Case Number: 3200018/2022

EMPLOYMENT TRIBUNALS

Claimant: **Rudy Saramandif**

Respondent: **Keymed (Industrial & Industrial Equipment) Ltd**

Heard at: **East London Hearing Centre (by CVP)**

On: **25 July 2022**

Before: **Employment Judge Housego**

Representation

Claimant: Graham Sinclair, a friend of the Claimant
Respondent: Oliver Lawrence, of Counsel, instructed by Mills & Reeve LLP.

JUDGMENT

1. It was reasonably practicable for the Claimant to present his claim for unfair dismissal within the time limit and it is struck out.

2. It is not just and equitable to permit the Claimant's discrimination claim, submitted outside the time limit, to proceed and it is struck out.

3. The Claimant is ordered to pay £900 costs to the Respondent.

REASONS

Issues

1. The Claimant claims unfair dismissal and age and race discrimination, and arrears of pay, or other payments said to be due.

2. The claims were filed out of time, and this hearing is to consider whether to strike them out for that reason.

3. The Respondent also applied for the claims to be struck out as having no reasonable prospect of success (or to order a deposit to be paid on the basis that if not no reasonable prospects of success the claims have little reasonable prospect of success.

Law

4. A claim for unfair dismissal must be presented within 3 months of the effective date of termination[1], extended in a variety of ways by the requirement to obtain an Early Conciliation Certificate from ACAS before filing a claim. What the extension is depends on when the notification is given by the Claimant and when the certificate is issued[2]. If not so filed, time may be extended for such further time as is reasonable, but only if it was not reasonably practicable for the claim to have been filed in time.

5. General guidance for the parties about the approach of the Tribunal in such cases (not all will be applicable) is:

   The test for extending time has two limbs to it, both of which must be satisfied before the Tribunal will extend time:

   • first the Claimant must satisfy the Tribunal that it was not reasonably practicable for the complaint to be presented before the end of the three month primary time limit

   • if the Claimant clears that first hurdle, she must also show that the time which elapsed after the expiry of the three-month time limit before the claim was in fact presented was itself a 'reasonable' period.

6. Hence, even if the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the three-month time limit, if the period of time which elapsed after the expiry of the time limit was longer than was 'reasonable' in the circumstances of the case, no extension of time will be granted.

7. As regards the first limb of the test, it is quite difficult to persuade a Tribunal that it was 'not reasonably practicable' to bring a claim in time. A Tribunal will tend to focus on the 'practical' hurdles faced by the Claimant, rather than any subjective difficulties such as a lack of knowledge of the law, an ongoing relationship with the employer or the fact that criminal proceedings are still pending. The principles which tend to apply are:

   • section 111(2)(b) ERA should be given a liberal construction in favour of the employee

   • it is not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit

   • however, a Claimant will not be able to successfully argue that it was not reasonably practicable to make a timely complaint to

[1] Employment Rights Act 1996 S 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.

[2] S207B of the Employment Rights Act 1996.

an Employment Tribunal, if he has consulted a skilled adviser, even if that adviser was negligent and failed to advise him correctly

• there may be exceptional circumstances where that principle may not apply, namely where the adviser's failure to give the correct advice about time limits is itself reasonable, for example, where both the Claimant and the adviser have been misled by the employer as to some material factual matter such as the date of dismissal

• where a claimant has consulted skilled advisers, such as solicitors, the question of reasonable practicability is to be judged by what he could have done if he had been given such advice as they should reasonably in all the circumstances have given him

• the question of reasonable practicability is one of fact for the Tribunal, and should be decided by close attention to the particular circumstances of the particular case

• a Claimant can rely on failure to act in reliance on advice from, for example, Tribunal employees or government officials. In *Fazackerley* the EAT held that the Employment Tribunal did not err in finding that it was not reasonably practicable for the claimant to have brought proceedings in time when he relied on incomplete advice from Acas that he should exhaust an internal appeal process first before considering starting a Tribunal claim

• it is not reasonably practicable to bring a claim if a Claimant is unaware of the facts giving rise to the claim. However, once they have discovered them, a Tribunal will expect them to present the claim as soon as reasonably practicable, rather than allowing three months to run from the date of discovery

• if a Claimant knows of the facts giving rise to the claim and ought reasonably to know that they had the right to bring a claim, a Tribunal is likely not to extend time. If the Claimant has some idea that they could bring a claim but does not take legal advice, a Tribunal is even less likely to extend time

• if a letter is posted by first class post, it is reasonable to assume that it will be delivered two days later (excluding Sundays and Bank Holidays). If it is not, a Tribunal is likely to extend time. However, the onus is on the Claimant to ensure that it does arrive in time: he must take all reasonable steps to check. Claimants' representatives should therefore always make a note of when they would expect to receive a response from the Tribunal (or Acas) and to chase if it has not been received

• if an employee makes a mistake on a claim form which means that it is rejected by an Employment Tribunal (such as incorrectly stating the early conciliation certificate number) and thereafter the time limit for the claim expires while he is labouring under the misunderstanding that he has not made a mistake, that misunderstanding—provided it is reasonable in the circumstances—may justify an extension to the time limit on the basis that it was not reasonably practicable for him to have brought the claim in time

- where an error on the part of solicitors leads to an initial employment tribunal claim being rejected and a corrected resubmitted second claim being presented out of time, in deciding whether it was 'not reasonably practical' for the resubmitted claim to be presented in time, the employment tribunal must assess the reasonableness of the solicitors' original error. This involves taking into account all the circumstances (eg in *Zhou* the claimant had completed her own ET1 form to save costs and her solicitors did not spot her error in respect of the early conciliation certificate number) and a recognition that not every omission, however technical, is unreasonable. In accordance with the *Dedman* principle:

  - if the error which led to the first claim being rejected was reasonable, and the claimant and her solicitors thereby believed a valid claim had been presented in time, the tribunal may find that it was not reasonably practicable to present the second claim in time, however

  - if the error on the part of the solicitors was not reasonable, then the claimant is bound by their error, and it would have been reasonably practicable for the claim to have been presented in time

8. If the first limb of the test is satisfied, the Claimant must then satisfy the second as well: even if a Tribunal concludes that it was not reasonably practicable for a Claimant to present the claim within the three month time limit (or extended period where the requirement for early conciliation applies) no extension of time will be granted unless the claim was presented within a 'reasonable' time (judged according to the circumstances of the case) thereafter.

9. If a Tribunal concludes that the extent of the delay between expiry of the primary three-month limitation period (or extended period where the requirement for early conciliation applies) and the date the claim was presented was objectively unreasonable, the fact that the delay was caused by the Claimant's advisers rather than by the Claimant makes no difference, and hence a time extension will be refused.

10. The test for discrimination claims (which have the same time limit) is whether it is just and equitable to extend time to permit the claim to proceed[3]. There is a similar extension of time for the ACAS early conciliation procedure.

11. I have considered the case law summarised and explained in Robinson v Bowskill & Ors (p/a Fairhill Medical Practice) (Jurisdictional Points : Claim in time and effective date of termination) [2013] UKEAT 0313_12_2011 and the factors in section 33 of the Limitation Act 1980 which is referred to in the BCC v Keeble [1997] IRLR 336, cited in *Robinson*.

12. The most recent guidance is in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23:

> *"37. The first concerns the continuing influence in this field of the decision in Keeble. This originated in a short concluding observation*

[3] S123 Equality Act 2010 Time limits
(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.

at the end of Holland J's judgment in the first of the two Keeble appeals, in which the limitation issue was remitted to the industrial tribunal. He said, at para. 10:

> *"We add observations with respect to the discretion that is yet to be exercised. Such requires findings of fact which must be based on evidence. The task of the Tribunal may be illuminated by perusal of Section 33 Limitation Act 1980 wherein a check list is provided (specifically not exclusive) for the exercise of a not dissimilar discretion by common law courts which starts by inviting consideration of all the circumstances including the length of, and the reasons for, the delay. Here is, we suggest, a prompt as to the crucial findings of fact upon which the discretion is exercised."*

The industrial tribunal followed that suggestion and, as we have seen, when there was a further appeal Smith J as part of her analysis of its reasoning helpfully summarised the requirements of section 33 (so far as applicable). 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.

38.I am not the first to caution against giving the decision in Keeble a status which it does not have. I have already noted the Judge's reference to the decision of this Court in Afolabi. At para. 33 of his judgment in that case Peter Gibson LJ said:

> *"Nor do I accept that the ET erred in not going through the matters listed in s. 33 (3) of the 1980 Act. Parliament limited the requirement to consider those matters to actions relating to personal injuries and death. Whilst I do not doubt the utility*

> *of considering such a check-list … in many cases, I do not think that it can be elevated into a requirement on the ET to go through such a list in every case, provided of course that no significant factor has been left out of account by the ET in exercising its discretion."*

In Department of Constitutional Affairs v Jones [2007] EWCA Civ 894, [2008] IRLR 128, Pill LJ at para. 50 of his judgment referred to Keeble as "a valuable reminder of factors which may be taken into account" but continued:

> *"Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found."*

That point was further emphasised by Elisabeth Laing J, sitting in the EAT, in Miller v Ministry of Justice [2016] UKEAT 0004/15: see paras. 11 and 29-30 of her judgment. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, [2018] ICR 1194, Leggatt LJ, having referred to section 123, says, at paras. 18-19 of his judgment:

> *"18. … [I]t 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 these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see [Keeble]), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see [Afolabi]. …*
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> *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)."*
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> *Although the message of those authorities is clear, its repetition may still be of value in ensuring that it is fully digested by practitioners and tribunals."*

38. I have also taken note of the judgment of Auld LJ in Robertson v Bexley Community Centre [2003] IRLR 434 (again cited in *Robinson*):

> *"25. 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".

39. The issue of whether to strike out a claim as having no reasonable prospect of success is contained in Rule 37(1)(a) in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

The Hearing

40. This was a virtual hearing. The Claimant did not say at the beginning that he had a representative. When this emerged after about 20 minutes I stopped the hearing so that the Claimant could telephone Mr Graham, which he did. Mr Graham had some technical problems but was able to participate fully in the hearing. As there was no witness statement from the Claimant he affirmed and I asked him about the reasons for the late filing of the claim, and about his claims so as to have information about the issues to be decided. Having done so I asked Mr Graham to set out the case for the Claimant. Mr Graham's address included much of what was in reality evidence by himself, and about the allegations made, and did not address the issue of time since dismissal. Both the Claimant and Mr Graham were clear that the claim was in late, and that there was nothing preventing the Claimant from filing his claim earlier. Having heard the oral evidence of the Claimant and the submissions of Mr Graham it was not necessary for me to ask Counsel to cross examine the Claimant or to make submissions.

Chronology

41. In this case:

    a. The Claimant's date of birth is 04 July 1959.

    b. The Claimant started work for the Respondent on 21 August 2017.

    c. On 20 October 2020 the Claimant was given a written warning about the quality and quantity of his output.

    d. On 25 November 2020 the Claimant was given a final written warning having failed to meet the minimum output target.

    e. The Claimant was dismissed on 19 January 2021, the Respondent says for capability reasons.

    f. The Claimant was paid in lieu of notice so his effective date of termination was 19 January 2021.

    g. On 27 January 2021 the Claimant appealed his dismissal.

    h. On 12 March 2021 that appeal was dismissed.

    i. The Acas period was 19 March 2021 to 30 April 2021.

    j. The claims were lodged on 06 January 2022.

Late filing of the claim – unfair dismissal

42. The Claimant says that:

    a. He was getting help from Graham Sinclair, to whom he is related. Mr Graham is a retired magistrate with some experience in such matters. He relied on Mr Graham.

    b. He is himself not knowledgeable about Tribunal claims.

    c. He wanted to resolve this by negotiation, but the Respondent would not negotiate.

    d. He was reluctant to bring a claim and did so only because he did not want others to endure what he says he endured.

    e. He was trying to gather evidence and has witnesses who he was confident would come forward if he had more time.

    f. He has high blood pressure and looks after his mother. He is fit for work but gets universal credit as his mother's carer. She lives about 2 miles from where he lives.

    g. The Claimant and Mr Graham kept returning to what was said were the merits of his claim and did not advance any reason why the Claimant could not have put in the claim.

    h. The Claimant repeatedly evaded the question of what it was that made him put in the claim when he did, and why it was that he did not claim for over 8 months after getting his Acas certificate. He had filled in the form online by himself.

43. The claim was filed almost a year after dismissal (19 January 2021 – 06 January 2022). The limitation period ended on 18 March 2021, but the early conciliation period was not commenced until 1 day after the limitation period ended. The claim was not filed for over 8 months after the Acas certificate was issued. The Acas period is not relevant, for this reason.

44. The Claimant offers no credible reason for the delay.

45. Even if the Claimant thought that he had to wait for his internal appeal the claim is still 8 months out of time.

46. The Claimant knew the process, for he started the early conciliation process a week after the appeal against dismissal was refused.

47. It was reasonably practicable for the claim to have been filed within the time limit.

48. Even if were not practicable to have done so the claim was not filed within a further period that was reasonable. That is because the Claimant dealt with the necessary precursor of the Acas early conciliation period on 19 March 2021 and received his certificate on 21 April 2021, but then did nothing for 8 months.

49. In coming to this decision I have focussed only on the Claimant: there is no just and equitable consideration and no balance of prejudice to consider.

Late filing of the discrimination claims

50. The discrimination claims are out of time, as a minimum, in the same way as the unfair dismissal claim as the date of dismissal is the last date possible for these claims. The ET1 also claims that the Claimant was subject to abuse from a white technician (presumably on the basis of race or age), but he gave no date. In his evidence to me he said it was about six months before he was dismissed. That claim will be out of time by a longer period than the discrimination claims relating to dismissal. It had no connection with his dismissal and so was not part of a series of matters. There was no reason why a claim could not have been made at the time.

51. The Claimant offers no credible reason why the claims were filed so late.

52. In deciding whether to strike out the discrimination claims I have regard to the length of the delay, and the reason for it. The delay is long and there is no credible reason to account for it.

53. Accordingly, it is not just and equitable to extend time for the filing of these claims and they must be dismissed.

No reasonable prospect of success

Unfair dismissal

54. After a written warning and final written warning, and with the Claimant not setting out any reason why his dismissal was unfair (save to say it was either race or age discrimination) this claim has no reasonable prospect of success, and I would have struck it out for that reason had I not struck it out as out of time.

Race discrimination

55. The claim form asserts that the Claimant was dismissed by a white person but that he had no issue with other managers who were darker skinned, as he says he is. He says that he was subjected to abuse by a white technician, but does not say what that was, or why it had anything to do with race. It is not enough to point to a difference in race and say that was the reason for a detriment. The Claimant offers no suggestion as to why they are linked.

56. Accordingly, the claim of race discrimination has no reasonable prospect of success, and I would have struck it out for that reason had I not already decided that it must be struck out as filed out of time.

Age discrimination

57. The Claim form gives no idea of what the age discrimination claim is. I clarified this in the hearing. He says he was dismissed because he is older than others. He does not name any comparator and relies on a hypothetical younger man.

58. There is no factual allegation to point to any link between age and dismissal. If it was bullying then it cannot succeed as the Claimant said that the person he said had bullied him also bullied a younger colleague.

59. Accordingly, the age discrimination claim has no reasonable prospect of success and had I not already dismissed the claim as out of time I would have dismissed it as having no reasonable prospect of success.

Arrears of pay, and other payments

60. The claim form gives no indication of what these claims are. The Claimant just ticked the boxes at 8.1 in the claim form. As there are no discernible claims, I would have struck the claims out as having no reasonable prospect of success had I not already struck them out as being out of time. The Claimant said that he thought it was about his pension, and that since he had raised the matter with them it had been resolved. There is no issue to be determined.

Costs

61. The Respondent applied for costs. Rule 76 applies. The Respondent had written a very clear costs warning letter, dated 04 July 2022 which the Claimant accepts he had received. It sets out that the claims are bound to be dismissed on the basis that they were out of time, and why that was said to be the case. It presaged this judgment. Even in his oral evidence the Claimant said (and this was reiterated by Mr Graham) that he knew the claim was filed late.

62. The claims had no reasonable prospect of success because they were filed so late. The Claimant knew that they were filed very late. It was unreasonable to continue with the claims after the costs warning letter was received (and it expressly stated that there would be no claim for costs if the Claimant withdrew after receiving it).

63. In principle this is case where costs must be considered, because it was unreasonable to continue with claims filed so late, as was understood, with no good reason being advanced as to why the claim could not have been filed earlier.

64. I enquired as to the Claimant's means. He said he was reliant on universal credit and lived in rented accommodation. The Respondent limited its claim for costs to Counsel's brief fee of £750 plus vat, £900 in total.

65. I decided that this was a reasonable sum for the Claimant to pay in costs, and so ordered.

Employment Judge Housego
Dated: 25 July 2022