claimant: In person
Respondent: Mr. A. Jones, counsel.

JUDGMENT

It is the judgment of the tribunal that the:

1. the Claimant's claim of unfair dismissal was presented out of time in circumstances it was reasonably practicable to have been presented in time.
2. the Claimant's claim of discrimination arising from disability was presented out of time but was presented within such other period as the tribunal considered just and equitable.
3. The Respondent's application for the Claimant's claim to be struck out or made subject to a deposit order fails.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are the written reasons for the judgment given orally at the Preliminary Hearing on 2nd December 2021. In accordance with Rule 62(3) of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (“the 2013 Regulations”) written reasons were requested by the Respondent on the 6th December 2021.
2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal’s Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

BACKGROUND

The Claimant’s case as formulated in his ET1

3. The Claimant’s complaint, as formulated in his Form ET1, presented to the tribunal on 8th February 2021, is in short, he was unfairly dismissed and subject to disability discrimination where the acts of discrimination were a failure to make reasonable adjustments and discrimination arising from disability.

The Respondent’s Response

4. In its Form ET3, the Respondent accepted the Claimant was an employee and that he was dismissed, but denied that that dismissal was unfair, contending it was for a potentially fair reason, namely a reason related to the Claimant’s conduct and that that dismissal occurred after a reasonable investigation and was within the band of reasonable responses open to it. It also denied discrimination.

Relevant Procedural History

5. The matter came before E.J Cadney on 10th August 2021 for a Preliminary Hearing during which a list of issues was accepted and a Preliminary Hearing listed to hear a number of matters including whether the Claimant was disabled within the meaning of the Equality Act 2010; whether the Claimant's claim had been presented out of time; whether the Claimant's claim should be struck out and for case management.
6. E.J. Cadney also permitted the respondent to enter an amended response as a result of the discussion that was had at the Case Management hearing

The Amended Response

7. The Respondent's amended response accepted that the claimant was disabled within the meaning of the Equality Act 2010 by reason of the Claimant's depression and anxiety.

THE PRELIMINARY HEARING

General

8. The Preliminary Hearing came before me.
9. The Claimant represented himself, and the Respondent was represented by Mr. Jones of counsel.
10. This was a remote hearing which was not objected to by the parties, being conducted entirely by CVP video platform. A face-to-face hearing was not held because it was not practicable and no-one requested the same it was conducted using the cloud video platform (CVP) under rule 46.
11. The parties agreed to the hearing being conducted in this way.
12. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no significant difficulties.
13. The participants were told that it was an offence to record the proceedings.

14. Evidence was heard from the claimant via video link. I was satisfied that he was not being coached or assisted by any unseen third party while giving his evidence.

DOCUMENTS AND EVIDENCE

Witness Evidence

15. I heard evidence from the Claimant: no witnesses were called by the Respondent
16. The Claimant gave evidence by way of written witness statements that was read by the me in advance of him giving oral evidence. He was cross-examined.

Bundle

17. To assist me in determining the matter, I have before me today an agreed bundle consisting of some 99 pages prepared by the Respondent. My attention was taken to a number of these documents as part of me hearing submissions and as discussed with the parties at the outset of the hearing, and before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

SUBMISSIONS

Claimant

18. The Claimant made oral submissions which I have considered with care but do not rehearse here in full. In essence it was submitted that:
 - (a) he was let down by his union who missed the time limit to present his claim;
 - (b) once he found this out he took steps to obtain advice and assistance; and
 - (c) he was dependant on the local library and, latterly his brother, for the provision of IT facilities needed to present his claim form.

Respondent

19. I had a written skeleton argument from the respondent that was supplemented orally. The submissions being in writing it is unnecessary to repeat them here. The oral submissions directed my attention to how the evidence heard applied to the relevant paragraphs in the closing submissions.

MATERIAL FACTS

General Points

20. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the Claimant in evidence, both in his statement and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the Claimant and the consistency of his account with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.
21. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Claimant

22. Was employed by the Respondent as a Fraud investigator. In March 2020 he was redeployed into the Universal Credit team.
23. The Respondent operates a computer database system called Customer Information System Searchlight ("Searchlight")
24. Employees are permitted to use Searchlight if they have a legitimate purpose. It is alleged the Claimant accessed that system without proper purpose and searched for his neighbour's address.
25. The Respondent discovered this and commenced disciplinary proceedings that resulted in the Claimant's dismissal on either the 23rd or 24th September 2020.

