



EMPLOYMENT TRIBUNALS

Claimant: Mr S Brady

Respondent: Bechtel Limited

Heard at: London Central **On:** 19 January 2022

Before: Employment Judge Joffe

Appearances

For the claimant: Miss A Nanhoo-Robinson, counsel

For the respondent: Mr R Westwell, counsel

JUDGMENT

1. The claimant's claim for unfair dismissal was not presented within the primary time limit allowed in section 111 of the Employment Rights Act 1996.
2. The claimant has not shown that it was not reasonably practicable for him to present his unfair dismissal claim in time or that he presented it in such further period as was reasonable and the Tribunal has no jurisdiction to hear the unfair dismissal claim, which is dismissed.
3. The claimant's claims under the Equality Act 2010 were not presented within the primary time limit allowed in section 123 Equality Act 2010.
4. It is just and equitable to extend time for the claimant's claims under the Equality Act 2010 and those claims will proceed to a hearing.

REASONS

Issues

1. This was an open preliminary hearing to consider whether the Tribunal had jurisdiction to hear the claimant's claims of unfair dismissal and direct age, sex and disability discrimination, it being common ground that all claims had been presented outside the primary limitation period.

2. The issues to consider were therefore as I set them out at a case management preliminary hearing on 23 June 2021:
 - a) Were the discrimination claims presented within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - Why were the complaints not made to the Tribunal in time?
 - In any event, is it just and equitable in all the circumstances to extend time?
 - b) Was it reasonably practicable for the unfair dismissal claim to be made to the Tribunal within the time limit?
 - c) If it was not reasonably practicable for the unfair dismissal claim to be made to the Tribunal within the time limit, was it made within a reasonable period?
In the alternative, if it is not appropriate on the basis of the material before the Employment Judge to determine those issues:
 - d) Should the claim or part of it be struck out as having, on time grounds, no reasonable prospect of success?
and, in the further alternative:
 - e) Should the claim or part of it be made the subject of a deposit order as having, on time grounds, little reasonable prospect of success?
3. I had a small bundle of documents running to 49 pages, which included, in addition to the pleadings and orders, some of the claimant's medical records and a handful of other documents. I heard evidence from the claimant and submissions from both parties, supported by skeleton arguments.
4. I gave oral reasons at the hearing on 19 January 2022. These written reasons are provided pursuant to a request made by the claimant.

Facts

5. I have heard no evidence from the respondent and of course make no findings of fact on matters as to the dealings between the claimant and the respondent save insofar as there are matters which are not in dispute.
6. The claimant worked as a technical writer and editor for the respondent for some ten years from 2 August 2010.
7. On 20 May 2020, the claimant received a letter putting him at risk of redundancy from Mr Patterson, his functional or second line manager. The claimant's immediate line manager was Ms Baker.
8. The claimant described himself as 'blindsided' by the letter; he said that he had just completed a proposal which resulted in the respondent winning a bid for a very valuable project.

9. The claimant said in his claim form that he had never had a discussion with Mr Paterson about the claimant's role in his team or Mr Patterson's goals for his team, although Mr Patterson had been in his role for 18 months.
10. The claimant's account (and I reiterate that I make no findings on these matters) is that he had a discussion with Mr Patterson and he asked Mr Patterson if he even knew what he, the claimant, did. Mr Patterson's answer suggested to the claimant that he did not know. The claimant said that Mr Patterson then said that the claimant was the worst performer in the team, which the claimant felt was inconsistent with his previous positive reviews and bonus. The claimant said that no one had found fault with his work.
11. The claimant told the Tribunal that, in trying to see a basis for his selection, he had suspicions that it must be his age, sex, disability or a personality conflict. The claimant is 70 and is disabled because of cancer. He said that, of his team of ten, all were in their mid-30s and eight were female.
12. He told the Tribunal he had hoped that, because the company was a good company which prided itself on ethics, the issue was likely to be overcome and he would retain his employment. In essence he said that he began to wonder if there was a discriminatory motive at the time of his selection but he believed it would be made right. He accepted in evidence that by the time of dismissal he had real doubts about the reason for his dismissal and its fairness.
13. The claimant said that he understood that the decision to select him for redundancy was made by Mr Patterson and Ms Baker, his immediate line manager.
14. The claimant said that after he was told he was being made redundant, he became depressed and was not functioning normally. He could not concentrate and had insomnia. The claimant had been on fluoxetine for depression for approximately five years. In late June 2020, his dosage was increased from 10 mg per day to 40 mg. Otherwise, the claimant's GP notes do not record him having any consultations or receiving any other treatment for depression during this period.
15. The claimant said that he was also drinking to excess, although it appears that after discussion with his wife he had sorted this out by 2 November 2020 when he saw his oncologist and the notes record that he drank 'minimal' alcohol.
16. On 28 July 2020, the claimant was told that the respondent had no suitable alternative employment for him and given notice to terminate his employment.
17. 27 November 2020 was agreed by the parties to be the claimant's effective date of termination. The claimant had asked for his accrued holiday be added to his notice period to extend his period of employment to this date.

