



EMPLOYMENT TRIBUNALS

Claimant: Mr M Dillon

Respondent: H & V 2000 Limited

Heard at: London East Tribunal (via Cloud Video Platform)

On: 31 October 2022

Before: Employment Judge Brewer

Representation

Claimant: In person

Respondent: Ms L Piper, Solicitor

JUDGMENT

1. The claimant's claimed for unfair dismissal is struck out as the Tribunal does not have jurisdiction to hear the claim.
2. The claimant's claimed for breach of contract is struck out as the Tribunal does not have jurisdiction to hear the claim.
3. The claimant's claimed for disability discrimination is struck out as the Tribunal does not have jurisdiction to hear the claim.

REASONS

Introduction and issues

1. This case was listed for an open preliminary hearing to do with the following:

“Was the complaint(s) presented outside the prescribed 3-month time limit (as extended by the relevant ACAS early conciliation period) and if so:

(a) should the complaint(s) be dismissed on the basis that the Tribunal has no jurisdiction to hear it;

(b) because of those time limits (and not for any other reason) should the complaint(s) be struck out under rule 37 on the basis that they have no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospects of success?"

2. There is some difficulty with this wording because if and determined the complaints should not be dismissed under the first limb of the above then the second limb is irrelevant. Claims are either in time because they have been made in time or because a judge decides to extend time, or they are out of time and time has not been extended in which case the tribunal does not have jurisdiction to hear them.
3. For that reason, I limited the hearing to the question of time limits that is to say was any claim submitted out of time and if so should time be extended.
4. The claimant represented himself and the respondent was represented by piper their solicitor. Mr Dillon gave evidence I was asked questions by me and by Ms Piper. I explained the time limits issued to Mr Dillon and that if he needed a break then he should say so. I explained to Mr Dillon that it was not my role to determine any substantive question in the case other than the time limit issue.
5. In his claim form the claimant has ticked the boxes for the following claims - unfair dismissal, disability discrimination, notice pay and "another type of claim" which he said was wrongful dismissal. after a short discussion it was agreed that there were three claims and the reference to wrongful dismissal added nothing to the claims being pursued.

Law

6. Turning to the law, the claims which on the face of it the claimant is pursuing attract two different tests in relation to time limits. The claims for unfair dismissal and notice pay, which is essentially breach of contract, are to be looked at in terms of the not reasonably practicable/reasonable time test. The claim for disability discrimination attracts the just and equitable test.

Unfair dismissal/breach of contract

7. S.111(2)(b) ERA (and its equivalents in other applicable legislation) should be given a 'liberal construction in favour of the employee' (**Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA).
8. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. '*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). Accordingly, if the claimant fails to argue that it was not reasonably

practicable to present the claim in time, the tribunal will find that it was reasonably practicable (**Sterling v United Learning Trust** EAT 0439/14).

9. 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' (see below).
10. in **Palmer and anor v Southend-on-Sea Borough Council** 1984 ICR 372, CA, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in **Asda Stores Ltd v Kauser** EAT 0165/07 explained it in the following words: *'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'*.
11. A claimant's complete ignorance of his or her right to claim unfair dismissal may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. As Lord Scarman commented in **Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA, where a claimant pleads ignorance as to his or her rights, the tribunal must ask further questions: *'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?'* In **Porter v Bannbridge Ltd** 1978 ICR 943, CA, the majority of the Court of Appeal, having referred to Lord Scarman's comments in **Dedman**, ruled that the correct test is not whether the claimant knew of his or her rights but whether he or she *ought to have known of them*.
12. Where the claimant is generally aware of his or her rights, ignorance of the time limit will rarely be acceptable as a reason for delay. This is because a claimant who is aware of his or her rights will generally be taken to have been put on inquiry as to the time limit. Indeed, in **Trevelyan's (Birmingham) Ltd v Norton** 1991 ICR 488, EAT, Mr Justice Wood said that, when a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right. Failure to do so will usually lead the tribunal to reject the claim.
13. The fact that the claimant has a disability may be relevant to the question of reasonable practicability.
14. In terms of the second limb of the test, in **University Hospitals Bristol NHS Foundation Trust v Williams** EAT 0291/12 the EAT emphasised that this limb of S.111(2)(b) 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. That said, a tribunal is unlikely to accept a late claim where the claimant fails to act promptly once the obstacle that prevented the claim being made in time in the first place has been removed.
15. What amounts to a 'further reasonable period' for the purposes of S.111(2)(b) is essentially a matter of fact for the employment tribunal to decide on the particular

