



EMPLOYMENT TRIBUNALS

Claimant:

Mr O Olayiwole

v

Respondent:

Plonk Crazy Golf Limited

Heard at: London (Central) (via CVP)

On: 19 June 2023

Before: Employment Judge Fredericks-Bowyer

Appearances

For the claimant:

Mr S Hall (Solicitor)

For the respondent:

Mr B Stanton (Solicitor)

RESERVED JUDGMENT FROM PRELIMINARY HEARING

The claim is dismissed because the Tribunal does not have jurisdiction to hear it; it was presented out of time and it is not just and equitable to extend time.

REASONS

Introduction

1. The case came before me to determine whether it was just and equitable to extend time for the claimant to file his claim. If I did not extend time, then the Tribunal would have no jurisdiction to hear the claim.
2. The circumstances giving rise to the claim occurred against the context of the claimant being diagnosed with relapsing-remitting multiple sclerosis. The claimant received his diagnosis month before his dismissal at the age of just 22. The disability has a significant on the claimant, and significant adjustments were made to the hearing.

3. Due to the sensitivity of the issues in the claim and the reasons for the delay, and the alleged interplay between the disability and the claimant's behaviours which led to dismissal, I reserved this decision to consider the case carefully and reach a decision which I am secure is correct. I am sorry for the delay this has caused to the matter, but it was the correct approach to adopt.
4. I have now reached my decision, and I recognise that it will disappoint the claimant. Despite reaching an adverse decision, I would like to place on the record my admiration for the claimant and the way he has faced his illness – including his openness and fortitude when taking part in this hearing. I wish him all the best with managing his condition.

Representatives and evidence

5. The claimant was represented by Mr Hall from the Disability Law Service. The respondent was represented by Mr Stanton. The claimant provided a witness statement ahead of the hearing and gave sworn evidence under cross examination. I had access to a bundle of document which ran to 255 pages. I also had sight of a letter dated 22 May 2023 from Dr Singh-Curry, Consultant Neurologist, which gave an update on the claimant's condition.

The issues and the hearing

6. The claimant accepted his claim was brought out of time. The only issue to determine was whether it was just and equitable in the circumstances to allow the claimant to present the claim when he did.
7. Dr Singh-Curry's letter outlined that the claimant's condition has deteriorated. In her words. I do not repeat all of the detail in these reasons (which follow a public hearing), but the letter sets out that there has been a negative effect on the claimant's cognition which reduced his recall, insight, executive functioning and initiation.
8. We had a conversation at the start of the hearing about reasonable adjustments to allow the claimant to participate in the hearing. The claimant was able to engage at the outset of the hearing and, whilst speaking and responding slowly, he was able to take an affirmation and then answer questions in cross examination. We agreed frequent breaks. The claimant's mother sat alongside him to guide him with the documents.
9. It was clear that taking part in the hearing was exhausting for the claimant. He expressed tiredness at one point, so there was a break. Later, the claimant fell asleep whilst giving evidence, necessitating a two hour break before coming back to continue with the hearing. The claimant was keen to continue with the hearing. His representative did not ask for a postponement or any further adjustments.
10. At the end of the hearing, the claimant's mother said that she thought he had been answering questions without properly thinking about the answers. She felt he had said what he thought Mr Stanton wanted to hear. I take that thought into account, but it is not something that was reflected in the evidence before me and I am conscious that the claimant's mother had not been called to give evidence. When

considering the weight of the claimant's admissions in cross examination in this hearing, I have accepted and outlined only those which are either (1) supported clearly by documentary evidence, or (2) points of fact which cannot realistically be disagreed with.

11. I am satisfied that any future hearings involving the claimant, of any type, should be done after consideration is given to whether an intermediary would assist with the claimant's communication, on the understanding that his condition may have deteriorated beyond the position it was during this hearing.

