



EMPLOYMENT TRIBUNALS

Claimant: Mr David Patrick Hayes

Respondent: The Commissioners For His Majesty's Revenue And Customs

Heard at: Bristol (via CVP) **On:** 23.05.2024

Before: Employment Judge David Hughes

Appearances

For the Claimants: Mr A Roberts, counsel

For the Respondent: Mr T Perry, counsel

JUDGMENT

1. The Claimant's complaints of unfair dismissal and breach of contract were not presented within the applicable time limit. It was reasonably practicable to do so. The complaints of unfair dismissal and breach of contract are therefore dismissed.
2. The Claimant was disabled by reason of anxiety (including social anxiety disorder), depression, long covid, ADHD and OCD, at the time of the events about which he complains.

REASONS

The preliminary hearing

1. This case comes before me for a preliminary hearing, originally ordered by Employment Judge Rayner on 04.01.2024.
2. At the hearing, I gave oral reasons for finding that the Claimant was disabled by reason of certain conditions, for finding that his claim in respect of unfair dismissal and breach of contract had not been presented in the time limit provided for by the Employment Rights Act 1996 ("ERA")¹, and that it was reasonably practicable for him to have presented it within that time limit.
3. Counsel for the Claimant having indicated that written reasons were

¹ And Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623.

sought, with the parties' agreement I indicated that I would provide those written reasons together with my judgment. I do so now.

4. As originally ordered the preliminary hearing was to determine whether or not the Claimant was a disabled person at the times material to his case, and to determine whether the Claimant's claims in respect of unfair dismissal and breach of contract were brought within the time limit provided for by s111 of the ERA 1996.
5. Originally listed for 2 days, the hearing's listing was reduced to one day, as a large measure of disagreement regarding disability has disappeared from the case. The position now is that the Respondent concedes that the Claimant has the conditions of anxiety (including social anxiety disorder), depression, and long covid. The Respondent has not conceded obsessive compulsive disorder, ADHD, or dyspraxia. The Respondent has conceded the effects and symptoms relied upon, including those identified in impact statement. The Respondent has also conceded that the effects are such that any of the conditions I find the Claimant to have had, would qualify as a disability under s6 of the Equality Act 2010 ("EA"). What the Respondent says is, all of the effects relied upon are capable of flowing from the admitted impairments, and the Respondent is neutral on whether disputed impairments are ones that he has, and whether the effects flow from them.
6. The time point remains live between the parties, and is the more substantial dispute.
7. For the sake of openness, I disclosed to the parties that I have dyspraxia, and long covid. Neither party raised any issue with me hearing the preliminary hearing.
8. At the hearing, I amended the directions in the case management order made by Employment Judge Raynor on 04.01.2024.

Facts

The Claimant's conditions

9. As noted above, the Respondent admits that the Claimant was disabled, because of certain conditions. As to the non-admitted conditions, I accept the Claimant's evidence that he was told by his GP that he had "*scored high*" on a test for ADHD. I accept his evidence that his doctor told him that he suffered from OCD. I find as a fact that he suffered from these impairments.
10. Moving on to dyspraxia, I must be cautious here, as someone who has that condition. I need to be careful about assessing the Claimant based on how the condition impacts on me. In his statement, the Claimant describes symptoms that may be attributable to dyspraxia. In the notes of a meeting of 07.10.2022, the Claimant is noted as saying that he believes he has the condition, but hasn't had a diagnosis.
11. On the material I have before me, I would not think it appropriate to reach

a finding that he does not have dyspraxia, but prefer to leave that question for determination at the final hearing.

12. I accept that the Claimant received help and support from his partner in administrative matters in his day-to-day life, and in relation to his claim before this tribunal.

The Claimant's dismissal

13. The Claimant was employed by the Respondent from 17.10.1997 until 16.02.2023. It does not appear to be in dispute – and to the extent that it may be in dispute, it is not necessary for me to resolve any dispute – that the Claimant took what appears to be a significant amount of time off during his employment due to ill-health.
14. On 07.10.2022, a meeting took place with the Respondent. I understand this to have taken place on-line. The Claimant attended, and was assisted by a trade union representative, one Wendy Hawkins. In that meeting, the Claimant was noted as saying:
- (a) That he was awaiting treatment for ADHD, had been waiting on an ADHD clinic for 4 years;
 - (b) That he was suffering more than ever, with poor organisational skills, forgetfulness, impulsiveness, continuous starting new tasks, inability to handle stress and mood swings;
 - (c) That since receiving a second covid jab at the beginning of October, he had not felt right;
 - (d) He described family difficulties. His partner lost her job, and struggled to find a new one. Their children had been struggling and had missed lots of school. He was concerned about a possible prosecution for the children missing school.
15. It is not necessary for me to set out the entirety of the minutes of that meeting.
16. Following the meeting, on 13.10.2022, the Respondent wrote to the Claimant, and told him that a decision had been made to recommend that he be dismissed.
17. On 15.12.2022, the Respondent wrote to the Claimant, to advise him that he was being dismissed. He was told that his last day of service would be 16.03.2023. He was advised of his right to appeal the decision to dismiss, and told that he had to submit any appeal within 10 working days of receipt of the letter.
18. In the same letter, the Claimant was told that his HR director was considering whether to award him compensation under a civil service compensation scheme. He was told that he had a right to appeal against the decision on the level of compensation on receipt, but also, perhaps somewhat confusingly, that *“you have the right to appeal to the Civil Service Appeals Board against the level of compensation awarded. If you plan to appeal... you will need to notify... your intention to appeal within*

21 days of the effective date of your dismissal, which is your last day of service”.

19. In fact, the Claimant was not told how much compensation he would be awarded until 26.06.2023 – although the money was paid into his bank account before that date.
20. On 10.03.2023, the Claimant sent in an appeal against the decision to dismiss him. His reasoning extends over slightly more than 3 pages.
21. On 20.03.2023, the Respondent wrote to the Claimant, to tell him that he had been awarded a compensation award of 50%. He was told that he could raise an internal appeal by writing to his Appeal Manager.
22. The following day, C emailed R. He expressed confusion as to what stage of the process he was in. He referred to an Appeal Manager, one Jasprit Gandhi, giving him a deadline of 10.03.2023. Ms Gandhi was the person to whom his appeal against the dismissal had been addressed. The Claimant said:

The main reason for my confusion is that my new Appeal Manager, Jasprit Gndhi (sic) (cc'd) gave me a deadline of 10 March 2023. I met this deadline by submitting an appeal on that date. I have heard nothing from anyone in the department since, until now. Does that mean that my appeal has been rejected?

23. Looking at matters now, it is fairly clear that the Claimant was confusing the appeal against the decision to dismiss him, with an appeal against the compensation award.
24. An appeal meeting took place on 20.04.2023. The Claimant attended, the meeting taking place remotely. He was not assisted by Ms Hawkins at this stage, or any other trade union rep. He told me that the last time he had tried to contact Ms Hawkins was in January 2023.
25. On 03.05.2022, the Respondent wrote to the Claimant, informing him of the outcome of the appeal meeting. It confirmed the decision to dismiss him, and expressly told him that his last day of service was 16.03.20223
26. The bundle included an email from the Claimant to Brendan Ricketts of the Respondent on 01.06.2023. I will not set out the email in full, but in it the Claimant refers to getting the outcome of his appeal on 04.05.2023, having been told that his employment would end in March and, in another letter, that he would get 50% compensation. He expressly asked if his end of service date remained the same, notwithstanding the delays in the appeal process.
27. The following day, Mr Ricketts advised him that his dismissal date did indeed remain the same. Mr Ricketts also advised that normally, any appeal against compensation level would be at the same time as the appeal against dismissal. Mr Ricketts added, *“if you feel that you could not do this due to delays by HMRC and would like to appeal the level of*

compensation I would submit you appeal giving reasons for the late appeal and your reason why you do not agree with the level of compensation”.

C's personal circumstances

28. In March 2023, the Claimant had sold his family home in Bristol. Intending to move to Swansea, he had arranged a rental property in Swansea, into which he and his family could move. He paid a deposit. However, on 01.04.2023, he was advised that the owner of the rental property had sold it, meaning that the Claimant could not take up occupation. Suddenly homeless, the Claimant and his family moved in with the Claimant's parents for 3 months. They obtained alternative accommodation in June, although they did not, in fact, move in until July 2023.
29. The Claimant had to try and arrange schooling for his children, whose difficulties I have touched on above. He had to liaise with those responsible for admissions to schools. Whilst doing so, the children were at home with the Claimant. He also had to chase up a referral from the Families in Focus social work team in Bristol, to the equivalent in Swansea.
30. The Claimant's family also suffered the loss of his partner's aunt on 16.06.2023. She died of cancer, having been given an all-clear in 2022 but fallen ill again in 2023. Her funeral took place on 30.06.2023. The Claimant's partner was close to her aunt, and I was told, was unexpectedly required to give a eulogy at the funeral. This bereavement was understandably very upsetting for the Claimant's family, and in particular for his partner.

Presenting the claim

31. The Claimant contacted ACAS to start the Early Conciliation (“EC”) process on 22.06.2023. The EC Cert was issued on 26.06.2023. Because the process was started after the primary period in which to present a claim had expired, the parties agreed that there is no extension for the EC period. That said, it was not possible for the Claimant to issue a claim between 22nd and 26th June.
32. The Claimant said that he had been aware of the existence of the Employment Tribunal from general knowledge. Although he had been aware of the possibility of being dismissed from October 2022, he did not think of a claim for himself at that time, due to the impact of his conditions and stressful events at home. He emphasised the impact of covid lockdowns on his family, mentioning that, with 3 children in the same school, his family were told to isolate at different periods when a child or teacher in one of their children's classes had covid. He says he was also optimistic that the Respondent would look upon his position favourably, taking into account the impact of the pandemic.
33. The Claimant said that he took legal advice a week or two before contacting ACAS on 22.06.2023. He says the occasion when he spoke to

his solicitors was the first time he had spoken to them. He says he didn't seek advice sooner because of the confusion over the date of the appeal, he'd appealed promptly and it had been accepted, then described getting a letter "*out of the blue*" telling him he had been awarded 50% compensation. He says he was very confused about the dismissal date being in March, when the appeal was in April.

34. The Claimant struck me as an honest witness, and indeed the contrary was not suggested in cross-examination. However, taking due account of the impact of his conditions and of the stressful circumstances in which he found himself, I have to find that he took an unreasonably optimistic approach to the position in which he found himself. Despite being aware from October that dismissal was an option, he told me that he did not discuss with his union rep the possibility of a claim to the tribunal. I accept his evidence on that. It is consistent with his evidence that he hoped his employer would look favourably upon his position, due to the pandemic.
35. That was honest evidence. But it was not reasonable behaviour. Dismissal as a very real possibility was on the cards from October, and clearly so. Not to have discussed the possibilities with his union rep was not the approach of a reasonable employee.
36. The Claimant's approach thereafter included believing that the effective date of termination would change. He was given no reason to believe that it would change. To hope for that to change, when there was no objective reason to think it would, was not reasonable.

Law and submissions

ERA

37. S98 provides as follows:

98.— General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental

quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

(6) Subsection (4) is subject to—

(a) sections 98A to 107 of this Act, and

(b) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

38. S111(1) and (2) provides as follows:

111.— Complaints to employment tribunal.

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(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—

(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.

...

Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 (“EOJO”)

39. Article 3 of EOJO provides that:

Proceedings may be brought before an [employment tribunal]¹ in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-

(a) *the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*

(b) *the claim is not one to which article 5 applies²; and*

(c) *the claim arises or is outstanding on the termination of the employee's employment.*

40. Article 7 of EOJO provides as follows:

² It was not contended that this was relevant.

Subject to article 8B³, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

(ba) where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

41. It was not in dispute that the claim was presented outside the period provided for by s111(2) and Art 7(a). In argument before me, this was referred to as the first limb. Mr Perry for the Respondent did not contend seriously that, if I found that it was not reasonably practicable to have presented the claim within that time limit, the second limb – whether it was presented within such further period as the Tribunal considers reasonable - could not be met by the Claimant. The contentious issue was, whether it was reasonably practicable to present the claim by 15.06.2022.

42. It is for the Claimant show that not reasonably practicable – see Porter v Bandridge Ltd⁴.

43. When looking at the time, attention should focus on the closing rather than early stages – see Schultz -v- Esso⁵ – but the parties did not contend that time even before dismissal was irrelevant and could not be considered.

44. The Respondent referred to Cygnets Behavioural Health Ltd v Britton⁶, in which Cavanagh J held that it had been perverse to accept as reasonable the ignorance of a severely dyslexic claimant suffering from mental health issues given that his ability to function in other respects (continuing to work, submitting an appeal against dismissal and engaging with his regulator) showed no evidence of his being unable to type a short sentence into a search engine and to seek information about unfair dismissal time limits, or to ask an acquaintance by email to search for that information' adding that 'it would be the work of a moment to ask somebody about time limits or to ask a search engine'.

45. The mere fact of an internal appeal does not justify a failure to present a claim in time – see Palmer & Saunders -v- Southend-on-Sea Borough

³ Dealing with the extension of the relevant period for EC.

⁴ [1978] 1 WLR 1145

⁵ [1999] ICR 1202

⁶ [2022] IRLR 906

Council⁷.

46. Mr Roberts for the Claimant referred me to Wall's Meat Co Ltd v Khan⁸, in which it was said that it would not be reasonably practicable to present a claim in time if there was "*some impediment which reasonably prevents, or interferes with, or inhibits*"⁹ the performance of the obligation in time.
47. Mr Roberts subjected the Cygnnet decision to criticism. He says that it was per incuriam, in that cases such as Marks and Spencer plc v Williams-Ryan¹⁰, Dedman v British Building and Engineering Appliances Ltd¹¹ and Lowri Beck Services Ltd v Brophy¹² had not been cited to it, and supported a liberal approach in favour of employees.
48. Mr Perry for the Respondent posed the question, what stopped the Claimant from presenting his claim in time? Mr Roberts contended forcefully that that formulation looked only at the "*prevent*", rather than "*interfere with*" or "*inhibit*" formulations in Wall's Meat -v- Khan.

EA

49. I was referred to s6 of the EA. As identified above, the only issue for me to determine on this was, whether or not the Claimant had the disputed conditions.

Conclusions on the issues

Time

50. With some regret, I find that it was reasonably practicable for the Claimant to have presented his claim in time.
51. The Claimant undoubtedly had a lot on his plate in the period between December 2022 and June 2023. I have little difficulty accepting that he and his family were in a difficult position. His conditions and the difficulties he and his family were experiencing in life could be said to constitute something of an interference with his ability to present his claim in time.
52. I am not satisfied that they prevented him from doing so. He was, despite everything going on in his life, able to engage in the disciplinary and appeal process. I do not blame him for prioritising other matters in life, but he was able to attend to employment-related matters.
53. I have said that the Claimant's circumstances did constitute something of an interference with his ability to present the claim in time. The question is, did they reasonably do so? Here, even with a liberal interpretation of the relevant test in the Claimant's favour, I have to find that they did not. He was aware of the existence of the tribunal. He was aware that he had

⁷ [1984] 1 WLR 1129

⁸ [1979] ICR 52

⁹ Per Brandon LJ

¹⁰ [2005] EWCA Civ 470, [2005] ICR 1293

¹¹ [1974] 1 WLR 171

¹² [2019] EWCA Civ 2490

been dismissed. He also had, for a time, Ms Hawkins' assistance. Although her involvement does not appear to have carried on beyond October, the Claimant did have access to a trade union rep at a time when he knew that dismissal was a possibility.

54. Even with everything else going on in his life, it would have been a simple matter to look into the tribunal and the time period for presenting a claim. That he did not do so was, I find, not reasonable. It is one thing to prioritise other matters in his life, quite another to ignore totally the possibility of a claim in respect of a dismissal that he knew was a possibility, and which then materialised. He did not have to prioritise his claim above the other pressing calls on his time, merely devote a small amount of time to looking into the time limit for pursuing a claim before a tribunal of whose existence he was aware.
55. The Claimant had taken an optimistic approach to matters from October, and that continued. He made assumptions favourable to his position, as to the likelihood of a benevolent attitude from the Respondent and the possibility of a change in his EDT, which were not reasonable.
56. If anything inhibited the Claimant from presenting his claim in time, it was that unreasonably optimistic approach.

Disability

57. In the light of my findings on the Claimant's conditions, and the Respondent's concessions, I find that the Claimant was disabled by reason of anxiety (including social anxiety disorder), depression, long covid, ADHD and OCD, at the time of the events about which he complains. The question of whether he was disabled by reason of dyspraxia will be determined at the final hearing.

Employment Judge Hughes

Date 31.05.2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

20th June 2024

FOR THE TRIBUNAL OFFICE