



EMPLOYMENT TRIBUNALS

Claimant: Mr Alan Morton

Respondent: Health and Social Care Information Centre
Trading as NHS Digital

Heard by Remote video link - CVP

ON: 16 September 2022

BEFORE: Employment Judge Jones

REPRESENTATION:

Claimant: In person

Respondent: Ms Heard, Solicitor

JUDGMENT in a Preliminary Hearing having been sent to the parties on 27 September 2022 and a request having been made by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following

REASONS

1. The issues are whether any of the claims are in time. If they are not in time the Tribunal has no jurisdiction to entertain them and they will have to be dismissed.
2. The claimant brings claims for unfair dismissal, a constructive dismissal, direct age discrimination, unpaid remuneration in the forms of legal claims for unauthorised deductions from wages and breach of contract. He also brings a claim for a redundancy payment and a claim for equal pay. At the commencement of the hearing the claimant explained that the equal pay claim was not based upon a difference relating to sex, the basis on which the Tribunal usually defines equal pay but rather related to unfair remuneration relating to his age. As such the claimant has withdrawn the equal pay claim and I dismiss that but he has not withdrawn his age discrimination claim which involves an application for compensation for the differential in what he says he should have been paid but was not paid because of his age.

3. The claims do not require any detailed development for these purposes save to say, in summary, the claimant says that he was underpaid in respect of a recruitment and retention payment, on call payments and payments at the appropriate grade, saying he was in fact doing duties at grade 8D although retained on a contract which remunerated him at a lower rate of pay at a grade 8C. In addition, all of these payments had ramifications for his pension which he would ultimately claim when he retired. The claimant says that there was a withdrawal of his role in about 2020. He had started to do different roles from 2018 to which these claims relate up until the date of termination of his employment on 30 June 2021.
4. The claimant had worked in one form or another as Head of Security Services Management from 1 November 2006 to 30 June 2021. It is not necessary for these purposes to explore each of the different roles he undertook throughout that period of time, but the claimant believes the above remuneration was unfair, that he was underpaid and that it was directly discriminatory on the grounds of age. He illustrates that by suggesting that no recruitment and retention payment was given because his employers had calculated he was unlikely to go anywhere else because he was over the age of 60 years and so he would not be paid that sum. The age discrimination claims relate to that and the consequential impact on pension. He says that because of the effect on his pension the less favourable treatment was ongoing until the date of his resignation and expiration of notice, save for the on call payments which ceased in February of 2021.
5. In respect of redundancy payment the time limit is governed by Section 164 of the Employment Rights Act 1996. The claimant would have to make a claim to the Tribunal within six months or notify his employer within six months of a claim for a redundancy payment. I am satisfied that was included in a grievance he submitted to his employer on 29 June 2021. He could bring a claim within a further six months to the Tribunal if it was just and equitable for the claimant to receive the redundancy payment. That extra six month time period time expired on 29 June 2022. The claimant did not present this claim until 8 July 2022. It is not saved by any period during which there was early conciliation which arose between 7 and 9 June 2022. In those circumstances the redundancy payment claim is plainly out of time. There is no residual discretion to consider whether it is in time and that claim must therefore be dismissed.
6. In respect of the claims for wages and other arrears of pay and consequential impacts on any pension the claims will be brought under unauthorised deduction from wages provision in Part II of the Employment Rights Act 1996 in respect of which the relevant time limit is set out in Section 23. In respect of the presentation of such claims as breaches of contract, the time limit provisions are under Article 7 of the Extension of Jurisdiction England and Wales Order 1994 which is formulated in similar language. In respect of the age discrimination claim time limits are governed by Section 123 of the Equality Act 2010.
7. In respect of the claim for unfair dismissal the time limits are contained within section 111 of the Employment Rights Act 1996.