The claim and defence

12. The claimant worked at the respondent as a host from 23 February 2022 to 18 July 2022. He was diagnosed with his relapsing and remitting MS in May 2022. The claimant was responsible for opening and closing the site during his shifts, and was responsible for customer service during booked activities. After setting out his medical condition, the operative part of the claimant's original claim was as follows:-

"I was shocked at the way I was discarded by my former employer at a time when I needed support, given the serious detrimental effects that MS could have on its sufferers. Prior to this, I had never been dismissed from a job, even at my young age.

I became forgetful, missing my way to work a few times resulting in my arriving late – something that was completely out of character for me. I also suffered from extreme fatigue which meant that I had to muster all the energy that I could to get to work each time. I informed my manager of the challenges I was experiencing from MS".

13. The claim documents were silent as to the reason given by the respondent for the decision to dismiss the claimant. The respondent says that the claimant lied about his whereabouts with the respondent and that that dishonesty justified dismissal. On one occasion, the claimant rang in sick when it transpired he had attended the Wireless music festival. On another occasion, the claimant failed to attend work to open the site. When asked about this by management, at the time, he said he was there. The respondent had proof from a customer that he was not there, and the claimant was forced to concede he had not been on site, as he should have been, when he had earlier lied and claimed to be there.
14. The claimant admitted to this dishonesty in cross examination, when faced with the bundle documents outlining these events. It is unfortunate these points were not within the original claim. Given the concessions made about these points, I must keep in mind that the final Tribunal will try the case with these admitted facts not in dispute.
15. There was a preliminary hearing before Employment Judge Stout on 26 April 2023. EJ Stout suggested to the claimant that he was bringing a claim for disability discrimination, but that it was not clear what type of disability discrimination claim he was intending to bring.

16. By the time of this hearing, the claimant had secured professional representation whom had supplied written submissions. Those submissions also admit the dishonesty of the claimant around the events leading to this claim. In clarification of the type of claim being brought, it was submitted that:-

“The claimant says that the alleged dishonesty and the events which the respondent relies upon were something arising in consequence of his disability and the dismissal was unfavourable treatment under s15 Equality Act 2010”.

17. The respondent concedes that the claimant’s manager knew about the claimant’s diagnosis and so had knowledge of the disability. To be successful with his claim, the claimant would be required to establish that his propensity to be dishonest, and to do those other impulsive things other than work, arose because of his disability. It is accepted that the claimant was dismissed because of his dishonesty. The respondent would then have the opportunity to establish that the dismissal was a proportionate means of achieving a legitimate aim. In so doing, it would need to satisfy the Tribunal that the dismissal was an appropriate and reasonably necessary way to achieve the aim, and that nothing less discriminatory could have been done instead.

18. The respondent submits that it was entitled to dismiss the claimant in the circumstances, and that it was a proportionate means to achieve the legitimate aim of preserving trust and fidelity between the respondent and its workforce on the basis that no reasonable employer should be expected to work with an employee in a responsible position who had been dishonest in the way the claimant has been.

Relevant facts about the late bringing of the claim

19. The claimant was dismissed on 18 July 2022. The deadline for contacting ACAS was 17 October 2022. He did not do so in the time limit, and did not present this claim until 24 November 2022. The claim was brought five weeks late and the Tribunal does not have jurisdiction to hear it unless it is considered just and equitable to extend time.

20. The claimant sent a letter on the same day as his dismissal setting out an appeal against that decision. This comprehensive letter was shown at page 253. The letter sets out all of the points which eventually became the document submitted with his claim form, including information about his diagnosis and the impact on him, and the perceived failings on the part of the respondent in dealing with him. The document also attaches medical evidence and information.

21. On 2 August 2022, the respondent wrote to the claimant in the following terms (page 254):-

“In short you were fired for gross misconduct.

You told your manager you were unwell and unable to come to work. He later found out you were actually at a music festival.

On another occasion customers informed us they were waiting outside for their booking. When we contacted you, you informed us that you were there. This turned out to be another lie. The customer sent us a time stamped photo of them outside the closed site, with you nowhere to be seen.