18. The claimant's evidence was that up until that point he believed that the respondent would see the error of its ways and realise he was needed by the business. He said that his depression increased when he realised that was not going to happen.
19. The claimant said that at that time he was lethargic. His mind was dull. He could not read more than a few pages at a time. He did not enjoy or do hobbies he previously enjoyed such as playing guitar and crossword puzzles.
20. During this period, the claimant said that he was aware that employment tribunals were places where employment disputes were litigated but he was not aware of the time limits for such disputes. He did not make any enquiries about employment tribunals.
21. On 26 January 2021, the respondent posted online an advert for a proposal technical writer job. The respondent's case it that this was not the same role as the claimant's and that the role was not available at the time the claimant's employment terminated. Those were not issues to be considered at this preliminary stage.
22. By early February 2021, the claimant said that he was seeking to shake off his depression. He said in his claim form that he was 'feeling well enough to seek another job'.
23. Whilst looking for other jobs, he said that he saw the writer-editor job at the respondent described above in mid-February. He said that it seemed to him to be his former role. He said that this confirmed his fear and suspicion that his dismissal was unfair and discriminatory.
24. So far as his mental health at this period was concerned, the claimant said that he still had good days and bad days. There would still be days after that when he would just 'mope around', as he put it.
25. I had no reason not to accept the claimant's evidence as to his depression; I also accepted that the circumstances of the pandemic explained why he did not make further contact with his GP during this period.
26. There was then a period between mid-February and 14 March 2021 when the claimant contacted Acas. The claimant said that he was investigating the tribunal process; he said that he was 'treating it like work'. He wanted to gather documents and do research, discuss the matter with people and to consider whether he wanted to use savings to pay for legal advice. He said that he looked at guidance on the government website and materials available from law firms on the internet.

27. On 26 February 2021, the primary limitation periods expired.
28. On 14 March 2021, the claimant started Early Conciliation and on 15 March 2021 he received his EC certificate. He said that by 18 March 2021, he had been assigned an Acas adviser who told him about time limits.
29. I note that it is surprising that the previous researches the claimant had done had not provided him with information about time limits; reasonable researches would have provided the claimant with this information.
30. The claimant also spoke at this time with a friend who worked in HR and took advice pro bono from a partner at the law firm, Withers.
31. On 26 April 2021, the claimant submitted his claim form. This was over a month after Early Conciliation ended in circumstances where the claimant's claims were out of time when he commenced Early Conciliation.
32. When asked why he took five weeks to submit his claim after speaking with an Acas adviser, the claimant said that he was wrestling with whether to represent himself or obtain representation and seeking pro bono advice from the Withers partner. He took the view that once his claim was out of time, it was out of time, and he wanted to get it right. He did draft versions of the claim form and quoted Thomas Jefferson: "If I had more time I would have written a shorter letter". He said "it took as long as it took, me being who I was" to reach a level which he thought suitable to submit. Pressed on the detail, he said that the claim form took him two weeks to prepare, spending three to four hours per day on weekdays. He would review the draft in the morning, do a new draft and then revisit the draft in the afternoon.
33. It should be noted that the narrative fits in boxes 8.2 and about half of box 15 of the ET1 form. It is a concise account.

