EMPLOYMENT TRIBUNALS

Claimant: Mr D Reynolds

Respondent: The Chief Constable of Devon and Cornwall Constabulary

Heard at: **Bristol (via video)** **On: 10 March 2023**

Before: **Employment Judge Danvers**

Representation

Claimant: In person
Respondent: Mr Arnold, counsel

JUDGMENT

1. The Claimant's claim for unfair dismissal was presented out of time under s.111 Employment Rights Act 1996 and is dismissed.

2. The Claimant's complaints of discrimination in respect of acts that took place on 9 August 2021 (or acts treated as done on 9 August 2021 by virtue of s.123(3) Equality Act 2010) were brought within such other period as the Tribunal thinks just and equitable under s.123(1)(b) Equality Act 2010. The Claimant's claims of discrimination will therefore proceed to a final hearing.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a Contact Officer from 13 April 2015 until 9 August 2021, when he was dismissed with pay in lieu of notice.

2. The Claimant notified ACAS of a claim on 1 March 2022 and a certificate was issued on 3 March 2022. By a claim form submitted on 13 March 2022, he brought claims for unfair dismissal and disability discrimination.

3. The Respondent initially failed to submit a Response to the claim within the allocated period and subsequently submitted a Response along with an application for extension of time for service of the Response on 1 June 2022. In this Response the Respondent denied the Claimant's claims and asserted that the claims should be struck out because they were out of time.

4. A Preliminary Hearing ('PH') took place on 21 September 2022 in front of EJ Youngs at which the Respondent's application for an extension of time was allowed and the Response accepted. A final hearing was listed to take place at Exeter Tribunal for 5 days starting on 5 June 2023. EJ Youngs also set down a further open PH on 8 December 2022 to consider whether the Tribunal has jurisdiction to hear the unfair dismissal claim taking account of the statutory time limit at s.111 ERA 1996. The claims and issues in the case were also clarified and set out in the Case Summary. It was confirmed that the Claimant pursues claims of unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments and harassment related to disability.

5. On 8 December 2022, upon hearing Mr Arnold and on the Claimant not attending and informing the Tribunal he had Covid-19, the PH was postponed. The PH was re-listed for 10 March 2023 to deal with the time limit point in respect of the unfair dismissal claim and, additionally, whether the discrimination claims were brought in time.

6. The parties were ordered to provide any documentary evidence in respect of the time limits issue by 10 February 2023 and any witness statement evidence on or before 24 February 2023.

Documents and procedure

7. The Claimant attended but, despite assistance from the Video Hearing Officer, was unable to get his video or audio to work. Accordingly, he dialled into the hearing by phone. The Claimant confirmed at the outset that he was content to proceed in that manner.

8. Ms Batchelor, Joint Legal Services, and Ms Holmes, Human Resources, also attended from the Respondent to observe. They also had intermittent difficulties with the video technology. However, Mr Arnold, on behalf of the Respondent, indicated that they were content for the hearing to proceed and eventually they dialled in as well.

9. I was provided with a PDF bundle of 175 pages which, after some initial difficulties, both the Claimant and Respondent had access to throughout the hearing. I also had skeleton arguments from the Claimant and Mr Arnold.

10. The bundle included a witness statement from Claire Flounders, HR Operations Delivery Manager for the Respondent. However, Ms Flounders did not attend the hearing. I read the statement but insofar as there appeared to be any dispute as to its contents or it was not supported by a document I was not invited to, and did not, place any weight on it.

11. The Claimant had not submitted a separate witness statement but indicated that he wished to rely on what he said in respect of limitation in his Details of Claim, Response to the Respondent Grounds of Resistance and Response to the Amended Grounds of Resistance as his evidence for this hearing. With Mr Arnold's agreement this was therefore treated as his evidence in chief on which he was questioned. Both Mr Arnold and the Claimant also made oral submissions, which I considered carefully and the key arguments they raised are discussed in my conclusions below.

The Law

Unfair dismissal time limit

12. s.111 ERA 1996 provides:

> (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—
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> (a) before the end of the period of three months beginning with the effective date of termination, or
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> (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.
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> (2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

13. Accordingly, under s.111, the Tribunal must consider:

    a. Whether the claim has been presented within the period of three months beginning with the effective date of termination (allowing for any extension due to early conciliation);

    b. if not, whether it was not reasonably practicable for the complaint to be presented within that period; and

    c. if it was not, whether it was presented in such further period as was reasonable.

14. The onus of proving that presentation of the claim within the period of three months 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***.

15. The Court of Appeal in ***Palmer v Southend-on-Sea Borough Council [1984] ICR 372*** at paragraph 34 held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too

restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

16. In ***Walls Meat Co Ltd v Khan [1979] ICR 52*** at p.56, Denning LJ held that the following general test should be applied in determining the question of reasonable practicability:

> 'Had the man just cause or excuse for not presenting his complaint within the prescribed time limit? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.'

17. In the same case (at p.61), Brandon LJ drew a distinction between a Claimant who is ignorant of the right to claim, and a Claimant who knows of the right to claim but is ignorant of the time limit:

> 'While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial Tribunal that he behaved reasonably in not making such enquiries.'

18. Per Scarman LJ in ***Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53*** at p.64, where a claimant is ignorant of his rights, the tribunal must ask further questions: 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?'

19. The essential points about the correct approach to the test of reasonable practicability were summarised as follows by the Court of Appeal in ***Lowri Beck Services v Brophy [2019] EWCA Civ 2490*** at para 12:

> (1) The test should be given "a liberal interpretation in favour of the employee "(Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470, [2005] ICR 1293, which reaffirms the older case law going back to Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53).
>
> (2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was

> "reasonably feasible" for the claimant to present his or her claim in time: see Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119. (I am bound to say that the reference to “feasibility” does not seem to me to be a particularly apt way of making the point that the test is not concerned only with physical impracticability, but I mention it because the Employment Judge uses it in a passage of her Reasons to which I will be coming.)
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> (3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time (see Wall's Meat Co Ltd v Khan [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.
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> (4) If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (Dedman). I make that point not because there is any suggestion in this case that the Claimant's brother was a skilled adviser but, again, because the point is referred to by the Employment Judge.
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> (5) The test of reasonable practicability is one of fact and not of law (Palmer).”

20. In respect of internal appeals, May LJ at page 384 said this in ***Palmer and Saunders v Southend-on-Sea Borough Council [1984] ICR 372, CA***:

> However in Bodha (Vishnudut) v. Hampshire Area Health Authority [1982] I.C.R. 200 another division of the appeal tribunal presided over by Browne-Wilkinson J. disagreed, at p. 205, in these terms:
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> “Despite the reference to there having been consultation with other members of this appeal tribunal, the fact that both the argument and the judgment were concluded on the same date shows that such consultation was obviously not very widespread. For the reasons we have given, we do not think we should follow that dictum having had the matter fully argued before us. There may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an industrial tribunal, as a question of fact, that it was not reasonably practicable to complain to the industrial tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not ‘reasonably practicable’ to present a complaint to the industrial tribunal.”
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> In the light of the passages from earlier judgments of this court which we have quoted in this judgment, we respectfully prefer the views on the effect of a pending internal appeal on the question whether it has been reasonably

> practicable to present a complaint within the time limit expressed by the appeal tribunal in Bodha's case [1982] I.C.R. 200 to those expressed in the Crown Agents for Overseas Governments and Administration v. Lawal [1979] I.C.R. 103

21. As to the fault of the adviser, In ***Marks & Spencer plc v Williams-Ryan [2005] ICR 1293, CA***, Lord Phillips MR, having reviewed the authorities, upheld the principle set out in ***Dedman*** as a proposition of law (at para 31):

> [In Dedman] the employee had retained a solicitor to act for him and failed to meet the time limit because of the solicitor's negligence. In such circumstances it is clear that the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an employment tribunal.

22. In considering whether a claim was presented in such further time as was 'reasonable', the tribunal does not need to be satisfied that the claim was presented as soon as 'reasonably practicable'. Such further time as was 'reasonable' is a less stringent hurdle and is a matter of fact for the Tribunal ***University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12***.

Discrimination time limit

23. Per s.123 EqA 2010:

> (1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—
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> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
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> (b) such other period as the employment tribunal thinks just and equitable.

24. Accordingly, under s.123, the Tribunal must consider:

    a. whether the complaint was brought within the period of 3 months starting with the date of the act to which the complaint relates (taking account of any early conciliation period); and, if not,

    b. whether it was brought within such other period as the employment tribunal thinks just and equitable.

25. Per the guidance of Auld LJ in ***Robertson v Bexley Community Centre [2003] IRLR 434 CA***, para. 25:

> 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 discretion is the exception rather than the rule.

26. However, this does not mean that 'exceptional circumstances' are required to extend time, the question is whether an extension of time is just and equitable.

27. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, [2018] ICR 1194***, Leggatt LJ, having referred to section 123, says, at paras. 18-19 of his judgment:

> 18. … [I]t is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980 , section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see Keeble), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Afolabi. …
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> 19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

28. In ***Apelogun-Gabriels v Lambeth LBC [2002] ICR 713, CA*** Gibson LJ said at para 16:

> … The very fact that there have been suggestions made by eminent judges in 1973 and in 1982 that the statutory provisions should be amended demonstrates that, without such amendment, time would ordinarily run whether or not the internal procedure was being followed. For my part, therefore, I can see no error whatever in what Lindsay J said in the present case in relation to this matter, that is to say that the fact, if it be so, that the applicant had deferred commencing proceedings in the tribunal while awaiting the outcome of domestic proceedings is only one factor to be taken into account….

29. Incorrect advice from a trade union representative or a failure to advise as to time limits in a discrimination claim does not amount to fault that must be attributed to a claimant in the context of the consideration under s.123 EqA 2010 (see, for example, ***Wright v Wolverhampton City Council UKEAT/0117/08/LA***).

Findings of fact

30. C was dismissed on 9 August 2021. On or around that date a colleague said to him that he could complain about the Respondent's treatment of him to Acas and the Employment Tribunal. From the outset the Claimant considered his dismissal to be 'fundamentally unfair'.

31. The Claimant said that when he was leaving the building after being dismissed, he was accompanied by his line manager. He mentioned to her that he would appeal and may consider taking matters to Acas or a Tribunal. He said that his line manager responded that he should 'appeal first, or it might look negative in relation to the appeal'. The Claimant said this was an informal discussion just making conversation as they were walking to his car. It was only in oral evidence that the Claimant identified that it was his line manager specifically who had made this comment. I raised with Mr Arnold in closing submissions that as things stood the Claimant's evidence on that point was unchallenged. Mr Arnold noted that he did not have instructions so as to be able to challenge the evidence, but that in any event the comment did not render it not reasonably practicable for the Claimant to present his claim or just and equitable to extend. Mr Arnold did not request any time to seek evidence to rebut the Claimant's evidence on the point. In those circumstances I accept the Claimant's evidence that the conversation with his line manager took place as he described.

32. The Claimant submitted an internal appeal shortly after his dismissal. The hearing of his appeal was delayed. In the written evidence he relied on, the Claimant suggested that this may have been deliberate delay on the part of the Respondent. However, in oral evidence he said that the delays were due to the unavailability of his own union representative to attend the appeal meeting. I therefore find those delays were not deliberate on the part of the Respondent in order to allow for the time limit to elapse.

33. The appeal hearing took place on 1 March 2022 and the Claimant's appeal was not upheld. The same day he went home and googled Acas. He contacted them by phone and was told about the three-month time limit to submit a claim. I accept this was the first the Claimant knew of the time limit. The Claimant then notified Acas of a claim on the same day. The conciliation certificate was issued on 3 March 2022 and he submitted his claim on 13 March 2022.

34. The Claimant took no steps between his dismissal and the outcome of his appeal to investigate his right to contact Acas about a claim or complain to a Tribunal. He had access to the internet throughout. The Claimant said, and I accept, that he was suffering from some anxiety after the dismissal and the effects of his Chrons disease and that as a result he was trying to focus on one thing at a time. However, the Claimant was able to apply for and successfully obtain new employment as a Customer Services Advisor from

the end of August 2021 and he worked in that role from then on until he changed jobs sometime later to work in a school.

35. The Claimant was supported in respect of his appeal by union representatives from the GMB. They did not tell him about the time limits for bringing a claim.

36. I accept the Claimant's evidence that the main reason he took no steps to investigate making a claim after his dismissal was because he had decided to see what happened with the internal appeal and was hoping that the appeal would lead to him getting his job back.

Conclusions

Unfair dismissal

37. It is agreed that the Effective Date of Termination was 9 August 2021 and that the Claimant's claim was not presented within three months, taking account of the provisions in relation to extension of time for early conciliation.

38. I have therefore considered whether it was not reasonably practicable for the complaint to be presented within that period.

39. The Claimant was aware from the date of his dismissal that he had the right to contact Acas and an Employment Tribunal to complain about his dismissal. He considered his dismissal to be unfair from the outset.

40. However, he took no steps to investigate how to bring a claim or what the time limits might be until 1 March 2022. The Claimant was therefore ignorant of the time limits until that date. I do not find this ignorance was reasonable in the circumstances. Although the Claimant's line manager had suggested, in an informal conversation, that he appeal first in case it was viewed negatively, the Claimant did not suggest that she told him that he *had* to do that or that she expressed the suggestion as a threat: the Claimant said they were simply 'making conversation' on the way to his car. I do not consider this comment amounted to the Respondent misleading or deceiving the Claimant as to his rights. Notwithstanding the comment from his line manager, the Claimant could have easily searched on the internet to find out how to bring a claim and the rules about bringing a claim or he could have asked his GMB union representatives directly what he needed to do or how to find out what he needed to do to bring a claim.

41. The fact that there was an ongoing internal appeal did not, in and of itself, render it not reasonably practicable for the Claimant to bring a claim (***Palmer***). Nor do I consider the comment of the line manager or any other facts to amount to special circumstances so as to mean that in this case the ongoing appeal rendered it not reasonably practicable for the Claimant to present his claim in time. To the extent that his union representatives should be criticised for having failed to advise him of the applicable time limits, that

failure is to be attributed to the Claimant for the purposes of considering reasonable practicability (***Dedman***).

42. Further, I conclude that although the Claimant was suffering from some health issues after his dismissal, in the light of him being able to quickly obtain and undertake new employment and pursue an internal appeal within the same period, he was not so affected as to mean it was not reasonably feasible for him to submit his claim.

43. Accordingly, I have concluded that it *was* reasonably practicable for the Claimant's unfair dismissal claim to have been presented in time. The Claimant therefore failed to present the claim in time within the meaning of s.111 ERA 1996 and the claim must be dismissed.

Discrimination

44. The Claimant confirmed that the final act of discrimination he relies on as part of his claim is his dismissal on 9 August 2021 and it is therefore agreed that all the acts of discrimination (whether or not they amount to conduct extending over a period and so are to be treated as ending on that date under s.123(3) or not) were brought outside of the primary three-month time limit.

45. Accordingly, I have gone on to consider whether the complaint in respect of dismissal and any other act ending on the same date was brought within such other period as I consider just and equitable.

46. I explained at the outset that I would not be hearing any arguments about whether earlier acts of alleged discrimination formed part of conduct extending over a period ending on the date of dismissal or whether any just and equitable extension should stretch to acts even earlier than the date of dismissal. I took the view that if the last alleged act was found to be 'in time' the question of time limits in respect of earlier acts would be best considered by the Tribunal at the final hearing.

47. I have concluded that the Claimant's claims of discrimination in respect of dismissal and any other acts ending on the same date were brought within such period as was just and equitable. I have reached that conclusion keeping in mind the guidance of Auld LJ in ***Robertson*** and having regard to the importance of time limits. The principal reasons for my conclusion are as follows.

48. First, this is not a case where the Claimant has given no reason at all for the delay. His delay was based on his genuine ignorance of the time limits and own mistaken belief that he should wait until the appeal process was concluded (partly based on what his line manager said) and on the hope that such a process would result in him returning to his job. He moved quickly when he became aware of the time limit issue. However, I do also take into account that he failed to take reasonable steps to find out information about the time limits earlier.

49. Second, I do accept that the anxiety and health issues the Claimant was experiencing at the time meant that he was seeking to focus on one thing at a time. He was also managing getting and starting new employment and dealing with the internal appeal process.

50. Third, having told his GMB union representatives what the situation was and given that they were involved in his appeal it is surprising that they failed to alert the Claimant of the time limit for Tribunal claims. While in respect of s.111 ERA 1996 this fault is attributed to the Claimant (***Dedman*****)**, in respect of my discretion to extend time for discrimination claims, this factor is a matter I can properly take into account (***Wright***) as weighing in the Claimant's favour.

51. Fourth, I agree the delay was not, as Mr Arnold put, a matter of missing the deadline by a day or two and was a more significant delay of four months. However, I find that it is unlikely that in this case the delay will have affected the cogency of the evidence. The Claimant's dismissal was the subject of an internal appeal which did not conclude until 1 March 2022. The Respondent has not suggested that there are matters it has been unable to respond to in light of the elapse of 4 months.

52. Finally, I do not accept that any significant prejudice has been caused to the Respondent by the delay. I note that in December 2021 a key witness (the dismissal officer) retired. In February 2023 she indicated that she is planning to relocate abroad for significant parts of the year and that she is not sure about her availability in June to attend a final hearing but that she would try to attend if she could. However, she has not told the Respondent that she will *not* be able to attend on the relevant dates and nor is there any certainty, had the claim been submitted a few months earlier, that the same issue would not have arisen. Further, the dates of the final hearing of this matter were listed in September 2022 and the Respondent appears not to have taken steps to secure the witness' attendance until some five months later; had the Respondent acted more promptly the witness may have had less uncertainty about her plans in June 2023. Therefore, the prejudice to the Respondent in this regard is speculative. On the other hand, if time is *not* extended the Claimant will lose his right to pursue his discrimination claims in their entirety. This is, as Mr Arnold fairly acknowledged, a substantial consideration that weighs in favour of the Claimant.

Employment Judge Danvers
Date: 14 March 2023

Judgment & Reasons sent to the Parties:
28 March 2023

FOR THE TRIBUNAL OFFICE