



EMPLOYMENT TRIBUNALS

Claimant: Mr B W Okma

Respondent: DL Insurance Services Limited

Heard at: London South (via CVP) **On:** 15th February 2024

Before: Employment Judge Nicklin (sitting alone)

Representation

Claimant: in person

Respondent: Mr J Cook, Counsel

RESERVED JUDGMENT ON A PRELIMINARY HEARING

1. It is the judgment of the tribunal that:
 - 1.1. It was reasonably practicable for the Claimant to have presented his unfair dismissal complaint within the 3-month time limit; and
 - 1.2. It is not, in all the circumstances of the case, just and equitable to extend time in respect of the Claimant's complaint under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.
2. The tribunal does not have jurisdiction to hear the Claimant's claim in respect of either complaint.
3. All claims are accordingly dismissed.

REASONS

Numbers in square brackets in these written reasons refer to the joint hearing bundle

Introduction

1. By a claim form presented on 15th September 2023, the Claimant brought a claim of unfair dismissal (under Part X of the Employment Rights Act 1996 ("ERA")) and an intimated claim under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("FTE").

2. The claim concerns the decision of the Respondent to dismiss the Claimant at the end of his fixed term contract as a Senior Business Analyst in March 2023 and allegations of less favourable treatment during his employment which are not related to the dismissal. The Respondent accepts that it dismissed the Claimant by not renewing the Claimant's contract and relies on some other substantial reason and/or redundancy.
3. The Respondent, in its ET3 Response, also made the point that the claim was presented out of time and that the tribunal does not have jurisdiction to hear the complaint.

Procedural history

4. On 26th October 2023, the Respondent applied to strike out the claim for want of jurisdiction (because of the late presentation of the claim). This hearing was initially to be the final hearing of the claim but it was converted by Employment Judge Burge on 4th January 2024 to a 3 hour public preliminary hearing to determine, under the relevant statutory tests (discussed below) whether the tribunal has jurisdiction to hear the complaints by extending time (if the claim was presented out of time). The judge also made some directions for the preparation of evidence for this hearing, to include a direction for the parties to produce witness statements and serve documents.
5. At this hearing, I had before me a joint hearing bundle running to 104 pages, a witness statement from the Claimant which included the documents on which he relied and written submissions from counsel for the Respondent.
6. The hearing was listed for 3 hours to decide the time limit issue as a preliminary issue. As it had not been done before this hearing, it was necessary to spend just over an hour at the beginning of the hearing clarifying the FTER claim in order to understand what complaints were being advanced, the relevant dates (for the purpose of the time limit issue) and the provisions under the FTER relied on. Once this was complete, I heard sworn evidence from the Claimant who was cross examined by counsel for the Respondent followed by helpful oral submissions from the Claimant and counsel for the Respondent.
7. As there was little time left to deliberate and deliver an oral decision and another hearing was listed before me in the afternoon, I advised the parties that the decision would have to be reserved and sent out in writing in due course. I have since written to the parties to apologise for the delay in sending this reserved judgment out as there has been little available time owing to other commitments.

Issues

Time limits

8. Was the unfair dismissal claim presented out of time?
9. If so, was the claim presented 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 the period of 3 months beginning with the effective date of termination?
10. What other complaints have been brought under the FTER and have they been brought within the period of 3 months beginning with the date of the less

favourable treatment or detriment to which the complaint relates (or the last act or failure to act where they are part of a series of similar acts or failures comprising the less favourable treatment)?

11. If such complaints are out of time, is it, in all the circumstances of the case, just and equitable to extend time in order to hear those complaints?

The Claimant's claims

12. During the hearing, it was confirmed by the Claimant that his claims are:

12.1.1. A claim of unfair dismissal (Part X of the ERA). This is not a claim of automatic unfair dismissal for a reason in Reg 6(3) of the FTER. The effective date of termination of employment ("EDT") was 31st March 2023. This date is not in dispute.

12.1.2. A single complaint of less favourable treatment under Reg 3(1) of the FTER in May 2022 when the Claimant says he was put at risk of redundancy by the Respondent. In this complaint, the Claimant compares his treatment to a permanent employee (for the purposes of Reg 2) who he says was doing broadly the same work and was not put at risk of redundancy. This event is raised in the ET1 claim form. The act complained of occurred in May 2022. No objection was taken by the Respondent to treat this as having occurred on 31st May 2022 for these purposes.

13. It was explained during the hearing that the test to consider the extension of time in respect of the two complaints (above) are different. These were set out during the hearing and had been summarised in the directions given by Employment Judge Burge in any event.

Findings of Fact

14. The Respondent carries on business in insurance. The Claimant was employed under a 12-month fixed term contract dated 30th September 2019 as a Senior Business Analyst. His contract was extended on three occasions until it was terminated on 31st March 2023. This was the end of his last extension to the fixed-term contract, as confirmed in a letter dated 4th March 2022 [47].

15. Following a meeting between the Claimant and his line manager, Barbara Giglio, on 28th February 2023, the Claimant was informed that his contract would terminate on 31st March by a letter of 10th March 2023 [71-74]. The Claimant appealed the decision on 24th March 2023 [84]. A meeting took place to hear the appeal on 11th April 2023. The appeal was rejected by an outcome letter dated 30th June 2023 [95-99].

16. The Claimant commenced ACAS Early Conciliation on 6th July 2023 and the EC Certificate was issued on 17th August 2023. The claim was then presented on 15th September 2023.

17. The dates by which to present the two complaints were as follows (subject to any extension for ACAS Early Conciliation by operation of section 207B ERA if that process had commenced before these dates):

17.1. Unfair dismissal: 29th June 2023

- 17.2. FTER complaint: 30th August 2022.
18. There is no dispute that the ACAS Early Conciliation period commenced after both of these two dates (on 6th July 2023).
19. In his witness statement, the Claimant said that the last act and unfair dismissal was an alleged failure to conduct a fair grievance process and failure to reassign work and should be dated from the communication of the appeal decision. However, I find that the last dates were as set out in paragraph 17 based on the two complaints brought and the events which form the basis of those complaints (i.e. a decision to put the Claimant at risk of redundancy in May 2022 and his EDT on 31st March 2023).
20. On 14th July 2022, the Claimant's line manager, Ms Giglio, wrote to colleagues confirming that she had informed the Claimant that he was no longer at risk of redundancy. The Claimant accepted that this had happened by this date and that the Respondent had apologised to him. The Claimant felt he was considered to carry 'legal baggage' from the issue of his being put at risk but there is no dispute he then continued in his role.
21. By this point in July 2022, I find that the Claimant knew that the issue of his being put at risk of redundancy had come to an end. The Claimant could have complained about his treatment at this stage. His reasons for not doing so were that he 'tried to make the most of it' and 'wanted it to work out' (i.e. his return to work). I accept the Claimant's evidence about that but find that he knew, at this time, on his own case, that he had a complaint to make against the Respondent (regarding the decision to put him at risk) but he chose to return to the role and carry on.
22. The Claimant accepted during his evidence that his line manager at the time he was placed at risk was Dene Burke who left in September 2022.
23. At the meeting on 28th February 2023, which led ultimately to the final decision to dismiss the Claimant, the Claimant was aware that the process he was going through "can result in his appointment being terminated" [69]. When the Claimant was put at risk of redundancy, he had called Citizens Advice who had told him that his fixed term contract will not simply expire. He had been given advice about claims of constructive dismissal. The Claimant believed that his employment would not expire and he didn't believe that the Respondent's attempts to terminate his employment were legal or possible. However, he accepts that he was told in the letter of 10th March that his employment was terminating on 31st March 2023.
24. When the Claimant lodged his appeal against the decision to dismiss, on 24th March 2023, he annotated Ms Giglio's letter of 10th March to highlight his objections and concerns. At point 4 of this letter, the Claimant pointed out that he had been dismissed but that it was unfair [72]. I find that, by the time the Claimant had been dismissed and certainly by the time he brought his appeal in March, the Claimant had knowledge of the facts giving rise to a claim for unfair dismissal. He did not believe he had been fairly dismissed and considered that it was unlawful.

25. The Claimant did not present a claim at this time (i.e. in or around March) because he had 'faith in the process' and therefore put some store in his quest to overturn the decision via his internal appeal.
26. The Claimant says that the Respondent cynically delayed in responding substantively with an outcome to his appeal on or just after the deadline for starting his claim had expired. This is because the meeting took place on 11th April but the outcome letter is dated 30th June 2023 and he would have needed to have start the ACAS EC process before this date.
27. I do not accept, on the evidence before me, that the Respondent had actively and deliberately delayed the outcome of the appeal (whether to run down the Claimant's clock for the presentation of a claim or otherwise) because:
- 27.1. The emails in the bundle show that the appeal manager, Mr Scrimshire, kept the Claimant updated about progress of the appeal. He wrote to the Claimant on 27th April 2023 explaining the interviews he had been conducting and the summaries of those interviews were awaited [100];
- 27.2. On 10th May 2023, Mr Scrimshire advised the Claimant that he felt it was necessary to contact other colleagues as part of his investigation [100];
- 27.3. He then followed up on 6th June 2023 with an apology for the delay and sent the outcome at the end of that month.
28. The Claimant accepted that he should have searched online to establish what was required for the tribunal claim process, including the applicable time limits. He instead focused on chasing and awaiting the outcome of the internal appeal. The Claimant was earning £81,270 per annum (gross). He would have been able to obtain some limited initial legal advice after termination of his employment, although I accept that he may have found it difficult to afford ongoing assistance due to other demands on his income.
29. On receipt of the appeal outcome, the Claimant did then seek advice from a solicitor and he told the tribunal that he was given advice about the applicable time limits. The Claimant then commenced the ACAS Early Conciliation process on 6th July 2023, 6 days after the appeal decision.

Law

Time limits

Unfair dismissal

30. The relevant provision is set out in section 111(2) ERA:

...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.

31. The fact that the Respondent has an internal appeals procedure does not alter the date of the EDT (J Sainsbury Ltd v Savage [1981] ICR 1, CA). The fact that a Claimant is waiting for the outcome of a pending appeal is not, ordinarily, sufficient by itself to justify a finding that it was not reasonably practicable to present the complaint in time (Bodha v Hampshire Area Health Authority [1982] ICR 200, approved by the Court of Appeal in Palmer).
32. The extension of time for limitation purposes given to Claimants whilst engaged in ACAS Early Conciliation (pursuant to section 207B ERA) does not assist a Claimant if the primary limitation period has already expired prior to the Claimant commencing Early Conciliation (Pearce v Bank of America Merrill Lynch UKEAT/0067/19 at para 23).
33. The Claimant bears the burden of proving that it was not reasonably practicable to present the claim in time and, further, to then justify the period of the delay (see Porter v Bandridge Ltd [1978] ICR 943 at 948).
34. A helpful explanation of the term 'reasonably practicable' is to ask "was it reasonably feasible to present the complaint to the [...tribunal] within the relevant three months?" (see Palmer and Anr v Southend-on-Sea BC [1982] ICR 372).
35. The relevant test under section 111(2) is a strict one (Cygnnet Behavioural Health Ltd v Britton [2022] IRLR 906).
36. Where a Claimant is aware of their rights (i.e. to claim unfair dismissal), they are under an obligation to seek information or advice about the enforcement of those rights (see Trevelyan (Birmingham) Ltd v Norton [1991] ICR 488 at 491).
37. The second stage of the test is to decide whether the claim was presented in a further period that the tribunal considers reasonable. This is not the same as asking whether the Claimant acted reasonably nor whether it is just and equitable to extend time. There must be an objective consideration of the factors causing delay and the period that is reasonable for the claim to then be issued in those circumstances. The tribunal should have regard to the strong public interest in claims being brought promptly (see further the observations of Underhill P in Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10 at para 16).

FTER claim

38. Under these Regulations, the jurisdiction to extend time is found in Reg 7(3) which provides:

A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

39. The tribunal has a wide discretion to extend time on a just and equitable basis. This is wider than the 'not reasonably practicable' test under s111 ERA. It is for the Claimant to show that it would be just and equitable to extend time. The exercise of discretion is the exception rather than the rule (see Robertson v Bexley Community Centre [2003] EWCA Civ 894; [2003] IRLR 434, per Auld LJ). It was observed by Sedley LJ in Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ; [2010] IRLR 327 that there is no principle of law

which dictates how generously or sparingly the power to enlarge time is to be exercised. Whether it is just and equitable to extend time is not a question of policy or law; it is a question of fact and judgment for the tribunal.

40. As confirmed by the Court of Appeal in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include, in particular, the length of and reasons for the delay. In Adedeji, the Court of Appeal confirmed that, depending on the circumstances, some or all of the suggested factors from the case of British Coal Corporation v Keeble [1997] IRLR 36 (which arose from a list of factors applied in personal injury claims in the civil courts pursuant to section 33 of the Limitation Act 1980), might be relevant matters to take into account:

40.1. The extent to which the cogency of the evidence is likely to be affected by the delay.

40.2. The extent to which the party sued had co-operated with any requests for information.

40.3. The promptness with which the Claimant acted once they knew of the facts giving rise to the cause of action (i.e. the claim).

40.4. The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

41. However, the tribunal should not rigidly apply these factors as if they are a checklist applicable to each case. The Court of Appeal in Adedeji referred, in particular, to the conclusions of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; [2018] ICR 1194 at paragraphs 18-19 (which are applicable to an FTER case as they are to an Equality Act case):

“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]. ...

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).”

Conclusions

Extension of time – unfair dismissal

42. The unfair dismissal complaint was presented out of time. The time limit expired on 29th June 2023 and the claim was presented 2.5 months later.

43. I conclude that it was reasonably practicable to have presented the claim within time because:

43.1. The Claimant knew, by the meeting with Ms Giglio on 28th February 2023 that his employment might be terminated the following month. He disagreed that this was legal or fair. It was clearly communicated to him by the letter of 10th March 2023 that his employment would end of 31st March 2023. Whether that was permissible or not (the Claimant maintains that his contract could not simply expire), it is plain that this was to be the end of his employment. Accordingly, the Claimant had early knowledge within the time limit window that he was being (and then was) dismissed. During this time, he considered that was unfair and wished to challenge it. As such, he knew of the facts giving rise to his claim against the Respondent.

43.2. Having heard the Claimant's evidence and considered his witness statement and the documents in the bundle, I conclude that the Claimant was well able to find out what else needed to be done in order to bring a claim to the tribunal. He carried out a professional and well-paid role for the Respondent and was well able to advance his case internally. He would have been able to obtain some limited initial advice (which he did after the appeal outcome) after he had received the letter on 10th March or after the EDT on 31st March. Alternatively, as the Claimant accepted himself, he could have simply searched online to find out about the time limits and what he needed to do to start the claim process. The fact that the ACAS Early Conciliation period commenced 6 days after the appeal process is indicative of the action the Claimant was able to take when he realised the internal process had been exhausted. There is no good explanation before the tribunal for these steps having not been carried out.

43.3. There is no good reason in this case to have delayed bringing the claim because of the internal appeal.

43.3.1. Whilst one can respect the faith and belief the Claimant placed in the Respondent to review his case on appeal, I am satisfied that the Claimant knew that it was open to the Respondent to reject his appeal. The response to his appeal may well have taken longer than he expected but it is not a good reason to wait in circumstances where the Claimant had all of the information which he would need to present the claim and complain about the decision to dismiss him.

43.3.2. There are no other reasons relied on to suggest there was any impediment to the Claimant preparing and presenting his claim within the primary time period.

43.3.3. It was, in the circumstances of this case, reasonably feasible for him to start the ACAS Early Conciliation process and present the claim before he heard of the appeal outcome and before the deadline.

44. In any event, had I found that it was not reasonably practicable to have presented the claim in time, I would have concluded that the further period after 29th June 2023 (up to 15th September 2023) was not reasonable in the circumstances. As the reason for delaying was to await the outcome of the internal appeal and given that the Claimant then obtained advice from a solicitor, allowing the ACAS EC process to run from 6th July to 17th August and then waiting almost a further month to start the claim (when it was known to be already out of time) is not a reasonable period in the circumstances. This period is far from prompt and there is a public interest in claims in this jurisdiction being brought promptly where it was not reasonably practicable to bring the claim in time in the first place.

Extension of time – FTER complaint

45. The tribunal has a wider discretion as to the extension of time for the FTER complaint. However, it remains the exception rather than the rule and, in my judgment, the length and reason for the delay in presenting the complaint is an important (though not the only) factor.

46. I conclude that it is not, in the circumstances of this case, just and equitable to extend time in order to hear this complaint because:

46.1. The event complained about took place in May 2022. The Claimant was placed at risk of redundancy and, by July 2022, this risk ended and he continued in the team as before. At best, time runs from 31st May 2022 and so the primary time limit for this complaint ended on 30th August 2022. Presenting the claim on 15th September 2023 is more than one year out of time. That is, in my judgment, a very long delay.

46.2. There is no good reason for delaying this long at all. Well before 30th August 2022, the Claimant was dissatisfied with the decision to put him at risk and that process had, in any event, ended in July 2022 with an apology. The Claimant chose not to take any action. This claim was only clarified and made clear at this hearing and it is not apparent that the Claimant had taken any steps to take action about this prior to the presentation of his claim. It would plainly have been open to the Claimant to have earlier taken advice or conducted research to find out how to enforce his rights and take action regarding the decision to put him at risk of redundancy.

46.3. If the tribunal allowed the Claimant to present this complaint so late, I conclude that it would place the Respondent at an unacceptable disadvantage when compared with the Claimant. There is significant prejudice to the Respondent because:

46.3.1. The Claimant's line manager at the time, Mr Burke, is no longer employed by the Respondent. He was a decision maker in respect of this complaint. This is important given that it will be more difficult and expose the Respondent to greater cost to answer the complaint than would have been the case in 2022.

46.3.2. The long passage of time is such that the cogency of evidence is likely to be affected by this delay. Witnesses would not likely give evidence until late in 2024 or early 2025 in respect of events in Spring 2022. This militates strongly against it being just and equitable to extend the time limit.

Outcome

47. It follows that the tribunal does not have jurisdiction to hear either of these complaints because it was reasonably practicable to have presented the unfair dismissal complaint within the time limit and it is not just and equitable to extend time in respect of the Claimant's 2022 FTER complaint.

48. For the above reasons, the claim in respect of both complaints must be dismissed.

Employment Judge Nicklin

Date: 10th April 2024