Law

Time limits for unfair dismissal claims

34. Section 112 of the Employment Rights Act 1996 provides that a claim for unfair dismissal must be presented within three months of the date of termination unless it was not reasonably practicable to do so and, if not reasonably practicable, was presented within such further period as is reasonable.
35. There is a substantial body of case law on the meaning of reasonable practicability.
36. I remind myself that: 'The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a

layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive': Wall's Meat Co Ltd v Khan 1979 ICR 52, CA.

37. The claimant must prove that it was not reasonably practicable to present his claim in time: "That imposes a duty upon him to show precisely why it was that he did not present his complaint": Porter v Bandridge Ltd [1978] ICR 943, CA.
38. In Lowri Beck Services v Brophy [2019] EWCA Civ 2490 Underhill LJ: summarised some of the existing case law principles:
 - a. The test should be given "a liberal interpretation in favour of the employee": Marks & Spencer plc v Williams-Ryan [2005] ICR 1293;
 - b. The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119;
 - c. If a claimant misses the time limit because he or she is ignorant about its existence or mistaken about when it expires, the question is whether that ignorance or mistake is reasonable. If it is not, then it will have been reasonably practicable for him or her to bring the claim in time: Wall's Meat Co Ltd v Khan [1979] ICR 52;
 - d. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee: Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53; and
 - e. The test of reasonable practicability is one of fact, not law: Palmer.
39. In relation to the issue of ill health, the respondent initially relied on the observation of HHJ Hull QC in Midland Bank plc v Samuels EAT/672/92 that "if a person asserts that they were unwell, then it is up to them to produce medical evidence of the extent and effect of the illness": However both parties agreed that, in accordance with Norbert Dentressangle Logistics Ltd v Hutton EATS 0011/13, I am entitled to consider the claimant's own account of his medical condition.
40. There is a number of authorities which consider the issue of whether it is reasonably practicable to present a claim in time where the claimant is ignorant of particular facts. The only one of these the parties referred me to was Churchill v A Yeates & Sons Ltd [1983] ICR 380, which is authority for the proposition that ignorance of a fact which is crucial or fundamental to a claim will in principle be a circumstance rendering it impracticable to submit the claim in time.
41. Whether the claim was presented within a further period of time which was reasonable is a question of fact for the Tribunal, which must undertake an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances, having regard to the strong

public interest in claims being brought promptly against a background where the primary time limit is three months: Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10

Time limits for discrimination claims

42. Under s.123(1)(a) Equality Act 2010 a claim for discrimination "may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates".
43. Under s.123(1)(b) EqA, the Tribunal has a discretion to allow a discrimination complaint to be brought within such other period as the Tribunal thinks just and equitable.
44. In Bexley Community Centre (t/a Leisure Link) v Robertson [2003] IRLR 434, the Court of Appeal made it clear that there that there is no presumption in favour of extending time; the onus is on the claimant to convince the Tribunal that it is just and equitable to do so.
45. In British Coal Corporation v Keeble [1997] IRLR 336, Smith LJ said that in exercising this discretion, the Tribunal should have regard to the prejudice that will be suffered by either party as a result of its decision on the extension of time; should have regard to all the circumstances of the case; and will be assisted by the factors mentioned in s.33 of the Limitation Act 1980. Those factors are as follows:
 - 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 co-operated 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 or she knew of the possibility of taking action.
46. It has been observed in a number of subsequent authorities that, whilst the Limitation Act factors may be helpful, Tribunals should not follow that list slavishly or treat it as a checklist. In Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, [2021] ICR D5, Underhill LJ said: "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 (as Holland J notes) "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."

