EMPLOYMENT TRIBUNALS

Claimant: Mr R Challoner

Respondent: University Hospitals of Leicester NHS Trust

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 14 December 2022

Before: Employment Judge Brewer

Representation

Claimant: Mr M Anastasiades, Solicitor
Respondent: Mr P Keith, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claims for unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments were presented out of time and the Tribunal does not have jurisdiction to hear those claims which are therefore dismissed

REASONS

Introduction

1. This case has a long history much of which I do not need to recite for the purposes of this judgment. My task was to determine whether claims which were made out of time should be allowed to proceed by time being extended as allowed for in the relevant legislation.

2. The claimant was represented at the hearing by his solicitor, Mr Anastasiades, and the respondent was represented by Mr Keith of Counsel.

3. I heard oral evidence from the claimant and his partner Ms Tuff. I had a bundle of documents prepared by the respondent which included the key documents from the claimant's medical records. I also had a written skeleton argument for Mr Keith, and I heard and have also taken into account oral submissions from both representatives.

4. At the end of the hearing given the time set aside for the hearing I reserved my decision which I set out in detail below.

Issues

5. There is no dispute in this case that the claims were submitted out of time. The claimant brings claims for unfair dismissal under the Employment Rights Act 1996, discrimination arising from disability and failure to make reasonable adjustments under the Equality Act 2010. The issue before me is whether time should be extended in respect of any of the claims to grant the Tribunal jurisdiction to hear them.

Law

1. I set out here a summary of the law. I should just note that in both the unfair dismissal and discrimination cases I have not set out the law relating to the extension of time limits under the statutory provisions because by the time the claimant contacted ACAS for early conciliation the primary time limit had expired for both types of claims and therefore the claimant cannot benefit from any statutory extension of time

Unfair dismissal

2. In relation to the claim for unfair dismissal the time limit is set out in section 111(2) of the Employment Rights Act 1996 (ERA) which is in the following terms:

> *"(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."*

3. S.111(2) ERA should be given a 'liberal construction in favour of the employee (**Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA).

4. 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).

5. 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).

6. 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'.*

7. 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. In **Porter v Bandridge Ltd** 1978 ICR 943, CA, the majority of the Court of Appeal 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*.

8. In **Trevelyans (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.

9. A debilitating illness may prevent a claimant from submitting a claim in time. However, this will usually only constitute a valid reason for extending the time limit if it is supported by medical evidence, particularly if the claimant in question has taken legal advice and was aware of the time limit. Note that such medical evidence must not only support the claimant's illness; it must also demonstrate that the illness prevented the claimant from submitting the claim on time.

10. The fact that the claimant has a disability may be relevant to the question of reasonable practicability. For example in **Chandler v Thanet District Council** ET Case No.2301782/14 TDC argued that the claimant had submitted his claim late. Although the employment judge found for other

reasons that the claimant had actually brought his claims in time, the judge found in the alternative that it was not reasonably practicable for him to have brought his claim in time. The claimant had adduced medical evidence to the effect that he suffered from work-related stress and had suffered a major depressive episode. This, combined with his dyslexia, made it difficult for him to prepare his claims and give instructions to his solicitors.

11. In **University Hospitals Bristol NHS Foundation Trust v Williams** EAT 0291/12 the EAT emphasised that S.111(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. 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.

12. In **Cullinane v Balfour Beatty Engineering Services Ltd and anor** EAT 0537/10 Mr Justice Underhill, then President of the EAT, commented that the question of whether the period between expiry of the time limit and the eventual presentation of a claim is reasonable requires an objective consideration of the factors causing the delay and of what period should reasonably be allowed in those circumstances for proceedings to be instituted. Crucially, this assessment must always be made against the general background of the primary time limit and the strong public interest in claims being brought promptly.

13. In **Nolan v Balfour Beatty Engineering Services** EAT 0109/11 the EAT reiterated this last point, stating 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. 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

Discrimination

14. In relation to the discrimination claims the time limit is set out in section 123 of the Equality Act 2010 (EqA) which is in the following terms:

> *"(1) Subject to section140B 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 **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."*

16. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable — **Pathan v South London Islamic Centre** EAT 0312/13 (discussed below).

