



EMPLOYMENT TRIBUNALS

Claimant: Mr J Carpenter

Respondent: Nortim Precision Engineering Limited

Heard at: Bristol (via CVP)

On: 17 November 2022

Before: Employment Judge Leith

Representation

Claimant: Mrs Bowler (Daughter)

Respondent: Ms Fox (Solicitor)

JUDGMENT having been sent to the parties on 25 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. The Claimant claims age discrimination, (constructive) unfair dismissal, and unlawful deduction from wages/breach of contract. The case was listed for a Preliminary Hearing by EJ Midgley to determine the following issues:

“Whether the claimant’s claims were presented within the time limit for bringing the claims. In particular, the Tribunal will determine:

a. Whether the claims were presented within 3 months of the act complained of or the last of those acts, if they formed conduct extending over a period

b. If not, in relation to the claims under the Employment Rights Act 1996 (unfair dismissal, whether s.111 ERA or section 103A and s.47B ERA 1996):

i. Whether it was reasonably practicable to present the claim(s) in time

and,

ii. If not, whether the claim(s) were presented within a reasonable period after the time limit expired.

- c. In relation to any claims of discrimination under the Equality Act 2010, whether it would be just and equitable to extend the limitation period to permit the claims to be presented within time.”
2. I spent some time at the start of the hearing clarifying the issues in the claim.
3. In respect of the claim of age discrimination:
 - a. The oldest act or omission relied upon was that the Claimant was not invited to social events (because he did not fit the image of the organisation, due to his age). This was said to have taken place on various occasions across a number of years, including prior to the onset of the COVID-19 pandemic.
 - b. The most recent act or omission relied upon was an allegation that the Claimant was very late to be invited to the 2021 Christmas party. The Claimant was invited on 13 December 2021, and it was alleged that his younger colleagues were invited earlier than that.
 - c. The remaining allegations related to the treatment of the Claimant during the COVID-19 pandemic, specifically between March 2020 and August 2021.
4. The claim of constructive unfair dismissal flowed from the Claimant’s resignation by letter dated 9 February 2022, which took effect on 28 February 2022.
5. There was in addition a claim relating to an alleged failure to pay the Claimant properly while he was on furlough. He was placed on furlough in the early part of the COVID-19 pandemic, and remained on furlough until 2 August 2021. It was not entirely clear whether the claim was pursued as a claim of breach of contract or a claim of unlawful deduction from wages; in considering whether the Tribunal had jurisdiction I therefore considered both possibilities.

Procedure

6. I heard evidence from the Claimant. I had before me a bundle of 57 pages.
7. I received a skeleton argument on behalf of the Respondent. I heard oral submissions from Ms Fox for the Respondent, and from Mrs Bowler for the Claimant.

Facts

8. I make the following findings of fact on balance of probabilities.
9. The Respondent is a business in Stroud, Gloucestershire, engaged in the manufacturing of precision machined parts.

10. The Claimant previously owned the Respondent company. He sold it to the current Managing Director, Tony Powell, but continued to be employed by the business.
11. The Claimant is now 75 years old. He was furloughed for much of the COVID-19 pandemic. His last day on furlough was 2 August 2021, and he returned to work on 3 August 2021. On 4 August 2021, he was absent from work due to ill health. He subsequently saw his GP and was signed off work. He never returned.
12. On 13 December 2021, the Claimant was invited to the Respondent's Christmas meal, which was to take place on 17 December 2021. The meal had been planned some time previously. The Claimant was upset to be invited at relatively short notice; he believed his colleagues had been invited much earlier. The Respondent's case is that although the booking had been made some time previously, due to a COVID outbreak the decision that the party would go ahead was only made relatively late in the day. I do not need to resolve that factual dispute (and indeed am not in a position to do so).
13. The Claimant's evidence was that on 17 January 2022, he agreed with his GP that he was unable to return to work. He gave notice of his resignation from the Respondent's employment on 9 February 2022. That notice expired on 28 February 2022.
14. Within the Claimant's resignation letter, he raised a grievance about the way he had been treated by the Respondent. He asked that correspondence about the matter be with his daughter, Mrs Bowler.
15. On 11 February 2022 Mr Powell wrote to Mrs Bowler acknowledging receipt of the Claimant's resignation. He explained that Lee Marner, a Non-Executive Director, and Lynne Boulton, the Respondent's HR Partner, would investigate the Claimant's grievance.
16. On 15 February 2022, Mrs Bowler exchanged correspondence with Ms Boulton. In the course of that correspondence, Mrs Bowler explained that she was "working to ACAS guidance and that of our solicitor".
17. The Claimant's grievance meeting took place on 4 March 2022. Mrs Bowler attended the meeting on behalf of the Claimant. The Claimant did not attend as he was unwell.
18. On 8 March 2022, a detailed written account of the Claimant's concerns was provided to Ms Boulton and Mr Marner. The document was written in the first person and bore the Claimant's name at the bottom.
19. A further meeting took place between Mr Marner, Ms Boulton and Mrs Bowler on 24 March 2022. The Claimant again did not attend. Mr Marner and Ms Boulton explained that the Claimant's grievance was not upheld. Their outcome was confirmed in writing on 30 March 2022.