26. The Claimant was represented throughout the disciplinary process and afterwards by his union: the Public and Commercial Services Union (“the PCS”).
27. The Claimant commenced ACAS conciliation on 21st November 2020 [1] and received his ACAS Certificate via email on 23rd November 2020 [1].
28. Limitation would have expired on the 22nd or 23rd December, but with ACAS Conciliation this would have adjusted the limitation period to 22/23rd January 2021.
29. The claimant was aware on the Wednesday, 27th January 2021 that the PCS had missed the date for presenting his claim form and failed to present his claim [92]. The PCS did not inform of this until he had contacted them to enquire about what was happening with his claim.
30. From the date he was made aware of the PCS’s failure, the Claimant made various enquiries as to his option including calling the local union; telephoning ACAS; using the library; on Tuesday, 2nd February contacting a CAB and on Wednesday, 3rd February calling a solicitor.
31. He attended his GP on Friday, 29th January, [97] this was the first time he had visited his GP since September 2020.
32. The Claimant presented his claim form on Monday, 8th February 2021.
33. All parties accept the claim form has been presented out of time. The claimant accepts his union representation missed the date for entry of his claim.

THE LAW

Statute

34. So far as is relevant the Employment Rights Act 1996 states:

111 Complaints to employment tribunal.

- (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

- (2) 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.

35. So far as is relevant the Equality Act 2010 states:

123 Time limits

- (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
 - (a) the period of 3 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.
- (2)
- ...
- (3) For the purposes of this section—
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.

CONCLUSIONS ON THE ISSUES

Findings on the Issues

Issue 1: was the Claim Presented in Time?

36. The parties accept that the claim has been presented outside the relevant statutory time limit. Therefore I need to consider the relevant discretion to extend time.

2: Unfair Dismissal

Issue 2A If Not, was it reasonably practicable for the Claim to have been presented in time?

37. It is for the claimant to show that it was not reasonably practicable to have presented his claim in time. “Reasonably practicable” means reasonably feasible: Dedman v British Building and Engineering Appliances [1974] ICR 53; Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119.

38. I find that it was reasonably practicable to have presented his claim in time:

- (a) he had placed his case in the hands of the PCS who, I find, are skilled advisors and they erred in missing the well-known date for entry of claims, a date that they accept they were aware of;
- (b) the Claimant was not however, wholly dependent on his advisors as he was aware from November about tribunal and the claims, he was not ignorant of this jurisdiction and his right to present a claim;
- (c) the Claimant says he was unclear of the time limits. I do not consider that this was a reasonable belief: having been aware of the claims and the tribunal process, and having made enquiries about the same both with his union and ACAS it is not reasonable for him to be ignorant of the time limits in this jurisdiction. The claimant's disability did not have any effect on his ability to make enquiries into his claims.

39. I consider therefore it was reasonable feasible for him to have presented his claim in time.

Issue 2B: If not, was it presented within a reasonable time there after?

40. If called upon to decide this I would have found that the claim was not presented within a reasonable time thereafter. Some 16- or 17-days elapse between the expiry of limitation and the presentation of the claim form. Even when the Claimant became aware of his union having missed the deadline it is still 12 days before the claim form is presented. During that time the claimant was able to seek advice and conduct a job search and was not prevented by reason of his disability from progressing the claim.

Issue 3: Equality Act 2010 Claims

Issue 3A : If not, is it conduct extending over a period?

41. The acts of discrimination complained of are one-off acts as opposed to continuing actions: failure to make reasonable adjustments and dismissal.

42. I have not heard any submissions addressing these being two separate actions. The focus has been on the claim of dismissal and the time limit issue that arises from that. The issue of any connection between the two acts should, therefore be put off to any final hearing.

Issue 3B: if not, was it presented within such other period as the employment tribunal considers just and equitable?

43. I am, therefore, in situation where I must consider the discretion contained within s123 of the Equality Act 2010.

44. Whilst Employment Tribunals have a wide discretion to allow an extension of time under s123, this does not however mean that the extension is automatic. The Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434,, that:

'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 the discretion is the exception rather than the rule.'

45. It would be wrong to think that exceptional circumstances are necessary, all that is required is that it is just and equitable to extend time: Pathan v South London Islamic Centre EAT 0312/13.

Factors in General

46. In s123 Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list, and whilst a useful guide of some factors can be found in s33 of the Limitation Act 1980— British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT: for tribunals, however, this is only a guide to some potentially relevant factors: Southwark London Borough Council v Afolabi [2003] ICR 800, CA. These factors include:

- (a) the length of, and reasons for, the delay;
- (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
- (c) the extent to which the party sued has cooperated with any requests for information;
- (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
- (e) the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Particular factors

47. There is no set list of factors that should be considered, however the following appear relevant to me:

Disability

48. In Department of Constitutional Affairs v Jones [2008] IRLR 128, CA, the Court of Appeal highlighted the fact that in disability discrimination cases there is an

additional factor to be taken into account when considering an application to extend the time limit — and that is the disability itself.

49. Here I am not told the disability had any impact on the claimant's failure to comply with the time limit or to have not entered a claim by the 8th February 2021. I note he did attend his GP on 29th January, but he does not say he was in anyway affected by his depression with what he could do, indeed his account in evidence is of being very active around this time on his claim: seeking advice on his claim and options as well as applying for job roles.

Explanation for the delay

50. The Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA held that the discretion under S123 EqA for an employment tribunal to decide what it 'thinks just and equitable' is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant.

