



EMPLOYMENT TRIBUNALS

Claimant
Mr W Otim

v

Respondent
Clarion Housing Group Ltd

PRELIMINARY HEARING

Heard at: Watford by CVP
Before: Employment Judge Alliot

On: 3 March 2023

Appearances:
For the Claimant: In person
For the Respondents: Mr John McArdle (legal executive)

JUDGMENT

1. The claimant's claims of unfair dismissal and for unauthorised deduction of wages/breach of contract are struck out as there is no jurisdiction to hear them.

REASONS

1. Notice of this preliminary hearing was sent out on 27 January 2023 and contains the following statement:-

“The purpose of the hearing is to decide whether notice and order dated 14 December 2022 should be permitted to proceed.”

2. That statement is unclear and potentially misleading.
3. The notice and order dated 14 December 2022 recites the following:-

“Having considered the file, Employment Judge Anstis is of the view that the tribunal has no jurisdiction to consider the claim and the claim has no reasonable prospect of success as all the claimant's claims appear to have been brought outside the standard time limits for such claims and no reason for extending time is given in the claimant's claim form.

Employment Judge Anstis orders that the claims will stand to be dismissed on the date 21 days from when this notice and order is sent to the parties without further order, unless before that date the claimant has explained in writing why the claims should not be dismissed.”

4. That order was made on 20 October 2022 but only sent out by the tribunal on 14 December 2022. In the meantime, no doubt in response to the respondent's application for a preliminary hearing, the claimant had coincidentally written to the tribunal on 22 November 2022 stating:-

“The claimant is not out of time in bringing up this case now because, when the claimant was dismissed unfairly on 11 November 2021; the dismissal triggered a mental health breakdown immediately. The claimant was clinically depressed and unable to think straight or function normally. The claimant was asked to rest and avoid further stress by claimant's care coordinator. The claimant was therefore ill and unable to function normally. Due to this condition it was therefore difficult to make representation as stipulated by respondent's policy.”

5. Thus, the claimant complied with the unless order (albeit that he was in ignorance of it) and the claim was not automatically struck out.
6. Notwithstanding the confusing nature of the notice of this hearing, the claimant has put in a witness statement and some medical evidence. The respondent has approached this hearing as being to deal with the time issues identified in the order sent on 14 December 2022. At the outset of this hearing, I confirmed with the claimant that he was in a position to deal with the time points. He has put in a witness statement and some medical evidence.

The evidence

7. I heard oral evidence from the claimant.

The law

Unauthorised deductions of wages/unfair dismissal/breach of contract

8. Sections 23 and 111 of the Employment Rights Act 1996 and s.7 Employment Tribunal's Extension of Jurisdiction (England & Wales) Order 1994 all require claims to be presented before the end of the period of three months beginning with the date of payment and/or the effective date of termination of employment, or within such further period as the tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the complaints to be presented before the end of that period of three months.
9. Further, a tribunal cannot consider a complaint under s.23 of the Employment Rights Act if the deduction was before the period of two years ending with the date of presentation of the complaint. A breach of contract claim has a 6 year limitation period.
10. As per the IDS Employment Law Handbook Employment Tribunal Practice and Procedure at 5.46:-

“When a claimant tries to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:

- Section 111(2)(b) Employment Rights Act should be given a “liberal construction in favour of the employee” – Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53, CA.

- What is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. An appeal will not be successful unless the tribunal has misdirected itself in law or has reached a conclusion that no reasonable tribunal could have reached. As Lord Justice Shaw set out it in Walls Meat Co Ltd v Khan [1979] ICR 52, CA: “The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer’s complication into what should be a layman’s pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the Employment Tribunal, and that their decision should prevail unless it is plainly perverse or oppressive”.
- 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.

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”.

11. Where ignorance of the time limit is relied upon then I must consider whether or not the claimant ought to have known of the time limit.
12. As regards health, “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...”
13. Further, the factors under s.33 of the Limitation Act may be relevant.

The facts

14. The claimant was employed on 15 September 2008. By 2021 he was working as a Neighbourhood Response Officer. The claimant was dismissed with immediate effect on 11 November 2021 and paid 12 weeks’ pay in lieu of notice. Consequently, the three-month primary limitation period would have expired on 10 February 2022. The period of early conciliation was from 26 to 28 June 2022 and so does not extend the primary limitation period. The claim was issued on 11 July 2022 and consequently is five months out of time.
15. The respondent accepts that the claimant was disabled within the meaning of the Equality Act 2010 at all material times by reason of bipolar affective disorder.
16. The claimant has provided some medical evidence and I have a letter dated 6 September 2022 from Dr Gupta, Consultant Psychiatrist, with Havering Community Recovery Service. This states:-

“This is to confirm that Mr Otim was under the care of our team from June 2014 until his discharge at the end of April 2022. Mr Otim’s care was then transferred to the Havering Access and Assessment Team for ongoing depot administration and psychiatric input.

Mr Otim suffers from bipolar affective disorder which is a severe and enduring mental health condition. Mr Otim’s condition is long-term and prone to relapses. He needs to continue psychiatric medication on a long-term basis to maintain stable mental health. Mr Otim’s relapses are likely to be triggered by lack of sleep and excessive workload.”

17. The claimant told me that he had a mental breakdown upon being informed of his dismissal. He states that he was unable to think straight or function normally. The claimant told me that his care coordinator had advised him to have complete rest and not appeal his dismissal or present a claim or obtain alternative employment. I do not have any medical evidence to substantiate the claimant's assertion that he had a mental breakdown or was advised to take complete rest and not take any active role in appealing his dismissal etc. The claimant told me that he could obtain this if necessary. I considered whether to adjourn this hearing to obtain such evidence but, given that Mr McArdle does not challenge that the claimant had a form of breakdown in November 2022, that seemed to me to be disproportionate and unnecessary.
18. I accept the evidence of the claimant as to his mental state following his dismissal and I have taken it that his inability to present a claim lasted until his discharge in late April 2022.
19. The claimant was able to place his CV with a recruitment agency, had an online interview, was offered a job, and worked for one week from 10 January 2022. The claimant told me the job did not go well as he fell woefully short of being able to do it. Whilst that does show some competence in being able to apply for and be interviewed for a job, I have concluded that it was not reasonably practicable for the claimant to present his claim by 10 February 2022.
20. The claimant was discharged from the Havering Community Recovery Service in late April 2022. Whilst he was discharged into the care of another organisation and so cannot be said to have completely recovered, the claimant himself acknowledged that by the end of April/May he was well enough to present a claim.
21. What the claimant did do was write to the respondent on 17 May requesting an appeal against his dismissal. That was refused on 18 May. The claimant repeated his request on 30 May and that was refused on 31 May. The claimant tried yet again on 19 June and that was refused on 21 June. On 26 June the claimant contacted Acas. The Acas early conciliation certificate is dated 28 June and it was only on 11 July that the claimant presented his claim to the tribunal.
22. I have taken the end of April/beginning of May as being a time when the claimant's mental state no longer prevented him from presenting a claim. He therefore took nearly two and a half months before presenting his claim. In my judgment any ignorance about time limits was not reasonable. The claimant could have researched the matter and acknowledged that he could have accessed the internet at his library. Whilst a short delay to see if he could appeal out of time may have been justifiable, I find that the delays after 18 May are not justifiable. The respondent had refused his appeal out of time by 18 May 2022. I find that the claimant could and should have presented his claim shortly thereafter.
23. The length of the delay excluding his health reasons is two and a half months. The reason for the delay I do not find to be reasonable. The respondent had refused his appeal out of time by 18 May 2022. I find that the claimant could and should have presented his claim shortly thereafter. The claimant made no active efforts to obtain any form of advice which would have prompted him to act

sooner. Consequently, in my judgment, the claim has not been brought within a reasonable time of the expiry of the primary three-month time limit.

24. As regards the unauthorised deduction of wages claim, this appears to relate to October 2012. That is clearly in excess of two years and six years prior to the presentation of the claim form and that I find it was reasonably practicable for that claim to have been brought within three months. It is clearly out of time.

The claimant’s disability discrimination claims

25. In his claim form the claimant expressly complains about the respondent’s refusal to hear his appeals. As recited above the claimant was requesting an appeal from 17 May 2022. The refusals to entertain his appeal are in time. In my judgment, whether or not the refusals to hear his appeals form part of a series of connected acts and/or a course of continuous conduct entitling the claimant to litigate his complaints of disability discrimination prior to his dismissal will be a matter for the full merits hearing to determine having heard all of the evidence. Further, whether or not to extend time on a just and equitable basis would best be determined by the full merits hearing. Consequently, I make no ruling on that issue and leave the matter open.

Employment Judge Alliott

Date: 15 March 2023

Sent to the parties on:

28 March 2023

For the Tribunal:

T Cadman

.....