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.

Findings of fact

19. I make the following findings of fact.

20. The claimant is disabled by reason of anxiety and depression and endocarditis.

21. The claimant was employed by the respondent from 11 August 1998 as a Medical Laboratory Assistant.

22. The claimant went off on long-term sickness absence from 31 July 2019. He never returned to work.

23. The claimant's absence was dealt with under the respondent's absence management policy which in broad terms involves three stages. The first two stages lead to warnings with stage 3 being the final stage at which an individual going through the process may be dismissed.

24. In this case the stage three meeting took place on 23 December 2020. Given the medical evidence and the inability of the claimant to get back to work in the foreseeable future, the claimant was aware that he would be dismissed at the stage three meeting and did not feel the need to attend nor to send along a representative on his behalf to the meeting. The claimant was content that he was going to be dismissed on the basis that the respondent was supportive of his application for ill health retirement (strictly speaking the application is for an ill health retirement pension but I have adopted the shorthand used by the parties). In the NHS, ill health retirement is a matter for NHS Pensions and not for the NHS employer. It was therefore no surprise to the claimant that by letter dated 28 December 2020 the decision to dismiss him with notice was confirmed.

25. The effective date of termination of the claimant's employment was 17 March 2021.

26. The normal limitation period expired on 16 June 2021. Given that the claimant did not contact ACAS until after expiry of the normal limitation period, he cannot benefit from any extension from early conciliation.

27. The claimant commenced early conciliation on 29 July 2021.

28. The early conciliation certificate was issued on 9 September 2021.

29. The claim form was presented on 6 October 2021.

30. In the claim form the claimant brings claims for unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments.

31. The claims were therefore presented some four months after the end of the normal limitation period.

32. Those are the brief facts and I now turn to the evidence and my conclusions.

Discussion and conclusion

33. The claimant provided a written witness statement upon which he was cross examined. The material parts of his evidence in chief were that he

had open heart surgery on 3 October 2019 after which he says he was unable to work or function properly. He said that this has affected his brain function, personality and memory. He said that he struggled to understand what was going on and was heavily reliant on his partner Ms Tuff. Under cross examination the claimant confirmed that this situation did not change and indeed has not changed to date.

34. The claimant refers in his witness statement to his medical records which are in the bundle of documents prepared for this hearing. At paragraph 17 of his statement the claimant states as follows:

> *"I refer to an entry in my medical records dated 23 June 2021 which notes how I called my GP surgery reporting how I was very depressed and worried that I was fearing the worst"*

35. That in fact is not correct. There are several entries for 23 June 2021 which indicate that the claimant's medical record was accessed several times that day. The first entry, which is on page 66 in the bundle, states that the claimant did not attend for a medical appointment. The second entry, which is on page 67, is made by or on behalf of Dr Kotecha and it states:

> *"phone call to PT for depression r/w. Well in himself… feels that when he is unwell then gets worried, did have a counsellor through let's talk which helped, changed to vitaminds and counselling stopped…"*

36. The third entry for 23 June 2021 confirms that a text message was sent to the claimant giving him details of VitaMinds (a counselling service). There are two further entries, but they contain no details, and they are certainly not suggestive of any involvement by the claimant and appear to be merely administrative matters.

37. So contrary to the claimant's evidence he did not report, or at least it is not reported in his medical record, that he was very depressed on 23 June 2021. That of course is relevant both to whether it was reasonably practicable for the claim to be brought in time and it may also go to the question of whether the extra time taken beyond the normal limitation period was reasonable and I shall discuss that separately below.

38. At paragraph 21 of his witness statement the claimant says

> *"I was not aware at the time of my dismissal that by law I had to file my claim for unfair dismissal and/or discrimination within three months from the last day of employment. I was not well enough to seek legal advice at the time. I suggest that my medical evidence proves that I was not well enough at that time period I found it all overwhelming as I had never been [in] this position before"*

39. It seems then from the claimant's evidence that he relies upon two impediments in relation to presenting his claims in time. The first is

ignorance of time limits and the second is the state of his health. The two are intertwined because the claimant says in effect that his ill health meant that he was not well enough to seek advice about pursuing claims against the respondent, I stress, "at the time". The reason I stress the claimant's evidence about his state of health "at the time", which I take to mean during what should have been the normal time limit, is because at one point the claimant said in evidence that he was considering bringing claims against his employer in February 2021, before his employment terminated although I accept he then said he was confused and that it was not in his mind to make a claim. The claimant did confirm that throughout his employment he was a member of Unison. The claimant also said that he spoke to ACAS at some time before he entered early conciliation but again, he later said that he was unsure about this and could not remember.

40. What the claimant was clear about was that he was reliant on Ms Tuff for help and in fact it was she who took advice about time limits for bringing Employment Tribunal claims and, that on the claimant's instructions, she completed the claim form. When the claimant was asked in cross examination about his state of mind between the date of termination of his employment and June 2021, he said that he was "*probably OK to ask questions it was not like I could not read".* He also said that he probably could have brought the claim in time but that he had a lot going on in his life which meant that he did not.

41. There is of course a central difficulty in the way the claimant puts these matters. His core evidence about his health, which for all practical purposes is inextricably linked with his disabilities, was that he was, if I might put it this way, equally unwell throughout the entire period from the date of termination of his employment until the present, notwithstanding inevitable 'ups and downs'.

42. The claimant said that he was, either himself or with the assistance of his partner, too unwell to be able bring the claims he now seeks to pursue within the normal time limits. However, the claimant did commence early conciliation in July 2021 at a point in time in which, on his own evidence, he was as unwell as he was during the normal limitation period. In short, there was no evidence to explain why during the period 17 March 2021 to 16 June 2021 the claimant was too unwell to bring his claims, but in the period 29 July to 6 October 2021 he was well enough to bring his claims. In other words, given the claimant's evidence that his mental health state did not improve at any point, how is it that he was able to bring the claims out of time but not bring the claims in time?

43. There was no suggestion that it was anything other than the claimant's decision to bring claims for unfair dismissal and disability discrimination. There is no suggestion that he did not complete the claim form, albeit that I accept the claimant's evidence that he did not physically complete it, his partner did that, however clearly that was done on his instructions and the details of the claims are his. In short, during the time when the claimant says he was so unwell that he could not seek legal advice and

did not understand the process he had to follow and was not aware of time limits he nevertheless became aware of time limits completed the claim form and presented the claim, and again this begs the question if he could do that during the period 29 July to 6 October 2021 why could it not have been done during the period 17 March to 16 June 2021?

44. It is material to note that on 20 July 2021 claimant was told that his application for ill health retirement had been refused and the claimant commenced early conciliation 9 days later. I do not consider this to be a coincidence.

45. It seems to me quite clear from the evidence that the claimant had no intention of making any claims against his employer arising from his dismissal. As I have said above he did not attend the stage three meeting, he did not seek to appeal against his dismissal and he said expressly that he was happy with what was being done, which is to say that he was to be, and was dismissed under the respondent's absence management process, his application for ill health retirement was supported by his employer and there was every expectation that he would be granted ill health retirement. It was only when that was refused the claimant swung into action and commenced the litigation process. The claimant's partner Ms Tuff was at that stage aware of the time limits in the employment tribunal. Despite that, it was not until 6 October 2021, four weeks after the early conciliation certificate was issued, that the claimant presented his claim form. it seems to me that if the claimant was able to enter early conciliation knowing of the time limits then it was incumbent on him to act quickly as soon as it was clear that the case would not settle through early conciliation.