51. The lack of a reason may, however, be a factor to consider.

52. Here the claimant has a reason for part of the time: the failure of his advisors. That reason goes up to 27th January, after that I have been told the claimant contacted various other people and organizations to obtain assistance. He did not however present a claim to the tribunal for 12 days after being aware he was late.

Incorrect advice

53. Whereas incorrect advice by a solicitor or a wholly understandable misconception of the law is unlikely to save a late tribunal claim in an unfair dismissal case the same is not necessarily true when the claim is one of discrimination — Hawkins v Ball and anor [1996] IRLR 258, EAT and *British Coal Corporation v Keeble and ors* (above). Here the Claimant left his claim in the hands of his advisors and was let down by them, he then tried to seek assistance from other sources, but failed.

Strength of case:

54. In Lupetti v Wrens Old House Ltd [1984] ICR 348, EAT, the Appeal Tribunal noted that tribunals may, if they think it necessary, consider the merits of the claim, but if they do so they should invite the parties to make submissions. However, this is not necessarily a definitive factor: even if the claimant has a strong case, time may not be extended for it to be heard. In Ahmed v Ministry of Justice EAT 0390/14 an employment tribunal found that A, a legal adviser in the magistrates' courts, had been treated less favourably because of race. However, the tribunal considered that it was not just and equitable to extend time to allow the claim even though its merits were strong, given that A had given no satisfactory explanation for why the claim was not presented in time and given the difficulty some witnesses had in recollecting what had happened. The EAT upheld the tribunal's decision.

55. I must take the claimant's case at it highest here as in all summary assessments, here the issue appears to be one of causation did the claimant do what is alleged as a result of something arising from his disability. I have heard no evidence on this and so need to make an assessment without any material. I cannot say this appears to be a strong case, but do feel it would turn on material I have not seen or had put before me. Accordingly I do not place great weight when assessing whether it is just and equitable to extend time on the merits of the matter.

Balance of prejudice

56. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent. Whilst some prejudice will always be caused to the employer if an extension of time is granted given that the case would otherwise be dismissed. However, the prejudice caused needs to amount to more than simply that.

57. What prejudice has been caused here? The Respondent has not made any submissions at all over the prejudice caused to it by the late admission of the claim. I was not told that any evidence would be unavailable, or its cogency affected; or that memories would have faded over the extended period of time. In light of the relatively short period of time the claimant would require for the

claim to be presented in time, the lack of submissions on this issue is, I find, hardly surprising.

58. Against this is the prejudice the claimant would suffer in being denied access to the tribunal for a failure that originally was not his fault and when he acted reasonably promptly after that error was brought to his attention.

Conclusion

59. Considering the relatively short length of any extension, the lack of any particular prejudice to the Respondent, the Claimant's reason for part of the delay and his actions from finding out that his advisors had missed the date to present his claim, I consider that the discrimination claim was presented within such other period as was just and equitable.

Strike out and Deposit Order

60. The Respondent then proceeded with its applications for strike out or a deposit order for the Claimant's claims.

61. In considering these applications I must take the Claimant's case at its highest and consider whether the claim has:

- (a) "no reasonable prospect of success" in which case I can strike the claim out (r37 Sch 1, the 2013 Regulations); or
- (b) "little reasonable prospect of success" in which case I can make it subject to a deposit order (r39, Sch 1, the 2013 Regulations).

62. I remind myself of the need for caution when striking out discrimination claims that is urged by the appellate courts on employment tribunals: Anyanwu v South Bank Students' Union [2001] IRLR 305 HL.

63. The Respondent did not identify any issue or part of an issue to which its applications were focused. The issue appeared to me however to be:

- (a) what caused the claimant to access Searchlight (the disability and unfavourable treatment being accepted); and
- (b) whether the suggested return to the benefit fraud team was reasonable. The Claimant contends the return was viable and open; the Respondent contends it was not as the team had been disbanded.

64. This is not a case where the Respondent is seeking to strike out the claim on the ground the itself is misconceived in law and do has no reasonable prospect of success; nor has it been advanced that the claim is “totally and inexplicably inconsistent with the undisputed contemporaneous documentation” (North Glamorgan NHS Trust v Ezsias [2007] IRLR 603) that shows the claimant’s case satisfies one of the two thresholds above. This is an application that appears to turn require me to make findings on evidence that I have not heard and assess the likelihood of a determination on central facts that need to arrived at from that unheard evidence.
65. This is not such an obvious and plain case where there is no dispute of fact, indeed far from it, the facts seem to be at the heart of this case and from the submissions of the parties this much is clear.
66. I considered the strength of the case when assessing the issue of time limits, and whilst I expressed views on the merits at that stage, I do not consider that the claim(s) fall below the threshold for either the Claimant’s claim to be struck out or made subject to a Deposit Orders.
67. The Respondent’s application is unsuccessful.

Employment Judge Salter

Friday, 17 December 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
10 January 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Case Number: 1400727/2021