20. The Claimant contacted ACAS on 26 June 2022 (day A). The certificate was issued on 27 June 2022 (day B). The claim was issued on the same day.
21. The Claimant's evidence was that he understood that there was a time limit of around 3 months to bring claims in the Employment Tribunal. His evidence was that he came to understand the time limit in February when he resigned, although neither he nor his daughter fully understood the operation of the time limits.
22. The Claimant's evidence was that he was ill throughout the early part of 2022. There was no medical evidence before the Tribunal. The Claimant had, however, been signed off work for over 6 months at the point that he resigned, having previously (on his evidence) worked for many years without taking time off sick. The Claimant's evidence was that he was very upset by the whole situation.

Law

Age discrimination

23. The starting point in respect of the Tribunal's jurisdiction to consider a claim of discrimination is section 123 of the Equality Act 2010, which provides as follows:
 - “(1) Subject to section 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.
 - (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
 - (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
 - (b) such other period as the employment tribunal thinks just and equitable.
 - (3) For the purposes of this section—
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
 - (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”
24. Insofar as relevant, section 140B provides as follows:

“(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.”

25. The question of whether it is just and equitable to extend time is a matter of discretion for the Tribunal. In the case of *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434, the Court of Appeal said this:

“It is also of importance to note that the 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 the discretion is the exception rather than the rule.”

26. There is, however, no need for the Tribunal to be satisfied that there was a good reason for the delay in order to conclude that it was just and equitable to extend time (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640).

27. The Tribunal may have regard by analogy to the factors set out in s.33(3) of the Limitation Act 1980 (*British Coal Corporation v Keeble* [1997] IRLR 336). However, the Tribunal is not required to treat those factors as a checklist (*Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15).

28. The factors in s.33(3) of the Limitation Act 1980 are as follows:

- “a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed [...];
- (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.”

29. There is no general principle that it will be just and equitable to extend the time limit where an employee sought to follow their employer's grievance process before bringing a claim in the Tribunal. Delay caused by an internal procedure is only one factor to be considered (*Robinson v Post Office* [2000] IRLR 804).
30. In deciding whether it is just and equitable to extend time, the Tribunal must consider the balance of prejudice.

Unfair dismissal

31. The starting point in respect of the Tribunal's jurisdiction to consider a claim of unfair dismissal is section 111(2) of the Employment Rights Act 1996 (“ERA”), which provides as follows:

- “(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.
- (2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).”

32. Section 207B deals with Early Conciliation – insofar as relevant it provides as follows:

- “(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.”

33. Where a claim is brought outside the primary time limit, there is therefore a two-stage test which the Tribunal must apply:

- a. Was it reasonably practicable for the claim to have been brought in time?
- b. If not, was the claim brought within a further reasonable period of time?

34. “Reasonably practicable” does not mean reasonable, and nor does it mean physically possible. Rather, it falls somewhere between those two extremes, and means something like “reasonably feasible” (*Palmer and anor v Southend on Sea Borough Council* [1984] ICR 372). The phrase should be given a liberal construction in favour of the employee (*Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53).

35. The burden of proving that it was not reasonably practicable for a claim to have been presented in time rests on the claimant (*Porter v Banderidge Ltd* [1978] ICR 943).

36. Ignorance of the right to bring a claim (or of the time limit for doing so) will only render it not reasonably practicable for the claim to have been brought in time where that ignorance is reasonable (*Wall’s Meat Co. Ltd. v Khan* [1979] ICR 52).

37. Ill health which prevents a claimant from submitting their claim in time may render it not reasonably practicable for the claim to have been brought in time (*Schultz v Esso Petroleum Co Ltd* [1999] ICR 1202). Medical evidence will usually be required. Evidence regarding the claimant’s actions during the limitation period will also be relevant (*Chouafi v London United Busways Ltd* [2006] EWCA Civ 689).

Jurisdiction – breach of contract

38. In respect of the claim for breach of contract, the starting point is Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623, which provides as follows:

“Subject to article 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-

- (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or
- (b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or
- (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.”

39. Article 8B deals with extension for early conciliation. It is in substantially the same terms as s.207B of the Employment Rights Act 1996.

Unlawful deduction from wages

40. In respect of the claim for unlawful deduction from wages, the starting point is section 23 of the Employment Rights Act 1996, which insofar as relevant provides as follows:

“(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

- (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
- (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

- (a) a series of deductions or payments, or
- (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).”

Conclusions

41. I will deal first with the claim of age discrimination. Logically, the most recent act complained of by the Claimant is not his invitation to the Christmas party, but rather the decision not to invite him at an earlier date. That must have taken place at some point earlier than 13 December 2021, although neither party suggested a date on which that was said to have taken place.
42. For the purposes of considering limitation, I will take the Claimant's case at its highest, and assume that the claim crystallised on 13 December 2021. The primary time limit therefore expired on 12 March 2022. The claim was not issued until 26 June 2022. It follows that the claim was brought outside the primary time limit. I must therefore consider whether it would be just and equitable to extend time.
43. In doing so, I bear in mind in particular the following factors:
- a. For the reasons set out above, I have assumed for the purpose of considering limitation that the last act relied upon by the Claimant took place on 13 December 2021. The claim was not issued nearly six and half months later – so over 3 months late. That is a significant delay; it is longer than the primary limitation period allowed by Parliament for the bringing of discrimination claims.
 - b. The Claimant's claim spans a much longer time period. The remaining parts of the age discrimination claim date from August 2021 and earlier. The oldest allegations predate the onset of the COVID-19 pandemic in March 2020. Given the passage of time, memories will inevitably have faded. The Respondent would be put to particular prejudice by the fading of memories, as they will have lost the opportunity to gather evidence while memories were fresh.
 - c. I do not underestimate the level of upset the situation caused to the Claimant, or the effect of his long period of absence from work. But there was no medical evidence before me to suggest that he would have been incapable of bringing a claim within the relevant time limit. Indeed, with Mrs Bowler's assistance, he was able to prepare and submit a detailed grievance.
 - d. The Claimant and Mrs Bowler had some advice from a solicitor in February 2022, and they were at the very least aware of the existence of ACAS by that point. Therefore, in my judgment they ought to have been aware of the relevant time limit.
 - e. The grievance process was concluded by 30 March 2022. The Claimant did not contact ACAS until 26 June 2022, and did not issue the claim until 27 June 2022 – nearly 3 months later. The Claimant cannot, in my judgment, be said to have acted reasonably promptly after completion of the grievance process.
 - f. The Claimant will of course suffer prejudice if time is not extended, in that he will be unable to pursue his claim. But that prejudice must be balanced against the prejudice to the Respondent in having to defend a claim brought considerably outside the relevant time limit.

44. In my judgment, having considered the balance of prejudice, it is not just and equitable to extend time. It follows that the Tribunal does not have jurisdiction to consider the complaint of age discrimination.
45. I turn then to the complaints of (constructive) unfair dismissal and breach of contract. It is convenient to consider them together, as the time limit provisions operate in the same way. The Claimant's Effective Date of Termination was 28 February 2022. The primary time limit expired on 27 May 2022. The claim was not issued until 27 June 2022. It follows that the claim was brought outside the primary time limit. I must therefore consider whether it was reasonably practicable for the Claimant to have brought the claim in time.
46. The Claimant's case was, in essence, two-fold – that he did not understand exactly how the time limits worked, and that he was in any event unwell during the relevant period.
47. While the Claimant did not understand in detail how the time limit operated, he was aware in broad terms of its existence. He was also aware of the existence of ACAS, and he had had some access to legal advice. He had the support of his daughter, Mrs Bowler. He was on notice of the existence of a potential claim and the existence of a time limit for doing so; the onus was on him to investigate it further. Therefore, to the extent that the Claimant was ignorant of the precise operation of the time limit, in my judgment that ignorance was not reasonable.
48. There was no medical evidence before me to suggest that the Claimant would have been reasonably incapable of bringing a claim in time. Again, with Mrs Bowler's assistance, he was able to prepare a detailed grievance during the period before the primary time limit expired. He was clearly upset by the situation. But on the strength of the evidence before me, I am not satisfied that his health rendered it not reasonably practicable for him to have brought his claim in time.
49. It follows that the Tribunal does not have jurisdiction to consider the complaints of (constructive) unfair dismissal and breach of contract.
50. Finally, and for completeness, the final day in respect of which the Claimant was paid furlough pay was 2 August 2021. There was no evidence before me regarding the Claimant's pay arrangements. Even if the Claimant was paid monthly, his last pay packet containing furlough pay would have been received in late August or early September 2021. Primary limitation would have expired, at the latest, in December 2021.
51. Although the Claimant was absent from work due to ill health during the period from August 2021 to the end of his employment, there was no evidence before me that his illness debilitated him to the extent that he would have been unable to have brought a claim within the time limit.
52. Even if I had been satisfied that it was not reasonably practicable for him to have brought a claim in late 2021, for the reasons I have set out above he could certainly have brought his claim in February or March 2022. He did not do so until June 2022. Therefore, I would in any event

have concluded that he had failed to bring his claim within a further reasonable period of time.

53. It follows that the Tribunal does not have jurisdiction to consider the complaint of unlawful deduction from wages.

Employment Judge Leith

8 January 2023

Date

REASONS SENT TO THE PARTIES ON
16 January 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE