



EMPLOYMENT TRIBUNALS

Claimant: Mr T Phillips

Respondent: Continental Landscape Ltd

Heard at: London South Employment Tribunal (as a hybrid hearing)

On: 19 January 2023

Before: Employment Judge Ferguson

Representation

Claimant: In person (assisted by his brother Mr M Phillips)

Respondent: Mr F Husain (solicitor), attending by video link

JUDGMENT having been sent to the parties on **20/1/23** 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

INTRODUCTION

1. This preliminary hearing was listed to determine whether the Tribunal has jurisdiction to consider the claim in light of the applicable time limits for bringing proceedings in the Employment Tribunal.
2. It took place as a hybrid hearing, the Claimant and his brother attending in person and Mr Husain for the Respondent attending by CVP for medical reasons.
3. The first part of the hearing was spent clarifying the claim and the complaints brought. With the Claimant's agreement some of the information was provided by the Claimant's brother.

BACKGROUND

4. The background, according to the Claimant and his brother, is as follows.

5. The Claimant, who is now 67 years old, was employed as a street cleaner for more than 40 years. He was employed initially by the local authority. He was transferred under TUPE to the Respondent in 2011. His employment ended on 7 July 2021, his 66th birthday.
6. The Claimant presented his claim by post on 6 July 2022. He ticked boxes for unfair dismissal, age discrimination, notice pay, holiday pay, arrears and “other payments”. He had engaged in early conciliation. Oddly there are two certificates, one giving the conciliation period as 9 to 24 September 2021, and another giving the period as 4 October to 12 November 2021. The earlier certificate is the one that is referenced in the claim form, but only the later certificate was on the Tribunal file. The Claimant handed up the other certificate at today’s hearing.
7. The Claimant’s ability to read and write is limited so his brother helps him with correspondence.
8. The Claimant received a letter from the Respondent’s pension administrator in around January 2021 saying he was due to retire on his 66th birthday and setting out the Claimant’s pension entitlement.
9. This prompted the Claimant’s brother to write a number of letters to the Respondent’s management asking what was the best way forward given the Claimant was due to retire on 7 July 2021, and asking if he could reduce his hours to three days a week. The Claimant says he was expecting to have a meeting where the options could be discussed. He says he never received any response to the letters. The Claimant says that in around early May 2021 he wrote a letter along the same lines.
10. On Friday 21 May 2021 the Claimant’s manager Raphael said he needed to speak to the Claimant urgently. He arrived in a van and asked the Claimant to get in. He showed the Claimant his letter and said you haven’t written this properly. He told the Claimant to write “I, Tony Phillips, want to retire on 7/7/21” and sign it. The Claimant did so. The Claimant received a letter the next day from the Respondent accepting his resignation. The Claimant says that on an unspecified date before this he had also asked Raphael about reducing his hours to three days a week and this was refused.
11. The Claimant complains of unfair dismissal. He accepts that he resigned, rather than being dismissed, but says that he was pressured to do so.
12. The Claimant also complains of age discrimination. He clarified today that he complains of the following things:
 - 12.1. The failure to hold a meeting about his retirement;
 - 12.2. The failure to respond to the letters;
 - 12.3. Refusing to allow him to reduce his hours to three days a week;
 - 12.4. Pressuring him to resign on 21 May 2021.

13. The Claimant says that other members of staff were allowed to work beyond their retirement date. He says it was favouritism, and that he was treated unfairly.
14. The Claimant also brings complaints of failure to pay notice pay, for accrued outstanding holiday, and for two weeks' arrears of pay. He also says he should have received a long service payment.
15. For most of the complaints, the latest time could have started to run for a claim to the Tribunal is the Claimant's effective date of termination. The complaints about pay could possibly run from a couple of weeks later depending when the Claimant's pay date was.
16. The ordinary time limit therefore expired on 6 October 2021 or a couple of weeks later.
17. If the first early conciliation certificate is valid then the time limit was extended by 16 days. So the extended time limit was either 22 October 2021 or a date in early November 2021.
18. If the second early conciliation certificate is valid then the extended time limit expired on 12 December 2021.
19. The Claimant's brother dealt with ACAS and submitting the claim form. The Claimant's brother explained that he had had a claim himself in the Tribunal about 7 years ago. He was therefore familiar with the process and understood about time limits. They sought help from the union and Citizens' Advice. The Claimant's brother said the union were not interested and Citizens' Advice said the union should help.
20. The Claimant's brother was aware that there was a deadline for submitting the claim after receipt of the early conciliation certificate. He tried to post the claim form to the Employment Tribunal office in Croydon, but he did not put enough postage on the envelope. When explaining this the Claimant's brother said he thought he could "get away with it". The envelope was eventually returned to him. He could not say when this happened. He said that sometime in early 2022 he posted it again to Croydon. Having not heard anything for a couple of weeks he called the office and they explained that claim forms cannot be accepted in Croydon by post. In July 2022 he sent the claim form by registered post to Leicester and it was accepted. He could not explain the long delay other than by referring generally to it taking a long time for the original claim form to be sent back, and postal delays generally.

THE LAW

Presentation of claims

21. Rule 8 (1) of the Employment Tribunals Rules of Procedure provides:

A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation which supplements this rule.

22. The Presidential Practice Direction “Presentation of Claims” sets out three methods by which a claim form may be presented.

22.1. Online by using the online form submission service HMCTS;

22.2. By post to Employment Tribunal Central Office (England & Wales), PO Box 10218, Leicester, LE1 8EG.

22.3. By hand to an Employment Tribunal Office listed in the schedule to the Practice Direction.

Extension of time on “not reasonably practicable” basis

23. Complaints of unfair dismissal, and for notice pay, holiday pay and unpaid wages, are all subject to a primary three-month time limit. The time limit may be extended if early conciliation takes place. The Tribunal only has jurisdiction to consider a complaint presented outside the extended time limit if it was “not reasonably practicable” to bring the claim in time and it is brought within a further reasonable period.

24. It is well established that ignorance or mistaken belief as to rights or time limits will not render it “not reasonably practicable” to bring a claim in time unless that ignorance or mistaken belief is itself reasonable. It will not be reasonable if it arises from the fault of the employee in not making inquiries that he or she should have made, or from the fault of the employee’s solicitors or other professional advisers in not giving all the information which they reasonably should have done (Wall’s Meat Co Ltd v Khan 1979 ICR 52).

25. As to what amounts to a “further reasonable period”, in Nolan v Balfour Beatty Engineering Services EAT 0109/11 the EAT stated that tribunals should always bear in mind the general principle that litigation should be progressed efficiently and without delay. 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 the further delay occurred.

Extension of time on “just and equitable” basis

26. Complaints of age discrimination must be brought in accordance with section 123 of the Equality Act 2010, which 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.

...

(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.

27. The Tribunal has a broad discretion in deciding whether it is just and equitable to extend time under s.123(1)(b) (Southwark London Borough v Afolabi [2003] IRLR 220). Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the claimant to show that it is just and equitable to extend the time limit.

CONCLUSIONS

28. The unfair dismissal and money claims are all substantially out of time, by at least six months. I am not satisfied that it was not reasonably practicable to bring the claim in time. The Claimant has not even given a date on which the original claim form was posted so I cannot be sure whether it was posted within the extended time limit. Even if it was, it was the Claimant's brother's error to send it by post to the Croydon Employment Tribunal office, which cannot accept claims by post, and not to pay enough postage, possibly deliberately. Those mistakes were not reasonable in the circumstances. I of course take into account that the Claimant is not legally represented. I also take into account his limited ability to read and write, but he had the assistance of his brother who has been through the Tribunal process before and either knew of the time limits and process for bringing a claim or could easily have found out.

29. In any event, the claim form was not submitted within a further reasonable period. The Claimant has not explained the lengthy delay to July 2022, which cannot have been solely because of the original claim form being returned. There is no evidence of any other postal or other delays outside the Claimant's control. The Tribunal therefore does not have jurisdiction to consider these complaints and they are dismissed.

30. As for the age discrimination complaints, again, they are substantially out of time. It would appear the last act of alleged discrimination was in May 2021. The ordinary time limit would have expired, therefore, in August 2021. There would be no extension for early conciliation because it was not started before the expiry of the ordinary time limit. The claim is therefore almost a year out of time.

31. The Claimant has not established a good reason for the delay. The Claimant's brother was aware of the importance of time limits having had his own claim in the Tribunal previously. The mistakes in submitting the claim were not reasonable, and in any event cannot explain the extent of the delay. There is real prejudice to the Respondent caused by the delay, in that the passage of time is likely to affect the cogency of evidence about what was said to whom about the Claimant's retirement. Further, on the Claimant's own case, it is not clear how he would be able to make out any age discrimination given that he accepts that others of the same age were allowed to continue working beyond

retirement. I therefore consider the prejudice to the Respondent in allowing the case to proceed is far greater than the prejudice to the Claimant in dismissing it. I do not consider it just and equitable to extend the time limit and therefore the Tribunal has no jurisdiction to consider this complaint either.

APPLICATION FOR RECONSIDERATION

32. In his application for written reasons the Claimant also applied for reconsideration of the judgment dismissing his claim. The only reasons given for the application were “no email on line etc etc, no computer to help with the claim”.

33. The application is refused because there is no reasonable prospect of the original decision being varied or revoked. The Claimant submitted the claim by post in July 2022 and provided no good reason for his failure to do so sooner. The fact that the Claimant may not have had a computer or email did not make it not reasonably practicable to submit the claim in time and nor does it alter the assessment of whether it is just and equitable to extend the time limit for the discrimination complaint.

Employment Judge Ferguson

Date: 27 February 2023