



EMPLOYMENT TRIBUNALS

Claimant: Mr A Malik

Respondent: BDO Services Limited

Heard at: London Central via CVP **On:** 26 February 2025

Before: Employment Judge Clark

Representation

Claimant: Mr T Malik - the claimant's father

Respondent: Mr A Carter - counsel

RESERVED JUDGMENT

1. The Tribunal does not have jurisdiction to hear the claimant's claims, which were presented out of time. It would not be just and equitable to extend time.

REASONS

1. This hearing was listed at a case management hearing on 13 November 2024 to consider the claimant's application for an extension of time as a preliminary issue under rule 53(1)(b) of the Employment Tribunal Procedure Rules 2024. There does not appear to be have been any change of circumstances since then to suggest that a different approach would be appropriate.
2. For the purposes of this hearing, the Tribunal took account of the contents of a joint bundle of documents running to 170 pages together with a list of issues which had been up-dated in light of the claimant's provision of further particulars of his claim. The bundle included medical evidence documenting the claimant's health following his resignation, as well as evidence connected to his new job role and the adjustments he needed for that. The claimant's resignation email and the internal reaction to it was also included, together with the respondent's document retention policy and a record of the claimant's sick leave whilst working for the respondent. The Tribunal also had regard to written witness statements from the claimant, his

father (Mr T Malik) and Ms H Lloyd, Employee Relations Manager at the respondent. All three were cross-examined on their evidence.

3. Aspects of the claimant's and his father's witness statements addressed contentious factual issues more relevant to a final hearing. The Tribunal explained to the parties that findings of fact would not be made in relation to these issues and that there was no need for cross-examination to address them.

Conduct of the Hearing

4. There were no significant technological problems during the hearing. Additional short breaks were timetabled to accommodate the claimant's health conditions at 10.50 and 11.30am. The Tribunal adjourned over lunch between Mr Carter's submissions on behalf of the respondent and Mr Malik's submission on behalf of his son. The claimant is a litigant to whom the Presidential Guidance on vulnerable witnesses applies. He found a couple of questions in cross-examination to be upsetting or insensitive in light of his conditions, in particular the suggestion that he was using reconstruction rather than his memory to give his evidence to the Tribunal. It was explained to him that Mr Carter was obliged to give him an opportunity to comment on suggestions or submissions that the respondent might later make. The claimant was given a break to consider his response and was advised that if he did not feel able to answer a particular question to inform the Tribunal. As it was, the claimant answered all the questions posed.

Issues

5. The Tribunal confines its consideration to the reason for the claimant's delay in presenting his claims for disability discrimination, unfair dismissal, unlawful deductions from wages and breach of contract (in relation to his notice pay) and the balance that is then required to decide whether time should be extended, in accordance with the legal tests set out below. The Tribunal has not been required to decide any question of continuing discrimination. The focus of this hearing has been exclusively on the effective date of termination of 15 September 2022. ACAS early conciliation started on 8 June 2024 and a certificate was issued on 12 June 2024. The claim form was presented on 16 June 2024, ie. around 18 months out of time in relation to the effective date of termination of the claimant's employment.

The Law

6. The relevant time limit for a claim for unfair dismissal is set out in section 111 of the Employment Rights Act 1996.

(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.”

7. The time limits for an unlawful deduction from wages or breach of contract claim are worded in the same way. The applicable time limits can be extended to reflect any delay caused by the parties’ engagement in early conciliation, however, these provisions do not apply where early conciliation was entered into after the primary time limit had already expired.
8. The meaning of the words “*reasonably practicable*” has been considered by the higher courts on a number of occasions primarily in relation to the three-month time limit for presenting an unfair dismissal claim. The resultant case law establishes principles which apply equally to claims for unlawful deductions from wages and breach of contract. The burden lies on the claimant to prove that it was not reasonably practicable for him to present a timely claim (*Porter v Bandridge Ltd [1978] 1 WLR 1145*). In *Palmer v Southend-on-Sea Borough Council [1984] 1 WLR 1129* the Court of Appeal held that the test equated to one of “reasonable feasibility” which fell somewhere between something which was physically possible at one end of the scale and pure reasonableness at the other.
9. In *Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10/DA* it was observed in relation to the second part of the test which involves determining what further period would be reasonable requires: “*an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted – having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months.*”
10. The substantive law concerning discrimination time limits is contained in section 123 of the Equality Act 2010. The relevant parts of the section provides that:
 - (1) “*Subject to sections 140(A) and 140B, proceedings on a complaint within section 120 may not be brought after the end of –*
 - (a) *the period of three months starting with the date of the act to which the complaint relates, or*
 - (b) *such other period as the employment tribunal thinks just and equitable.*
 - (2) ...
 - (3) *For the purposes of this section –*
 - (a) *conduct extending over a period is to be treated as done at the end of the period;”*
11. The “just and equitable” extension in section 123(1)(b) gives the Tribunal a broad discretion to extend time, albeit there is no presumption in favour of granting an extension. It falls to the claimant to prove that there are grounds to extend. The factors set out in section 33 of the Limitation Act 1980 are likely to be relevant to the exercise of the Tribunal’s discretion, but there may be other factors. The length and reason for the delay will clearly be relevant, as may be whether the claimant has had access to legal advice and what prejudice might be caused to either party by the grant or refusal of an extension.

Background

12. The respondent is a large firm which provides accountancy and business advisory services. The claimant was employed by it as a graduate trainee in audit/financial services from 1 March 2021 until 15 August 2022 when he resigned by email due to ill-health. He stated in his resignation that the “*extreme working requirement*” had impacted his health, that he had been working almost 20 hours a day including weekends to meet deadlines and had used his holidays as study leave as he was studying for accountancy exams. He expressed himself to be “*totally exhausted*”. Internal correspondence between the claimant’s manager and HR expressed surprise at the claimant’s resignation and the contents of his email. The hope was expressed that there was support the respondent could offer to make his work more manageable. As it happens, the claimant’s resignation was not withdrawn and the effective date of termination was 15 September 2022.
13. The claimant attributes a deterioration of his health to a covid booster injection he had in late December 2021. This prompted a visit to A&E with chest pains and caused him to take a day’s sick leave on 31 December 2021. The claimant explained that the early symptoms of the illness with which he was eventually diagnosed (Systemic Lupus Erythematosus, “SLE”) were subtle and he managed them with painkillers and continued with his work for the respondent without taking time off. He did not take any further sick leave until 8 August 2022, when he was signed off sick by his GP from 8 – 22 August 2022 with “*malaise and likely viral illness*”. This led to an admission to A&E and marked the start of a sustained period of serious ill health, in which the claimant was in and out of a number of hospitals throughout the autumn of 2022 with, at times, life-threatening symptoms. It must have been an extremely traumatic time, not just for the claimant, but also for those close to him. To compound this, the claimant also went through a divorce in the latter half of 2022. In early December 2022 the claimant was diagnosed with SLE and subsequently, PTSD and anxiety. These are the conditions on which he relies for his disability discrimination claims. He has also been diagnosed with Raynaud’s syndrome.
14. Following his SLE diagnosis in early December 2022, the claimant had to adjust to new treatments and their side effects in early 2023, added to which he was admitted to hospital from 28th March 2023 to 7th April 2023 with pneumonia. The claimant started a new job on 22 May 2023 for an NHS Trust. His medical chronology indicates that he had no hospital admissions between May and September 2023, when he was treated for a burn sustained when cooking and then had time off in November 2023 due to an infection. He was hospitalised in January/February 2023 and also in June 2024. He has regular on-going hospital appointments and blood tests connected to his health conditions. These appointments are both tiring and an additional source of stress.
15. In order to obtain his new job, the claimant had to make an online application, which he did with the help of his family, and also, pass an interview. He underwent an occupational health assessment before he started. The claimant says he has had a number of challenges associated with his new work, including difficulties in

achieving the adjustments he needed in his new role, but his employment is on-going.

16. In a medical report dated 13 January 2025, in support of his request for reasonable adjustments for this hearing, the claimant's GP, Dr Anwer, explained that the claimant's multiple hospital admissions and intensive treatment has had a "*profound effect on his mental and emotional well-being*" and he was diagnosed with PTSD following his prolonged hospitalisation in 2022. SLE means his immune system is compromised and he experiences joint pain, fatigue and skin rashes. He struggles to speak for extended periods, but is fit for work provided reasonable adjustments are put in place, including working from home.
17. The claimant explained in his witness statement that anxiety and PTSD mean that he can experience brain fog and difficulties with concentration and memory. He finds it difficult revisiting any traumatic experiences, including those experiences on which he relies as forming the subject matter of this claim and he is prone to migraines. Stressful situations can lead to a flare up of SLE, as was acknowledged in an OH report in his current role dated 16 July 2024.
18. The claimant accepts that he did not raise a written grievance with the respondent either about his working hours, pressure of work or requesting reasonable adjustments. He says that all his communications about his health during his employment were verbal. He was worried that his training contract might be compromised if he submitted a written grievance as he had been told that he had to pass his exams. The lack of any internal grievance during or after the claimant's employment means that there was no contemporaneous investigation of his subsequently stated concerns. This does make it more difficult for both parties to remember what was said and when, up to 3 years ago.
19. Ms Lloyd gave evidence on behalf of the respondent. Whilst she was not employed by the respondent when the claimant worked for them, she outlined the challenges the respondent would experience in defending the claimant's claim given the lack of documentation. A search of the respondent's computer systems has been conducted using the claimant's name. Apart from some limited HR records and the correspondence around the claimant's resignation, the respondent has no relevant documentation concerning the claimant's employment. Ms Lloyd explained that notes would not be taken of informal meetings between an employee and their manager. She had asked both the claimant's immediate line manager and the director to whom he reported and neither of them could remember the claimant's raising health concerns or making requests reasonable adjustments with them. Where an employee does request reasonable adjustments, they would generally do so to their manager, who would then contact HR. HR then arrange an assessment with the respondent's external occupational health provider (assuming the employee consented). This process would certainly generate documentation, but there was no such documentation in this case. The claimant does not positively assert that particular documentation exists – he no longer has access to his work emails and simply said, "*maybe there was and maybe there wasn't*" relevant email correspondence prior to his resignation email. He recalled that his main method of communication was either telephone calls, Teams or face to face.

20. In his evidence, the claimant accepted that he was aware that he had a potential claim to the Employment Tribunal in the spring of 2023, but he explained that he did not fully understand the extent of his potential disability discrimination claim. That became more apparent in the course of CBT treatment between March and June 2024. He was also concerned that his anxiety and SLE symptoms could be exacerbated by bringing a Tribunal claim and he did not want to revisit what he had experienced without medical help for his mental health conditions. This did not take place until 2024 when he had CBT.

Conclusions

21. In the three months following the termination of the claimant's employment in September 2022, he was seriously unwell – in and out of hospital, sometimes with life-threatening symptoms and without a diagnosis. The claimant's focus and energies in the autumn and early winter of 2022/2023 were, understandably, consumed by his health, even after his diagnosis with SLE in early December 2022. He then had to adjust to his diagnosis with a chronic illness and a new course of treatment. Even if there were times when the claimant was not sufficiently ill to be in hospital, the worry and uncertainties about his health, compounded by the emotional turmoil of his divorce, leads the Tribunal to conclude that it was not reasonably feasible for the claimant to have brought a claim to the Employment Tribunal by 14 December 2022 (the end of the primary time limit). It follows that it was not reasonably practicable for the claimant to have brought a timely claim. Had he submitted a claim which was marginally out of time (ie by a matter of weeks), the Tribunal would have little difficulty in finding that either he had brought a claim within a reasonable period of the expiry of the Employment Rights Act 1996 time limit, or that it was just and equitable to extend time for his discrimination claims. However, there was a further 18 months' delay before he presented his claim, so further consideration is needed of the reasons for that delay and its implications for a fair hearing.

22. At three months, the time limits for most claims to the Employment Tribunal are significantly shorter than for many other civil claims. In this context, the claimant's delay was substantial. The Tribunal reminds itself that it is in the public interest that Employment Tribunal claims are brought promptly so that evidence is preserved and memories are fresh.

23. The Tribunal is satisfied that the claimant was aware that he had the potential for a legal claim of some sort against the respondent at the time of his resignation. In evidence he explained that he knew he had a claim "*at the back of my mind*". Whilst he might not have known the nuts and bolts of his possible claim, he is a relatively sophisticated litigant as a graduate working in a professional environment. This means, subject to his ill health, he was capable of accessing sources of information online about employment rights and Employment Tribunal time limits.

24. As someone with chronic health conditions, the Tribunal accepts that the claimant's ability to undertake additional administrative or legal tasks was inhibited, particularly given he experiences symptoms of fatigue and anxiety, the latter of

which increases the risks of a deterioration in his physical health. He has to juggle regular medical appointments, which are both time consuming and a source of anxiety. However, he was able, with the help of family members, to obtain alternative employment in May 2023. The claimant has maintained that employment, albeit with some challenges in terms of getting the right reasonable adjustments both in relation to his workload and so that he is not exposed to infections. He has had some periods of hospitalisation since April 2023, but, as Mr Carter submitted, a period between late April 2023 and mid-September 2023 with no in-patient admissions.

25. The claimant points out that he will have had regular outpatient appointments throughout and still needed to manage his symptoms. The Tribunal accepts this and nothing in these reasons should be read as minimising the health challenges the claimant has had and is still experiencing. At the same time, from the spring of 2023, the claimant's health does not appear to have been in the relentlessly critical state it was in late 2022. It is accepted that conducting legal proceedings, even with assistance, can be stressful and having additional strategies to deal with stress through CBT will have been helpful to the claimant. However, the medical evidence does not suggest that the claimant would have been incapable of starting legal proceedings prior to undergoing CBT or that the CBT recovered memories he had suppressed. Bearing in mind the time limit is three months from the relevant act, the Tribunal considers that an application by the claimant would have been reasonably practicable from the spring of 2023 at the point where he was fit for work with reasonable adjustments. Whilst it is acknowledged that the claimant's physical and mental health presented challenges to him throughout 2023, the medical evidence provided does not suggest that he was incapable of starting or conducting litigation. As such, the Tribunal is not satisfied that a claim presented on 16 June 2024 was presented within a reasonable time after the expiry of the primary time limit. It follows that the Tribunal does not have jurisdiction to hear the claimant's claims for unfair dismissal, unlawful deduction from wages or breach of contract.
26. The fact that it might have been reasonably practicable to bring a claim in 2023 is not determinative of the claimant's application for an extension of time to bring his disability discrimination claim, albeit the reasons for the delay are something to weight in the overall balance. The just and equitable test is more nuanced than that of reasonable practicability and involves balancing the parties' respective interests together with the public interest in the proper administration of justice. Refusing the claimant's application to extend time denies him the opportunity to have his grievance publicly aired and determined. It potentially deprives him of the ability to obtain compensation and vindication. That is an obvious prejudice to the claimant.
27. The effect of the delay in bringing a claim is that memories fade and neither party can give their best evidence. This can be mitigated by the existence of documentary evidence. As the claimant acknowledged in his oral evidence, he has been able to provide a much more detailed chronological account of events between August 2022 and June 2024 in his witness statement than on his claim form with the assistance of his medical records. This was in response to Mr Carter's suggestion that the claimant was reconstructing events as best he could

rather than relying on his memory. Reference to documentation is a perfectly legitimate way to supplement or prompt memory. In this case, there is almost no documentary evidence and this provides a significant difficulty for both parties in recalling events which took place between January and August of 2022.

28. The respondent has conducted a search of its email system for documents relating to the claimant and nothing has been returned. One of the respondent's communication tools was Microsoft Teams and all those messages are routinely deleted after 90 days. Whilst HR records are kept for 8 years, Ms Lloyd explained that there were limited documents retained in relation to the claimant and certainly no documents suggesting that he had informed the respondent that he was struggling with his health. His sickness record was retained, which reveals one day of sickness absence on 31 December 2021 and then his absence from work at the time he resigned (8th August and 10 – 12th August 2022) with a GP's fit note attributing his absence to "*malaise and likely viral illness*".
29. The respondent's potential witnesses, who would be the claimant's two line managers and the HR Manager at the time do not recall the claimant having informed them that he was struggling with his mental or physical health or that they noticed anything to suggest that he might be. Whilst the claimant's father criticised the absence of notes taken during informal meetings, Ms Lloyd's evidence setting out the lack of documentation was not challenged. The Tribunal asked the claimant whether he was suggesting that written records or emails existed, but he simply did not know. If the claimant is not asserting that there should be specific records of, say, a request for adjustments or his informing the respondent of a health concern and the respondent asserts they do not exist, the Tribunal is bound to proceed on the basis that there are no relevant written records. This means that both the claimant and the respondent's witnesses have to rely exclusively on their memories of events up to three years ago.
30. Whether due to the passage of time or otherwise, the claimant has not yet been able to identify when he verbally informed the respondent that he was struggling with his mental or physical health prior to his sickness absence in August 2022 or when he requested adjustments to his work. It is now nine months since the claim was presented and the claimant's further particulars simply allege that he "*spoke to manager [sic] on several occasions.*" This lack of detail is perhaps understandable given the passage of time and the traumatic ill health of the claimant, nonetheless, it causes a particular prejudice to the respondent. Any individual managers will have been dealing with a number of employees and their challenges over the past three years, so having no details to jog their memories puts them at a real disadvantage. A claimant generally has a better chance of remembering things related to their work, since they would have been uniquely relevant and important to them as individuals.
31. There is nothing which the respondent has done following the claimant's resignation which has contributed to the delay in the claim being presented. The internal correspondence in the bundle suggests that the respondent's immediate reaction to the claimant's resignation was surprise and to see if there was support which could be offered to him, which might lead to his remaining at the respondent. Equally, there can be no criticism of the claimant for failing to submit a written

grievance. It is not uncommon for employees to be fearful of doing so and he was clearly too ill to contemplate this in August 2022 at the time of his resignation and in the immediate aftermath.

32. The claimant's case relies on his being able to prove that the respondent knew or ought to have known that he was disabled whilst working for the respondent from in or about January 2022 to August 2022. On the claimant's own case his symptoms of SLE were subtle during his employment, so findings of fact about what the claimant told his managers will be key. The claimant has not been able to identify what was said, to whom and when and there are no contemporaneous documents which might help either him or his managers to refresh their memories. This is a direct consequence of the length of the delay in the presentation of the claimant's claim. In these circumstances, it is very difficult to see that a fair trial can be possible to the respondent. Whilst there were cogent reasons for the claimant's delay in presenting his claim and, particularly so, in the first four or five months following the termination of his employment, the Tribunal is satisfied that it would not be just and equitable to grant such a long extension of time to permit his disability discrimination claim to proceed. The cogency of the evidence has been so damaged by the delay that a fair trial is no longer possible.

Employment Judge

26 February 2025
Date _____

JUDGMENT SENT TO THE PARTIES ON

20 March 2025
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FOR THE TRIBUNAL OFFICE