Conclusion on unfair dismissal

46. Taking all the above into account I consider that it was not reasonable for the claimant to be ignorant of time limits in the Employment Tribunal. He was aware during his employment that he would be dismissed at the stage 3 absence review meeting and indeed he was happy for that to take place in his absence and without any representation present. He did not appeal against his dismissal which is strong evidence that he was expecting to be dismissed and content that that was the case given his expectation in relation to ill health retirement. He had clearly been able to give that matter some thought and of course he had the assistance of his partner and his trade union. If he wished to consider bringing a claim against his employer, he had ready access to advice. He is also clearly an educated and articulate individual albeit I accept that he is disabled by reason of anxiety and depression.

47. If the claimant had been considering litigation, then in the absence of anything else, as occurred later, he had access to advice through Ms Tuff, and even if the claimant could not access the Internet because he was too unwell, there was no suggestion that his partner could not.

48. Insofar as the claimant relies on ignorance of time limits alone, I find that this ignorance was not reasonable in all the circumstances.

49. In relation to ill health/disability, I have sent out above the core contradiction in the claimant's case, and I reiterate here, that if his health status did not change throughout the entire period that we discussed during the hearing, it follows that if he was able to bring a claim commencing with early conciliation on 29 July 2021 and ending with the presentation of the claim on 6 October 2021, he was by definition able to bring it within the normal time limit and the claimant presented no evidence to suggest otherwise.

50. For those reasons I find that it was reasonably practicable for the claimant to have presented his claims in time.

51. Even if I am wrong about that, and I do not consider that I am, the claimant's second difficulty is that given that at the date he entered early conciliation he knew that his claim was already out of time, because he was aware of the relevant time limits at that time, he gave no evidence as to why it took another four weeks from receipt of the early conciliation certificate for him to present his claim. I consider that given all of the facts I have found above, the extra time taken to present the claim after the end of early conciliation was not reasonable.

52. For all of those reasons the tribunal does not have jurisdiction to hear the claimant's claim for unfair dismissal.

Conclusion on discrimination

53. In reaching a conclusion on whether to extend time on a just and equitable basis I have particularly taken into account the length of time taken to bring the claim and the reasons for the delay.

54. As I have found above, in my judgment it was never the claimant's intention to bring a claim for either unfair dismissal or discrimination on the basis that he was content that he would he be dismissed on the assumption that he would receive an ill health retirement pension, and it was only shortly after his application for that had been rejected that he entered early conciliation and ultimately presented the claims. It seems to me that it is neither just nor equitable to allow a claimant who, on any reasonable reading of the evidence, did not intend to bring any claims against his employer arising out of his dismissal or matters related to it and only did so when he was disappointed to be refused an ill health retirement pension (which I stress the respondent had no control over).

55. I accept the point made by the respondent that given the passage of time it is likely that the cogency of the evidence will be adversely affected although that alone would not in my view prevent me from extending time.

56. However, a more telling issue is the question of how promptly the claimant acted once he knew of the facts giving rise to the causes of

action he now seeks to pursue. The fact is that the claimant knew of the facts giving rise to his causes of action in December 2020 but decided not to take any action until after the end of the primary time limit. As I have found, in my judgment that was an express decision taken for the reasons I have set out above and the commencement of early conciliation was a change of mind by the claimant. I would add that the four weeks from the issuing of the early conciliation certificate to the presentation of the claim form is a clear indication that the claimant was not acting promptly.

57. Finally, I have considered the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of bringing claims against the respondent. Again, the claimant was aware of his dismissal in December 2020. At that point he was under notice, in employment and was a member of Unison from whom he could have obtained legal and practical advice without any cost, or of course he could have asked Ms Tuff to seek that advice on his behalf, but at the time he did not. In fact, he did nothing until shortly after his application for ill health retirement was refused.

58. For all of those reasons I consider that it is not just and equitable to extend time.

59. In the circumstances the Tribunal does not have jurisdiction to hear any of the claimant's claims which are therefore dismissed.

_____

Employment Judge Brewer

Date: 15 December 2022

JUDGMENT SENT TO THE PARTIES ON

.....

.....

FOR THE TRIBUNAL OFFICE