If you would still like to come in and discuss it, I will make time for you. However, my decision is final.”

22. The claimant did ask to go and discuss the issue. In response, the respondent provided a phone number for him to call, but also wrote: *“The decision is final. You were dismissed for gross misconduct and will not be re-employed”*. I am satisfied that the claimant was on clear notice by 2 August 2022 that the decision to dismiss him would not be reversed. His only recourse or escalation from this date was to notify ACAS for early conciliation and then pursue a claim to the Employment Tribunal.
23. The claimant says that his dismissal caused him to spiral into depression and he was given anti-depressants. He was ultimately taken to A&E and admitted into hospital on 18 October 2022. He was admitted into hospital on the following day and was still in hospital on 22 November 2022, when his mother submitted his claim on his behalf. In cross examination, the claimant accepted that his mother could have submitted the claim on his behalf in time. The claimant’s view was that she was very busy and he was not sure he wished to pursue the matter. He accepted that his appeal letter set out the same information as the claim does and that that was information that was readily available.
24. On 10 August 2022, the claimant attended his GP and then hospital. He disclosed his medical notes for those appointments. His mother reported changes in behaviour which she found concerning, including drug and alcohol misuse and a propensity to have accidents. Despite those reported difficulties, the claimant was noted as being *“very polite, appeared to be listening, asked a relevant question, no over cognitive concerns, not overtly under influence of drugs/etoh at this time”*. At the hospital, the claimant is noted as *“lives at home with his mother”* and *“due to start apprenticeship in digital marketing in September”*.
25. When asked about living at home with his mother, the claimant accepted that he could have asked his mother to initiate his claim at any point prior to his hospital admission. He accepted that his mother had been able to start the claim on his behalf whilst he had been in hospital, and could have done so whilst in hospital prior to the time limit which meant his claim was late. The claimant expanded on the reference to a digital marketing apprenticeship. He said that he never started the apprenticeship because of his illness. He accepted that he had taken some steps to secure that apprenticeship, although the claimant diminished the significance of doing so by explaining that it was not a formal scheme but more like work experience. It appeared that the opportunity arose because of a friendship connection rather than a competitive application route.
26. There is then a gap in the notes where the claimant says that his condition declined. On 30 September 2022 and 7 October 2022, the claimant had a telephone appointments with the GP and discussed strategies to stop smoking. On 18 October

2022, the claimant's mother advised that she would take over communication with his medical care because of his MS worsening. On the same day, the claimant's mother sought advice which led to the claimant being admitted into hospital. The notes indicate that the claimant's condition had worsened significantly, although it does state: –

“this is complete contrast to how he was like a week ago when he was still able to walk, move, though lacking balance. Seeing neuro letter Oct 2022 – actually stated improvement”.

27. When asked what had changed which meant the claimant's mother was able to bring the claim on his behalf *after* the expiry of the time limit, as opposed to her not doing so before the expiry, the claimant said simply that he was not sure he wished to bring the claim until he had reflected on all of the circumstances following the deterioration to his health.

Relevant law – just and equitable extension

28. Section 123(1) Equality Act 2010 sets out the relevant time limit for bringing a claim in the Employment Tribunal in relation to complaints arising from work. Those provisions read:-

“(1) Proceedings on a complaint under 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 proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

29. The parties accept that the primary time limit in this case expired on 17 October 2022, and so the claim can only be considered in time if I consider it just and equitable to extend time. It is for the claimant to persuade me to exercise my discretion to extend time (Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298). That discretion is wide, and is to be exercised in response to the particular facts or circumstances of the case in question (Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 CA; University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23). Extension of time is the exception rather than the rule (Department of Constitutional Affairs v Jones [2008] IRLR 128).