8. The relevant chronology is:
- 7.1 The claimant provided notice by his resignation on 30 March 2021 to expire on 30 June 2021.
 - 7.2 The claimant raised a grievance on 29 June 2021. In that grievance the claimant complained that he believed he was not being appropriately paid but he sought a settlement package to include redundancy and on call payments. He added that if it could not be agreed he would proceed to an Employment Tribunal to pursue a case in respect of age discrimination, constructive dismissal, premature retirement and future losses of earnings and a redundancy payment. The claimant set out a detailed explanation of why he claimed he had not been treated appropriately and paid properly.
 - 7.3 The claimant submitted further information on 19 July 2021 and had a meeting with the investigator, Ms Thomas, on 22 July 2021.
 - 7.4 In mid-September 2021 the claimant contacted ACAS for the first time because he was not satisfied that the matter was being dealt with fairly. This concerned the alleged failure of the Investigating Officer to grasp his points. He says his concern increased over the following months, not least when he received the investigation report and it did not include his comments and when the grievance manager did not address his complaints about the restructuring which he said had taken place. When he spoke to the ACAS officer who encouraged him to pursue the grievances to their exhaustion including an appeal.
 - 7.5 That investigation report was received on 21 October 2021. The claimant was concerned that his documentation had not been included in the investigation report and he submitted further comments in respect of that in detail on 30 November 2021 and he included a power point presentation.
 - 7.6 The grievance hearing was postponed on a number of occasions, latterly because of ill health of employees of the respondent, but ultimately took place on 17 December 2021. The claimant attended.
 - 7.7 The claimant had a further conversation with another ACAS officer towards the end of 2021. At that time the ACAS officer alluded to time limits. The claimant then explored that matter on the website of ACAS. I am satisfied from his evidence that he was not clear as to what the time limits related and he did not find anything on the website which alerted him to the fact that there were time limits for bringing claims in the Employment Tribunal.
 - 7.8 The claimant received a written outcome to his grievance on 5 January 2022 which dismissed all but his complaint for on-call payments.
 - 7.9 The claimant appealed his grievance outcome by letter of 17 January 2022. He attended an appeal on 10 May 2022. It was dismissed by letter of 18 May 2022.

7.10 The claimant contacted ACAS on 7 June 2022 with a view to bringing these claims. He received an Early Conciliation Certificate on 9 June 2022.

7.11 The claimant presented this claim on 8 July 2022. He had been away from home for part of the period after he received the Early Conciliation Certificate. I am satisfied from his evidence that when he contacted ACAS for early conciliation purposes it became clear from what they said to him that there were time limits for bringing complaints in the Employment Tribunal.

9. In respect of time limits in the claims for unfair dismissal and the claims for monies due as unauthorised deductions or as damages for breach of contract the primary time limit is three months from the effective date of termination of the claimant's employment or when the last of a series of deductions from wages was made. It is not in dispute that the claims would be outside that primary time. That would have been by 29 September 2021. Ms Heard suggested the on-call payments which stopped in February 2021 might have been out of time at an earlier period for the purposes of the unauthorised deduction claims but they could also be brought as breach of contract claims that is academic. On any view the primary period for bringing an unfair dismissal claim or any of the money claims would have expired on 29 September 2021.
10. The question is, was it not reasonably practicable for the claimant to have presented his claims before that date and, if not, were they presented within a reasonable period thereafter. I must consider why the claimant had not brought his claim within the primary time period.
11. The claimant was aware that there were remedies he could seek in law, namely the Employment Tribunal, because he had alluded to those in his grievance to his employer on 29 June 2021. He was not aware, on my findings, that there was a time limit to bring claims until as late as June 2022.
12. He was aware of the facts which gave rise to his claims which are before me at the time he resigned and certainly by the time his employment expired on 30 June 2021.
13. The claimant was not unwell or does not suffer from a disability.
14. The reason the claim was not brought by 29 September 2021 was because the claimant was unaware of any time limit. The solicitor for the respondent said that is not of itself a reason which can be advanced to satisfy the Tribunal that it was not reasonably practicable to bring the claim before that time, although it can be capable of being such a reason depending on all the circumstances of the case. The claimant had a conversation with ACAS in September 2021 before that primary period had expired. I am satisfied this was a discussion about the wisdom of pursuing a grievance. I do not think the issue of time limits really came into it at that time. It is not the case that because one is exhausting a grievance process it is not reasonably practicable to present a claim.

15. The claimant was an impressive witness. He is an intelligent and educated man. He held a position of responsibility with the respondent for many years. He had explored various issues concerning presenting the claims online from the ACAS website or other blogs or websites concerning age discrimination. He had not picked up on the fact there were time limits. He was on a reasonable remuneration package and could have taken legal advice. He had not thought at that time that it would be necessary to take the claim to the Tribunal and that was very much a last resort.
16. I have come to the conclusion it was reasonably practicable for the claimant to have presented his claim by 29 September 2021. Although he was not aware of time limits, I am not satisfied that his ignorance of them was a satisfactory explanation. Given his experience and education, he could be expected (that is it would have been reasonably practicable) to have checked up on the procedure for bringing a case, either by an online search or from somebody who had expert knowledge, whether it was a lawyer or the Citizens Advice Bureau.
17. Even if I were wrong, I am not satisfied that he pursued the claim within a reasonable period after he became aware of the existence of time limits on the 7 June 2022. When he became aware that there was a three month time limit, and he was out of time by 270 days by then, he could have been expected reasonably to have acted without delay. The claim should have been issued as soon as he received the Early Conciliation Certificate. Bringing his case should have taken priority over other commitments. Notwithstanding he was away from home for a period, as soon as he became aware of time limits he should have prioritised this. A delay of another month was not reasonable.
18. I am therefore not satisfied that the claimant has established that it was not reasonably practicable to present the claim within three months, or that he presented it within a reasonable period thereafter in any event. The claims for unfair dismissal and monies due are out of time and the Tribunal does not have jurisdiction to consider them.
19. That leaves the age discrimination claim. If it were to proceed it would require consideration in respect of amendments. The time limit question is different to the earlier claims. The question is whether it was presented within such further period after 29 September 2021 as is just and equitable. These considerations are different to those involved in determining whether it was not reasonably practicable to present a claim and as Ms Heard says, often includes such factors as are determined by the courts considering the limitation period in personal injury cases. In particular, what is the respectful hardship, or prejudice, to the parties; what is the length of and reason for the delay (which I have considered above), to what extent was the evidence impacted by any delay, did the claimant have knowledge of the facts enabling him to bring a claim and the right to bring a claim or any facts surrounding the procedures such as time limits and to what extent did he have access to advice, take reasonable opportunities to inform himself of the relevant matters and to what extent was the respondent culpable of any contribution to the delay?

20. I start with hardship. It is clearly a hardship to any individual who cannot pursue his legal right because of a time bar because those rights will never be determined on an evaluation of the evidence and their merits. They will simply fail because of the time bar. It is a hardship to a respondent not to be able to avail itself of the defence of the time bar. An employer is entitled to organise its affairs by reference to a limited period within which it will be exposed to litigation. It will have to be mindful of the fact that there is a further discretionary consideration in these types of claims.
21. The claimant says the respondent has contributed to this delay in one sense; he was making his decisions upon the basis of exhausting the internal processes before resorting to court action and those internal processes took a long period. The respondent was principally in control of that timeframe. There were delays of ill health of the respondent's staff. The claimant had to submit further information repeatedly which he thought had been overlooked. There was a substantial period between the outcome of the grievance hearing and the outcome of the appeal. On the other hand, it is not the respondent who needs to worry about time limits. I am not satisfied the evidence is such that I can infer they knowingly and deliberately dallied in order to ensure the claimant missed the time limit to sue them.
22. In respect of whether the claimant had knowledge of the relevant material, I have found he had knowledge of the facts which would have been the basis of the claim and he had knowledge of the fact that there were legal avenues of complaint albeit he is not a legal specialist, let alone an employment specialist. As I have indicated he was not aware of time limits until June 2022 but as I have also found I think he could reasonably have obtained information about the time limits with some more diligent research on Tribunal procedures and what he would have to do if the grievance process had not succeeded. I am satisfied he did not take up that or exhaust those enquiries as he reasonably should have done or explore the opportunity of taking some limited expert advice at an early stage.
23. I am satisfied that the delay will have had some impact on the evidence. It is common knowledge that delay does have a corrosive effect on evidence, whether it be by way of documents becoming unavailable or more generally witnesses being less reliable. On other hand, although it was suggested there were data protection requirements to delete documents, I am not satisfied that any particular documents of that nature would have been lost. My attention was not drawn to any. The extensive grievance procedure from which there were a lot of documents remain. There will be substantial contemporaneous documentation and I think it probably the case that will also go back to 2018.
24. I am satisfied that it is likely that witnesses' recollections will have been affected by these delays, the delay from the 29 September 2021 to the date the claim was issued which is the material delay to which I must have regard. That 282 day delay will have impacted on that. When trying to recollect the dates, the claimant spoke of both the on call payments ceasing in February 2020 and also him speaking to ACAS in September of 2020. This was of course wrong. It is easy to forget dates or mistake them for years. He said himself that that was a consequence of how long it had been since these

matters arose. Although a simple example it is a straw in the wind about how memories are influenced by the passage of time.

25. Taking all of those factors into account I reached the conclusion that the age discrimination claim was not presented within such further period as it is just and equitable to allow it to proceed. I am satisfied balancing the hardship that it is greater to the respondent than the claimant in this case.
26. In those circumstances I do not have jurisdiction to consider any of the claims and they all have to be dismissed.

Employment Judge Jones

Date: 8 November 2022

FOR THE TRIBUNAL OFFICE