circumstances of the case. There is no hard and fast rule about what period of delay is reasonable and the extent of the delay is just one of the circumstances tribunals will need to consider although in **Nolan v Balfour Beatty Engineering Services** EAT 0109/11, it held that tribunals determining whether a claim was submitted within a further reasonable time must consider all the circumstances of the particular 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.

Discrimination

16. The three-month time limit for bringing a discrimination claim is not absolute: employment tribunals have discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so — S.123(1)(b) EqA. In **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA,

'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 claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'

17. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in **S.33 of the Limitation Act 1980** (as modified by the EAT in **British Coal Corporation v Keeble and ors** 1997 IRLR 336, EAT). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular,
- 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 plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.
18. In **Department of Constitutional Affairs v Jones** 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. However, while a tribunal is not required to go through every factor in the

list referred to in Keeble, a tribunal will err if a significant factor is left out of account — **London Borough of Southwark v Afolabi** 2003 ICR 800, CA.

19. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other.
20. The fact that a claimant has awaited the outcome of his or her employer's internal grievance procedures before making a claim is just one matter to be taken into account by an employment tribunal in considering whether to extend the time limit for making a claim — **Apelogun-Gabriels v London Borough of Lambeth and anor** 2002 ICR 713, CA.

Findings of fact

21. The claimant started employment with the respondent on 1 November 2010. he says that he was diagnosed with ADHD at around the age of 10 and that given that his employer was his uncle, his employer was aware of this diagnosis at the time they employed him.
22. The claimant worked as a ductwork manufacturer until his employment terminated on 9 December 2021.
23. The respondent says that the claimant was dismissed summarily for gross misconduct. The claimant denies gross misconduct.
24. What the claimant said in evidence was that he believes that the respondent was in financial difficulty and that the reason he was dismissed was to save money because he was the highest paid employee.
25. There is no reference in the claim form to disability or any act of disability discrimination and in his oral evidence the claimant confirmed that he was not alleging that he was dismissed because he was disabled from which I conclude that the claimant is not in fact claiming disability discrimination. However, he did not formally withdraw that claim.
26. On 9 December 2021 the claimant says he made a data subject access request (DSAR) which he says the respondent has ignored. He also telephoned his father after he had been dismissed who came to pick him up. The claimant says he was shocked at being dismissed. It was just two weeks before Christmas.
27. At that stage the claimant was concerned that he would have to leave his rented accommodation but in fact he was told that he would not have to move out until the end of January 2022. Nevertheless, given that fact was that the house had to be packed up and arrangements had to be made to find other accommodation. Eventually the claimant moved into a spare room in his parents' house, but his children went to live with the claimant's in-laws given there was no room at his parents' house.
28. The claimant says he was busy with the above arrangements until the end of January 2022. At that stage his father fell ill and was taken into hospital.

29. Sadly, the claimant's father passed away on 3 March 2022.
30. Notwithstanding the above difficulties, the claimant spoke to the CAB during January 2022, and they drafted a grievance on his behalf part of which concerned the fact that he was not given the right of appeal against the dismissal, as a result of which the claimant was given an appeal which was held on 27 January 2022 and which he participated in. Unfortunately, the appeal did not conclude on that date and has never in fact been concluded.
31. Prior to the appeal hearing, and on the advice of the CAB, the claimant also contacted ACAS for early conciliation.
32. After 27 January 2022 the claimant did nothing as he said he was waiting for the second part of the appeal hearing.
33. The claimant said in evidence that he was given no advice about time limits either by the CAB or ACAS. The claimant said that when he had spoken to a CAS all that they had said to him was that if he was not happy with the outcome of the appeal, he should call them back.
34. The claimant said that he could not recall when he became aware of time limits, but it was after the normal time limit had already expired and he thought that by that time he had been advised of that fact by ACAS.
35. The claimant commenced early conciliation on 30 March 2022, and he received his early conciliation certificate on 19 April 2022. Given the date of dismissal the normal time limit for all of his claims expired on 8 March 2022 and therefore he did not contact ACAS for early conciliation until after the expiry of the relevant time limits in which case there is no extension of time for early conciliation applicable in this case.
36. The claimant says that he wrote the claim form shortly before he sent it and when asked why he had waited between 19 April 2022 and 6 May 2022, the date he presented his claim, the claimant said that he did not know.
37. Those then are the brief facts.

Discussion and conclusion

38. I turn it first to the unfair dismissal and breach of contract claims.
39. As mentioned above, the claimant did not seek early conciliation until after the normal time limit had expired. The claimant says that he was ignorant of the relevant time limits but in my judgement if he was, then that ignorance was not reasonable.
40. At the date of dismissal, the claimant was aware of his right to make a DSAR, he then sought advice from the CAB and he spoke to ACAS all well within the normal time limit in this case. Even if I take the claimant that his word, that no one at the CAB or ACAS mentioned time limits to him, it seems to me that he was sufficiently well informed such that he could have easily found out either by asking about the

process to be followed to institute a claim as part of his discussions with either the CAB or ACAS, or he could simply have gone on line and found out. In fact, I find it difficult to believe that neither the CAB nor ACAS mentioned time limits to him.

41. In terms of what was going on in the claimant's life, this was no doubt a difficult time for him, but that is true of everyone who is dismissed. I accept that in this case the claimant's circumstances were made more difficult by his father's illness and subsequent passing away. However, during the period January to early March 2022, as well as speaking with the CAB and ACAS, the claimant submitted a grievance and attended and participated in a grievance hearing. The claimant's reason for doing nothing after the conclusion of the first part of his appeal was not because there was some physical or mental impediment to him turning his mind to, and submitting his claim, it is because he was awaiting the setting up of the final part of the appeal hearing. Whilst he was entitled to wait for a period for his employer to arrange to finish the appeal hearing which had started on 27 January 2022, that does not excuse the claimant missing the time limit for presenting his claims. That was not an impediment to him bringing his claims in time.
42. There is a further difficulty for the claimant which is that once he had his early conciliation certificate, by which time he certainly knew his claims were out of time, he waited a further three weeks before presenting his claim form to the Tribunal. He gave no reason for waiting that period.
43. I find that it was reasonably practicable for the claimant to submit his claim within the normal time limit and even if I'm wrong about that, and I do not consider that I am, the extra three weeks taken after the claimant received his early conciliation certificate was not of itself reasonable.
44. For those reasons the claims for unfair dismissal and breach of contract are struck out on the basis that the tribunal does not have jurisdiction to hear them.

Disability discrimination

45. The claim for disability discrimination is decidedly problematic. It would be easy to presume that the act of discrimination which the claimant relies upon is the dismissal. But as I have set out in my findings of fact, the claimant does not say that his dismissal was an act of discrimination, rather he says that he was dismissed so that the respondent could save money on his pay. Despite being given a number of opportunities to say how he says he was discriminated against, at no point did he say that he was and, as I have indicated, he certainly did not say that he was dismissed by reason of a disability or indeed for a reason connected to a disability. The claimant very clearly said that he was dismissed by the respondent so that the respondent could save the costs of his pay given their financial difficulties.
46. The position I am in therefore is that of having to decide whether it is just and equitable to extend time for claims which are wholly unpleaded, and in respect of which therefore it is impossible to say what the actual time limit is.

47. Given the evidence and given the claims as set out in the claim form presented to the Tribunal, I consider that it was not the claimant's intention to claim disability discrimination, but even if it was I find that it is not just an equitable in all the circumstances to extend time and for that reason the claim for disability discrimination, such as it is, is also was struck out.

Employment Judge Brewer
Date: 31 October 2022