30. In the usual way, considering what is 'just and equitable' to extend time involves balancing various factors which are common to situations where a Judge must consider whether to waive a breach of a time limit or some other order. This includes the length and reasons for the delay, how quickly the claimant acted upon discovery of the time limit, and, perhaps most importantly when considering fairness, where the balance of prejudice lies between the parties. This, in turn, includes considering factors such as the merits of the claim should it continue, whether evidence has been lost due to the delay, and whether the delay has resulted in any material degradation to the principles enshrined by the overriding objective.

Discussion and conclusion

31. It would be easy for sympathy and admiration felt for the claimant to cloud proper consideration of whether it is just and equitable to extend time in these circumstances. I do not do that. Extending time is a discretionary exercise which is to be an exception and not a rule. I must balance the principles outlined above.
32. In this case, I am satisfied that, despite the difficulties which presented within the time limit, the following relevant conclusions can be drawn:-
- 32.1. The claimant knew instantly that he was unhappy with the decision to be dismissed;
- 32.2. The claimant sent a comprehensive letter setting out the matters which became the subject of this claim on the date of dismissal and that material was available in written form throughout the period;
- 32.3. The claimant secured an opportunity to do a digital marketing apprenticeship shortly after dismissal;
- 32.4. The claimant's medical condition fluctuated throughout the limitation period, which meant it improved as well as deteriorated;
- 32.5. The claimant lived with his mother throughout the limitation period and could have asked her to conduct the claim on his behalf;
- 32.6. The claimant's mother could have started the claim on the claimant's behalf when he was in hospital and before the time limit expired; and
- 32.7. When the claimant decided he wished to pursue the claim, his mother was able to notify ACAS and then bring this claim.
33. To this end, I consider that the overriding reason for the claim being brought late was that he did not know whether or not he wished to pursue his claim until the time limit had expired. His illness, significant though it was, was not the bar to the claimant bringing his claim in time. I do not consider that the claimant's illness had no impact at all; it was plainly the most significant thing the claimant was dealing with in the time period. However, all claimants bringing claims to the Tribunal are managing some difficulty during the period of the time limit, whether that is health or financial distress, or the busy-ness of life when work goes awry.
34. The claim was brought five weeks after the expiry of the time period. The claimant does not get credit for time spent in ACAS early conciliation when the time limit has expired before beginning the conciliation process. In my view, that is a significant delay before bringing a claim because it is almost half again of the time period set by Parliament for bringing this sort of a claim. Time limits are strict and should be enforced. Given the findings above about the ability of the claimant to bring his claim in time, if he had wished to, I do not consider that there is a good reason for this length of delay. If the claimant had decided to pursue the claim earlier than he did, the claim would be brought in time. A claimant deciding late to pursue a claim they could have brought before the expiry of the time period is not a reason to find it just and equitable to bring a claim.

35. I turn next to consider the impact of the delay on the available evidence, and whether or not it will be possible to have a fair hearing of the matter after it has been presented late. Mr Stanton tells me that almost the entirety of the documentary evidence was presented in this hearing. This consists only of the claimant's employment contract and the texts and e-mails between the claimant and the respondent relating to the incidents of dishonesty and the claimant's appeal. Mr Stanton says that the respondent was not on notice there could be a claim until the form was presented late, and so it is possible that some documents have been lost.
36. In my view, the evidence required for this case to be heard would be quite contained. The claimant would be required to establish that his dishonesty was indeed 'something arising' from his disability. That is not evidence which exists between the parties, and would always have to come from external (likely expert) instruction. It is agreed that the respondent knew of the disability. It is agreed that the claimant lied to the respondent about his whereabouts. The decision making process to dismiss, such as it was a process, is set out in skeletal form in the documents disclosed and would need to be supplemented by oral evidence. I consider it unlikely that the respondent witnesses' recollections of the events in question are severely impacted by 5 weeks' delay within the context of the amount of time it takes to bring an Employment Tribunal matter to trial.
37. However, I do have significant concerns about the ability of the claimant to secure and present his own evidence. I understand that the claimant's condition means that he may struggle to recall the events in question at the time period relating to his claim. I am also aware of concerns that, under cross examination, the claimant may not always give an accurate assessment of his position in relation to those questions. I am concerned about the impact time has on his condition and whether or not the claimant could take part in a final hearing should the case progress that far. These are not matters which relate to the delay, though, and would be concerns for any Judge should the claim have been brought in time. I do not take this aspect of evidence degradation into account because the delay in bringing the claim after the time limit expiry is not ultimately a long one.
38. What is relevant from the above paragraph, though, is consideration about the level of prejudice visited upon the respondent from having to defend such a claim where the evidence is unsure, or the ability to have a fair hearing is unsure, in circumstances where the claim is out of time and should ordinarily not go ahead. I consider that this is a prejudice to the respondent in these circumstances, which I come back to below.
39. Finally, I consider the merits of the claim and the defence in order to help inform where the balance of prejudice lies. In my view, the claimant's admissions that he committed dishonesty are a very significant weakness to his claim. He is not admitting minor dishonesty for which some employers would not dismiss an employee. The claimant called in sick when he was actually at a music festival. He failed to attend work to open the site for a pre-booked event and then lied to his managers to say he was there when in fact he was not.
40. It would be absurd for an Employment Tribunal not to accept an employer's evidence that these matters destroyed the trust and confidence it had in an employee even,

sadly, accounting for any reasons for that deception. To that end, I consider it extremely likely that the respondent would be able to establish that dismissal in those circumstances was a proportionate means of achieving a legitimate aim. I must consider that this element of the test casts significant hardship on to the respondent, because it would be required to defend a claim (at significant time and cost) which seems very unlikely to succeed.

41. I am sceptical about the claimant's ability to link his dishonesty to his disability in order to establish that the dishonesty was 'something arising'. I have seen no evidence in the documentary evidence of such a link aside from a passing reference to 'impulsivity', but those comments are made in the context of a broader set of events related also to other mental health impacts of the MS disability he relies upon. However, I do not take this part of the claim into consideration when assessing merits because I am not a medical expert and no medical evidence has been produced to specifically deal with that point. I mention this issue only to make clear that my assessments of the merits of the case relates only to the strength of the respondent's defence.
42. I accept that there is obvious prejudice to the claimant should the claim not continue. He considers that he has been discriminated against because of something arising from his disability, and it is a deprivation of remedy and of the chance to be heard for his claim to end at this hearing. However, in the circumstances, I do not consider it just and equitable to extend the time for him to bring his claim. His claim was submitted out of time where I have concluded that it could have been brought in time. I have concluded that the principal reason that it was not brought within time was because the claimant did not decide to pursue the matter until it was too late to do so within the time limit. Time limits are strict and it is not open to a claimant to be allowed to bring a claim after the time limit has expired because they choose to do so. My conclusion about this is the same whether or not the claimant knew about the time limit. He knew he was unhappy with his dismissal immediately. It was up to him or someone who assists him to find out about the time limit and comply with it.
43. I consider that there would be an unfair level of prejudice to the respondent if time is extended. It clearly communicated with the claimant that it would not reverse its position. In the absence of a claim brought on time, it legitimately considered that the matter was at an end. It is prejudiced by having to spend time and cost defending a claim which was brought out of time. Crucially, it would be asked to defend a claim which I have assessed as having weak prospects of success in circumstances where the claimant may not be able to contribute to an effective hearing with accurate evidence being called. This additional prejudice tips the balance away from the claimant and leads me to conclude that it is not just and equitable to extend the time for him to bring his claim to the point at which he did so.
44. The Employment Tribunal therefore has no jurisdiction to hear the claim. It is dismissed in its entirety.

Case Number: 2209018/2022

**Employment Judge Fredericks-
Bowyer**

Dated: 25 August 2023

Sent to the parties on:

29/08/2023

For the Tribunal Office: