



EMPLOYMENT TRIBUNALS

Claimant: Mr S Philips

Respondent: Chris Hayter Haulage Limited

Heard at: Liverpool

On: 9 February 2023

Before: Employment Judge Aspinall

Representation

Claimant: in person

Respondent: Mrs Brunsdon, solicitor

JUDGMENT having been sent to the parties on 9 February 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 on 9 February 2022, the following reasons are provided:

REASONS

Background

1. By a claim form dated 2 November the claimant claimed unfair dismissal and discrimination.
2. The respondent defended the complaints, sought further and better particulars and raised a jurisdictional time point, saying that the tribunal could not deal with the complaints as they were brought out of time.
3. The matter was listed for a public preliminary hearing under Rule 53(1)(b) to determine the preliminary issue of whether or not the complaints were brought in time.

The Hearing

Documents

4. The parties had prepared a bundle of 42 pages.

Adjustments

5. The claimant identified as transgender and having autism. He shared a Patient Summary document from his GP records. It showed he was diagnosed with autistic disorder and gender identity issues in 2015. He had written to the Tribunal on 1 February 2022 to say that he intended to bring an autism support worker to the hearing with him, who could speak on his behalf and explain his disabilities.
6. I asked did he wish to seek an adjournment as he did not have a support worker with him. He did not. He wanted to go ahead today. We discussed how the respondent and the Tribunal might support him in accordance with guidance in the Equal Treatment Bench Book. He asked that we be patient and try not to overtalk as he can feel overwhelmed. He struggles with background noises but found the courtroom manageable.
7. The claimant explained that he can experience “ranging” which can be a factor for some people with autism. I asked how he would like us to support him with that, would he like to be given space to finish talking or would he find redirection helpful? He appreciated the understanding of the condition and would find gentle redirection helpful. We all agreed that we would;
 - Show patience and not overtalk each other
 - Keep noise to a minimum so far as we were able
 - If the claimant was ranging in cross-examination, wait a while, and then ask “would you like me to repeat the question for you ?”
8. The claimant was content that with those agreements in place he did not need a support worker.
9. I checked with the claimant his understanding of today’s hearing and he was able to explain to me that it was to decide the time point and that if extensions were not granted that would be the end of his case. I explained that if they were, we would go on to prepare the case for its next hearing.

The purpose of the hearing

10. It was agreed that the purpose of the hearing was to decide if the complaints were brought in time and if not whether time would be extended.
11. The first step was to understand the complaints. The claimant brought the following complaints:
 - Unfair dismissal, both ordinary and automatically unfair for having made

a public interest disclosure, and public interest disclosure detriment and Discrimination, based on his autism (disability) and or transgender identification.

12. Before evidence we agreed a timeline and the agreed facts set out below. It was clear that the issue was the extension of time. I explained the different “tests” for the tribunal to apply to the claimant. For unfair dismissal I explained the two limbs of the *not reasonably practicable* and *such further period as was reasonable* in Section 111 ERA96. For the discrimination complaints I explained the *just and equitable* test in Section 123 EqA 2010. I used checking back questions to confirm that the claimant understood. He was able to summarise the position for me and knew that if the tests were not met that would be the end of his complaints. He would, of course, have a right to invite me to reconsider and or to appeal.

Oral evidence

13. I heard oral evidence from the claimant. He gave his evidence in an open and straightforward way, answered the questions without ranging and with reference to the documents. He was able to explain the “stop the clock” provisions in response to a question in cross examination and admitted that he had known he had time limits to keep and that his complaint was already out of time when he brought it. He made frank admissions as to his own delay based on his hope that a settlement could be reached. I found him to be an honest witness.
14. At the start of her cross-examination Mrs Brunson asked the claimant did he think that his autism had had any effect at all on his ability to bring his complaint in time. He did not. His only point about autism was that the respondent had disputed that they had known he had autism and he said that they had known as he had told Chris Marsden he had autism at interview.
15. The respondent and claimant each made closing submissions.

The Facts

16. The following facts were agreed:
 - 16.1 The claimant’s employment began on 24 January 2022.
 - 16.2 His employment ended on 21 June 2022.
 - 16.3 He began ACAS early conciliation on 20 July 2022.
 - 16.4 He achieved his certification on 30 August 2022.
 - 16.5 He brought his Tribunal complaint on 2 November 2022.
17. I make the following findings of fact as to why the claimant did not bring his complaint in time.
18. The claimant brought a grievance on the day he left employment. He did this by typing up its content on his smartphone and emailing it to the respondent.
19. He contacted ACAS for informal support and was hopeful that a settlement

could be reached. He entered conciliation on 20 July and continued to hope that settlement would be reached. He used his phone and email and the internet to continue to work with ACAS and to contact the respondent. He looked up the respondent's Chief Executive's contact email and copied his grievance to the Chief Executive as well as submitting it online through the respondent's website.

20. After Day B he was able to register with an employment agency and do some work for a haulage company. He had a smartphone which he could use for the internet and email. He used the internet through his phone regularly and used a banking app, though it was his preference to attend the bank in person.
21. He continued from Day A and beyond Day B to contact ACAS and the respondent and to wait in hope, in response to the respondent saying it would get back to him and to ACAS, that there would be a settlement. Towards the end of October 2022, he realised that the respondent was not going to settle, and he concluded that he would have to bring a tribunal complaint. He discussed it with his conciliator who had continued post Day B and post the deadline for submission of a complaint, to support him, and his conciliator told him that as he was out of time, he would need to give his reasons for being late, make the application urgently and ask a judge to allow the claim to be brought out of time.
22. The claimant then, in late October, sent a letter to the respondent warning them that they had a further seven days in which to reach agreement with him or he would commence proceedings. He spoke to HR and was hopeful that the respondent would get back to him. He allowed those seven days to expire before bringing his complaint.
23. He lodged his complaint on 2 November 2022, 32 days late.

Relevant Law

24. Unfair dismissal, ordinary and automatic and public interest disclosure detriment are complaints brought under the Employment Rights Act 1996 and the relevant section dealing with time for bringing those complaint is Section 111 ERA96 it provides:

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.

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

25. Section 207B deals with the effect of ACAS conciliation:

207B Extension of time limits to facilitate conciliation before institution of proceedings

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).

...

(2) In this section—

1.

(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

2.

(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.

26. If an unfair dismissal complaint is out of time then a tribunal may extend time where the claim was brought,

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.

27. First, the claimant must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on him *Porter v Bandridge Ltd* [1978] IRLR 271, [1978] ICR 943. If he succeeds in establishing it was not reasonably practicable then, second, the tribunal must be satisfied that the further time beyond the primary time limit within which the claim was in fact presented was reasonable.

28. In *London Underground v Noel* [1999] IRLR 621, Judge LJ explained that in relation to the 'not reasonably practicable' legislative formula 'The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, “in all the circumstances”, nor when it is “just and reasonable”, nor even where the tribunal, “considers that there is good reason” for doing so.'

29. The tribunal must find as a fact what was the operative reason for the lateness, put another way, what was the substantial cause of the employee's failure to comply.

30. The complaints about discrimination are brought under the Equality Act 2010. The section that deals with those time limits is Section 123 EqA 2010. It provides

123 Time limits

- (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.

31. Section 140B Equality Act 2010 has the same provisions as the ERA for stopping the clock when the claimant has gone to ACAS.

140B Extension of time limits to facilitate conciliation before institution of proceedings

- (1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).
- ...
- (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.

32. If a discrimination claim is out of time, then a tribunal has a discretion to extend time to allow a claim to have been brought within

“such other period as the employment tribunal thinks just and equitable”

33. In this area of law Parliament has chosen to give the employment tribunal the widest possible discretion Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640. Section 123 does not prescribe the factors which should be taken into account when exercising the discretion.

34. A decision on the exercise of the discretion to extend time will rarely be interfered with on appeal. Time limits are exercised strictly in employment cases and there is no presumption that a tribunal should exercise its discretion to

extend time on the 'just and equitable' ground unless it can think of a reason not to extend: 'the exercise of discretion is the exception rather than the rule' Robertson v Bexley Community Centre [2003] EWCA Civ 576.

35. The best approach for a tribunal in considering the exercise of the discretion under s 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 "the length of, and the reasons for, the delay" Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23.