Conclusions

Reasonable practicability

47. I concluded that claimant was not well enough to pursue the possibility of a legal claim until about February 2021, when he started looking at jobs. He was on a strong dose on antidepressants and I accepted that he struggled to concentrate even on reading and hobbies. I bore in mind that the claimant is a man who had worked for many years and was suddenly out of a job he liked and valued; as he said, his self esteem was affected. I had before me no real evidence that he carried out any activity that was inconsistent with that account and I accept that a person who is significantly depressed will struggle to make enquiries necessary to commence the daunting process of litigation.
48. As to whether the claimant was, as was submitted on his behalf, ignorant of crucial facts necessary to his cause of action, up until the point when he saw the job advert, I did not consider that he was. He already suspected or believed that his job was not redundant and thought that his selection was likely to have been on the grounds of one or more protected characteristics based on the facts he was aware of. No doubt the advertising of the job seemed to him to make his potential case evidentially stronger and, as he said, it made him angry.
49. There was then approximately a month between the point when the claimant was well enough to look for jobs and consider bringing proceedings and when he approached Acas
50. The claimant said that he started to research the matter by looking at websites. I take judicial notice of the fact that, given the short time limits which exist for Tribunal claims, advice about those time limits features fairly prominently in information provided on the government website and elsewhere. Any reasonably thorough research would have turned up those time limits. I find that the claimant could not have been reasonably ignorant of time limits after the point he started researching the possibility of bringing a claim.
51. Furthermore the claimant was not actually ignorant of the time limits after he contacted Acas in March 2021, by which point the primary time limit had expired on 26 February 2021
52. The claimant then does not appear to have appreciated the urgency of submitting his claim as soon as possible. At this point he had skilled advisers,

including the pro bono solicitor, who should have told him that it was incumbent upon him to submit his claim without further unnecessary delay.

53. If his advisers did not tell him that, he is unfortunately fixed with their error. If they did tell him and he took the view that it was more important to perfect his submission than to get his claim in quickly, that was not objectively reasonable.

54. In those distances I do not find that it was not reasonably practicable for the claimant to submit his claim in time and, in any event, I find that he did not submit the claim within such further period as was reasonable after the Acas adviser told him of the time limit.

55. The unfair dismissal claim is dismissed.

Discrimination complaints: just and equitable extension

56. I looked broadly at all the factors which seemed to be relevant to the question of whether it was just and equitable to extend time. That included the Limitation Act questions, but I recognised that my discretion was a broader discretion and I should not slavishly follow those factors.

57. I looked at the issue of prejudice. It was not suggested by the respondent that evidence would have lost cogency between the expiry of limitation and the date the claim form was submitted. The only prejudice pointed to by the respondent was the universal prejudice suffered by respondents if extensions of time are allowed, that of having to defend the claims. If I do not exercise my discretion to extend time, the claimant will suffer the prejudice of having no remaining claims before the Tribunal.

58. I did not hear any submissions from parties on the merits of the claims and so cannot factor that into my considerations. It seems doubtful that it would be possible to make any assessment on the basis of the pleadings alone.

59. I looked at the promptness with which the claimant acted when he knew of the facts giving rise to his claims. I concluded that the claimant did not act promptly but I also accepted that, at least until February 2021, his depression was a significant impediment to his ability to concentrate sufficiently or motivate himself to present the claim. Looking at the length of and reasons for the delay, the delay was a delay of some two months. That is a relatively significant delay when measured against the primary limitation period but I have accepted that the claimant's ill health prevented him from pursuing the matter until near to the end of the primary limitation period.

60. I have also found that some of the further delay after that was unreasonable; by mid to late March 2021 the claimant was aware of the time limits but did not act with urgency because of his desire to present a document which was to the standard he wished it to be, having undertaken such investigations as he considered necessary and thought about the costs and possible representation.
61. I remind myself that is not necessary for there to be a good reason for delay in order for time to be extended but the lack of a good reason is a factor in the exercise of the discretion.
62. Although the latter period of delay was unreasonable in an objective sense, I find that the claimant was not deliberately flouting time limits. He reached an unreasonable conclusion in balancing the time limits against his own desire to submit a document which was to the standard he desired it to be. I bear in mind that his profession was as a writer and editor and that he was still suffering from depression at this time, albeit not as severely as earlier in the period.
63. Looking at the whole picture and balancing up the unreasonable delay later in the period against the lack of loss of cogency of evidence and the lack of prejudice to the respondent beyond the inevitable prejudice of having to defend a claim, I concluded that the balancing exercise came down in favour of my exercising discretion to extend time for the Equality Act complaints.
64. I accordingly made case management orders which are contained in a separate document.

Employment Judge Joffe
11 February 2022

JUDGMENT SENT TO THE PARTIES ON
14 Feb. 22

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FOR THE TRIBUNAL OFFICE