



EMPLOYMENT TRIBUNALS

Claimant: Mr D Wills

Respondent: Sainsbury's Supermarkets Ltd

Heard at: Southampton

On: 15 June 2022

Before: Employment Judge Dawson

Appearances

For the claimant: In person

For the respondent: Ms Ahmad, counsel

JUDGMENT

1. The tribunal lacks jurisdiction to consider the claimant's claims due to the passage of time between the events complained of and the date when the claim form was presented..
2. The claimant's claims are dismissed..

REASONS

1. At a hearing on 5 January 2022, Employment Judge Gray listed 2 issues to be determined at a preliminary hearing along with the giving of further directions. Those issues were as follows
 - a. On the basis that it appears that the Claimant's claims were presented out of time, whether time should be extended and/or whether the question of the extension of time in respect of any of the claims should be considered at the final hearing (the time limit jurisdictional issues to be determined are summarised in the case management summary below);

- b. To determine the length of service and effective date of termination of the Claimant. The parties agree that the employment started on the 31 August 2017. The Claimant asserts the effective date of termination was the 8 September 2019. The Respondent asserts it was the 9 August 2019.
2. He listed the case to be heard by video.
3. The case initially commenced by way of Video Hearing platform but it became apparent that the claimant's technology was incompatible with that platform so that other participants could not see him. That was disadvantageous both to the claimant and to the respondent and that hearing had to be abandoned. The case continued by way of Cloud Video Platform but due to the fact that less time was available tribunal only determined the first issue. Having heard the positions of the parties and considered the evidence, I decided that it was not necessary for the question of the extension of time to be determined at a final hearing and that I should determine it at this hearing.
4. Employment Judge Gray had directed the claimant to serve a witness statement on the issues. Unfortunately he had not done that but at the outset of the hearing it was agreed that the witness evidence he wished to give (as distinct from the documents which he had sent to the tribunal in a number of emails) was contained in 3 documents being;
 - a. a document headed "Medical Declaration"
 - b. a letter to Sainsbury's Supermarkets and the tribunal dated 26 August 2021 and
 - c. a letter with file name Nelson Legal which was dated, underneath the claimant's signature at the bottom, 25 July 2021.
5. It was agreed that those 3 documents would be the claimant's evidence in chief along with some amplification that he had given in the discussion I had with him prior to his evidence starting which lasted approximately 30 minutes and which he confirmed as accurate when he took the affirmation.
6. The claimant has brought claims of unfair dismissal and disability and age discrimination. The claimant agreed, during the course of the hearing, that all of the acts of discrimination which he alleges had taken place by the time when his employment ended, whether that is treated as being 8/9 September 2019 or 9 August 2019.
7. It is not in dispute that the claimant presented his claim on 10 March 2021 but, because the original claim did not have a conciliation certificate number, the claim was treated as being presented on 26 March 2021.

The Law

8. In respect of a claim for unfair dismissal, section 111 Employment Rights Act 1996 provides

(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.

9. The leading authority is the decision of the Court of Appeal in *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] 1 All ER 945, [1984] IRLR 119, [1984] ICR 372, CA. In that case, May LJ stated

"[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done—different, for instance, from its construction in the context of the legislation relating to factories: compare *Marshall v Gotham Co Ltd* [1954] AC 360, HL. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [*Singh v Post Office* [1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic—"was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection."

10. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'.
11. Lady Smith in *Asda Stores Ltd v Kauser* EAT0165/07 stated: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.
12. In *University Hospitals Bristol NHS Foundation Trust v Williams* 0291/12 the EAT emphasised that s111(2)(b) does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the expiry of the time limit in order to allow the claim to proceed. Rather, it requires the tribunal to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired.

13. In *Nolan v Balfour Beatty Engineering Services* 0109/11 the EAT reiterated that tribunals, when considering whether to extend time under S.111(2)(b), should always bear in mind the general principle that litigation should be progressed efficiently and without delay. It stated “ [23] These provisions demonstrate a legislative intention that claims should be presented promptly – reflecting the general principle that it is in the public interest that litigation should be progressed as efficiently as possible — and that claimants should not be permitted to delay in presenting them once whatever the obstacle was that prevented timeous presentation has been removed” The EAT went on to hold that, when deciding what would have been a reasonable time within which to present a late claim, tribunals should have regard to all the circumstances of a case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred.
14. In respect of the discrimination claims, section 123 Equality Act 2010 provides
- (1) Subject to sections 140A and 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
15. In *Olufunso Adedeji v University Hospitals Birmingham Nhs Foundation Trust* [2021] EWCA Civ 23, Underhill LJ stated “It will be seen, therefore, that Keeble did no more than suggest that a comparison with the requirements of section 33 might help “illuminate” the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and “the Keeble factors” and “the Keeble principles” still regularly feature as the starting-point for tribunals’ approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J’s phrase, “not dissimilar”, so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). 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.

Findings of fact

16. I find that at all times following the termination of the claimant's employment with the respondent he had general anxiety which had, at times, been treated with medication. However the claimant was keen to point out, and I accept, that because the drug which had been used to treat his anxiety was described as toxic by his GP he decided to stop taking medication. Further information is given in his document headed "Medical Declaration". It seems to me, having heard the evidence which I have, that I must take account of the fact that the claimant's ability to present a claim form to the tribunal would have been affected by the general state of his mental health. Having said that, the claimant has not relied upon any specific medical evidence that says that he was not able to present a claim either within 3 months of the date of the termination of the contract or at any time thereafter.
17. The claimant explained that following the termination of his employment a number of difficulties befell him. They are, largely, set out in the letter of 26 August 2021. The claimant was homeless for periods between the termination of his employment and the presentation of his claim, he explained that he was, at times, sleeping in a car, at times sleeping in a tent or a storage unit and at times renting a room in a Travelodge. One of the reasons for him becoming homeless was that he believed he had been the victim of county lines drug dealers who sought to cuckoo him (the evidence of which being that his flat door was damaged). The claimant's letter of 26 August 2021 shows that he found accommodation in December 2019 but in evidence he told me that he lost that accommodation on 6 August 2020. I accept that evidence.
18. The claimant had also purchased a car in May 2019 which was defective and which he sought to have repaired under the warranty. He explained that he had had to travel to Taunton and when the repairs were not done sufficiently quickly he had been forced to stay in a Travelodge there. He had sought to persuade the garage to pay for his accommodation expenses rather than provide him with a courtesy car but had been unsuccessful in doing so. Again, I accept that evidence.
19. The claimant also told me that he had been prosecuted for the offence of assault and in January 2020 had been given a conditional discharge in that respect although forced to pay compensation and significant court costs.
20. The claimant explained that he faced difficulties with accessing the Internet, particularly during lockdown when libraries were closed and he also had difficulty with claiming universal credit and was forced to appeal in that respect. His appeal was successful.
21. When asked why he did not present a claim after January 2020, when the criminal proceedings against him had been concluded, the claimant gave a long answer that culminated to the effect that, as a consequence of his conditional discharge and being homeless he could not obtain new employment and it was at that stage that he decided to think back and bring an employment tribunal claim against Sainsbury's. I accept that evidence.
22. The client also told me that in around October or November 2019 he went to the Citizens Advice Bureau to discuss his criminal proceedings. He said that he

would have mentioned that he had resigned from Sainsbury's but an employment tribunal claim was not discussed because the meeting focused on the criminal defence issues.

23. In respect of all of this evidence, I accept what the claimant told me as being substantially accurate.
24. The claimant accepted in cross examination that, notwithstanding the significant challenges he faced during the period following termination of his employment, as set out above, he was also able pursue a number of matters.
25. In respect of his car, when it was finally repaired in January 2020 he took the matter up with the Financial Ombudsman. He wrote to the Financial Ombudsman and expected a quick response but he said that it was dragged out until 2021. He emailed the financial ombudsman and telephoned them many times.
26. As I have indicated, the claimant was able to appeal against the award in respect of universal credit and was successful in doing so. His appeal was sent on 3 November 2020
27. The claimant was unhappy with the decision made by the police in respect of some things which happened to the claimant and he said that he telephoned the 101 telephone number hundreds of times and that he had complained in writing many, many times to different organisations including "professional standards".
28. The claimant did not suggest that he was either unaware of the 3 month time limit or unable to discover it. I accept, however, that access to the Internet would have been limited for the claimant during those times when public libraries were in lockdown. The claimant told me, and I accept, that whilst he could access the Internet via the library outside lockdown times, it was much more difficult (if not impossible) during lockdown.

Conclusions

29. I have no doubt that the claimant has faced, and faces, many challenges in life. It is difficult not to have sympathy for a person who finds themselves in the position that Mr Wills does. Nevertheless, the question for me, in respect of the claim of unfair dismissal, is firstly whether it was reasonably practicable to present the claim within 3 months and, secondly, if not whether the claim was presented within a reasonable period of time thereafter.
30. I conclude that even if I were to find that it was not reasonably practicable for the claimant to present a claim within 3 months of the date of termination of his employment, he did not present a claim within a reasonable period thereafter. It is apparent that in January 2020 the claimant was able to engage in disputes with his garage and the Financial Ombudsman and, he was also able to successfully appeal against his decision in respect of Universal Credit. He was able to make complaints about the police to professional standards. On a close analysis, the claimant has not really presented any evidence as to why the

series of unfortunate events which have happened to him prevented him presenting the claim to the tribunal before March 2021. It is clear that he was able to function to a significant level and if he could achieve those things which I have set out above, I can see no reason why he could not have presented a claim form by November 2020 at the latest (when he made his Universal Credit appeal).

31. In respect of the claims of discrimination, I must bear in mind the importance of the fact that Parliament has given a deliberately short period of for presenting claims. The delay in this case is well in excess of a year beyond the date when the claims should have been presented. Again, I do not consider that in reality the claimant has given a good explanation as to why the claims were not presented sooner than they were. At risk of repetition, if the claimant could deal with matters such as the Financial Ombudsman, Universal Credit and his concerns about the police, I am unable to find any good reason why the claimant did not present the claims considerably before he did and, in any event, by November 2020 at the latest.
32. I also accept the submission made by counsel for the respondent that the witness they would have called on the question of the date when the claimant resigned is now retired. Whilst I do not automatically find that means that the respondent is prejudiced because of the likelihood of fading recollections, and I note that the witness is still available to give evidence, those who are to be accused of discrimination are entitled to have those accusations made quickly and resolved quickly. It is inevitably stressful to be accused of discriminating against someone and that is a factor which I consider I should take into account.
33. Given the length of the delay in this case and the fact that I do not think that the events which have happened the claimant provide a satisfactory explanation for the delay in presenting the claims, I have concluded that the claims were not presented within such period as is just and equitable.
34. In those circumstances the claims of discrimination and unfair dismissal were presented out of time and the tribunal lacks jurisdiction to consider them. It follows from that that the claims must be dismissed..

Employment Judge Dawson
Date 15 June 2022

Judgment sent to the parties: 23 June 2022

FOR THE TRIBUNAL OFFICE

Notes

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