Applying the Law to the Facts

36. First, the complaints were clarified and the relevant dates recorded as agreed facts.

The unfair dismissal complaint

37. The claimant's employment ended on 21 June 2022. His primary limitation date was 20 September 2022. He went to ACAS on 20 July 2022 and got his certificate on 30 August 2022.

38. Section 207B(4) ERA 96 provides the formula for calculating time for a complaint where the time limit (primary limitation date of 20 September 2022) expires during the period beginning with Day A (20 July 2022) and ending one month after Day B (30 August + one month = 30 September).

39. This is a Section 207B (4) case. The time limit would have expired between Day A and Day B plus one month. Section 207B(4) says that in those cases the time limit expires instead at the end of that period.

40. The claimant's time limit for his unfair dismissal complaint expired on 30 September 2022. He brought his complaint on 2 November 2022. His complaint is brought 32 days out of time.

41. Turning then to the extension of time in the unfair dismissal complaint I find the substantial cause of the failure to lodge the complaint in time was the claimant's hope of settlement. He said he "sat back" and left it to the ACAS conciliator even after 30 August 2022 and beyond his deadline on 30 September 2022 to try and resolve matters. He was seeking and attaining a job through an agency between 30 August and 30 September 2022, communicating with ACAS and the respondent and using his smartphone to get online.

42. I find that the claimant has not shown that it was not reasonably practicable for him to have brought his complaint by 30 September 2022. He could have done that and protected his position, even if he was at that time still hopeful of a settlement. He readily admitted he could have brought his complaint *and* continued to seek to settle.

43. He does not meet the first limb of the test in Section 111. Even if he had, he could not show that he had brought the complaint in such further period as was reasonable. He told me in evidence that even after he had decided the respondent would not reply, that he could "see their game", he wrote a letter

giving the respondent a further 7 days in which to respond. At that point, in some unspecified date in late October 2022, the complaint was already out of time and the claimant had been talking to the respondent through ACAS since early July 2022. It was not reasonable of him to wait a further seven days for a settlement that had not been forthcoming in almost 5 months and where a Certificate had been issued on 30 August 2022 and his deadline already expired.

44. For those reasons the unfair dismissal complaint must stand dismissed.

The time in the discrimination complaint

45. The claimant's employment ended on 21 June 2022. His primary limitation date was 20 September 2022. He went to ACAS on 20 July 2022 and got his certificate on 30 August 2022.

46. Section 140B(4) EqA 2010 provides the way of calculating the time limit for a complaint where the time limit (the primary limitation date of 20 September 2022) expires during the period beginning with Day A (20 July 2022) and ending one month after Day B (30 August + one month = 30 September).

47. This is a Section 140B (4) case. The time limit would have expired between Day A and Day B plus one month. Section 140B(4) says that in those cases the time limit expires instead at the end of that period.

48. Applying the law, I find that the claimant's time limit for his unfair dismissal complaint expired on 30 September 2022. He brought his complaint on 2 November 2022. His complaint is brought out of time.

Discretion to extend time

49. I have had regard to the relevant case law. I have had regard to length of delay from the deadline 30 September to 2 November 2022. I find that the reason for delay was that the claimant was hoping for settlement. He frankly admitted that he "sat back" and left it to ACAS. He had believed the respondent when it said it would get back to him and or to ACAS.

50. The respondent made submissions on the merit of the discrimination complaint. I accept that the merit may be taken into account. The statute does not contain a list of factors and I have had broad regard to all the circumstances known to me. The respondent submitted that the discrimination complaints are weak and rest on hearsay. I reject that submission for the purposes of this determination. I have taken the claimant's discrimination complaints at their highest. I have assumed that they would all succeed if he went to a final hearing. Even in those circumstances, and this is a jurisdictional assessment not a "prospects of success" assessment, they are brought out of time and the claimant has not established that it would be just and equitable to allow an extension.

51. None of the complaints contained in the claim can proceed, the Tribunal does not have jurisdiction to hear them. They stand dismissed.

Employment Judge Aspinall

Date 9 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
15 February 2023

FOR EMPLOYMENT TRIBUNALS