

# THE INDUSTRIAL TRIBUNALS

CASE REF: 1095/19IT

**CLAIMANT:** Tony Litter

**RESPONDENTS:** JMC Mechanical and Construction Limited

## DECISION ON A PRE-HEARING REVIEW

The decision of the Tribunal (Employment Judge Sitting Alone) is that the claimant's claims are dismissed in their entirety.

**Constitution of Tribunal:**

**Employment Judge (sitting alone):** Employment Judge Knight

**Appearances:**

**The claimant was represented by Ms Nuala McMahon, Ulster University Law Clinic.**

**The respondent was represented by Mr Sean Doherty Barrister-at-Law instructed by J Blair Employment Law Solicitors.**

### Issues

1. This Pre-Hearing Review was arranged to determine the following issues:

(1) Whether the claimant's complaints in respect of

- (a) Unfair dismissal;
- (b) Notice pay;
- (c) Holiday pay; and
- (d) Breach of Contract

have been presented within the statutory time limits?

(2) If not, whether it is reasonably practicable for the complaints to have been presented within the statutory time limits?

(3) If not, whether the complaints were presented within a reasonable period thereafter.

(4) Whether the claimant's complaint in respect of disability discrimination was presented within the statutory time limit?

(5) If not, whether it is nevertheless just and equitable for the Tribunal to hear and determine the claimant's complaint in respect of disability discrimination notwithstanding that it was presented outside the statutory time limit?

(6) Whether the claimant's contract of employment was terminated by operation of

law by way of frustration?

(7) If so, on what date did the termination take place?

## Evidence

2. The tribunal considered the oral evidence of the claimant and documents, including medical records in an agreed hearing bundle.

## Law

### Time Limits for presenting the Claim

3. The statutory provisions relating to the time limits for presenting a claim of unfair dismissal, notice pay, holiday pay and breach of contract are expressed in similar terms to the effect that an industrial tribunal shall not consider a complaint 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.
4. In order to persuade the tribunal to exercise its discretion to extend the statutory time limit, the claimant must first show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the claimant (**Porter v Bandridge Ltd [1978] IRLR 271, [1978] ICR 943, CA**). If he succeeds in doing so, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable. The test as to whether it was possible to present an originating claim within the statutory time limit is one of “reasonable feasibility”. (**Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945, [1984] IRLR 119.**)
5. The time limit for presenting a claim under the DDA is contained in *Paragraph 3 of Schedule 3 to the DDA* which provides that:
  - (1) *An employment tribunal shall not consider a complaint under section 17A or 25(8)] unless it is presented before the end of the period of three months beginning when the act complained of was done.*
  - (2) *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.*
6. Exercising the discretion to extend time limits in discrimination cases requires consideration of the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain

appropriate professional advice once he or she knew of the possibility of taking action. (***British Coal Corp v Keeble* [1997] IRLR 336.**)

## Frustration

7. Where a contract is frustrated, the contract is terminated by operation of law, without there being a dismissal within the meaning of Article 126 of the Employment Rights (Northern Ireland) Order 1996 as amended. In cases of illness, the essential question is whether the employee's illness has rendered the performance of the contract impossible or substantially different from that which the parties contemplated. The frustrating event must not be the fault of the person seeking to rely upon it. Frustration frequently arises in the context of a long-term illness. An industrial tribunal considering frustration by sickness should consider factors such as:
  - (a) the terms of the contract generally, and in particular as to sick pay;
  - (b) how long the employment was likely to last in the absence of the sickness;
  - (c) the nature of the employment;
  - (d) the nature of the incapacity;
  - (e) the prospects of recovery;
  - (f) the period of past service;
  - (g) the need of the employer to get the work done;
  - (h) the need of the employer to get a replacement;
  - (i) the risk of the employer becoming responsible to a replacement for redundancy or unfair dismissal rights;
  - (j) whether the employer could reasonably be expected to wait any longer (see ***Egg Stores Ltd v Leibovici* [1977] ICR 260**);
  - (k) whether wages had continued to be paid; and
  - (l) the acts and any statements by the employer as to the contract – in particular whether the employer dismissed the employee by words or deeds (***Marshall v Harland & Wolff Ltd* [1972] ICR 101** and ***Williams v Watsons Luxury Coaches Ltd* [1990] ICR 536**).
8. It is not necessary for the tribunal to be able to point to a precise moment in time when the contract of employment ended. The **Egg Stores case** is authority for the proposition that the whole point of frustration is that the contract terminates automatically and the employer need take no steps to end it.
9. The issue of frustration must be considered in the context of the DDA. The EAT held in ***Warner v Armfield Retail and Leisure Ltd* (UKEAT/376/12), [2014] ICR 239**, that in an unfair dismissal case where disability discrimination was also in issue, before the doctrine of frustration can apply, the tribunal must first consider whether the employer is in breach of its duty to make reasonable adjustments. The employer is subject to the law of unfair dismissal and disability discrimination provisions, but there can be no claim for wages, including holiday pay after the contract has ended.

## Facts

10. The claimant commenced employment on 26 January 2004 with the respondent as a plumber. He was a foreman managing a team. This was a physically demanding role and which also involved measuring and pricing "jobs". Unfortunately, the

claimant was incapacitated by a stroke in January 2011 and was no longer physically able to carry out his duties. The claimant informed Mr James McCully, the Managing Director of the respondent company, who visited him in hospital that he would be “unable to work for a while” Following his stroke, the claimant was diagnosed with other serious illnesses including haemochromatosis, cancer, depression, and had to have a hip replacement operation. In addition to his physical incapacity the medical records show that the claimant suffers from chronic insomnia, considerable stress, with poor concentration and has feelings of being “tired all the time”.

11. The claimant did not have written terms and conditions of employment. He was however paid contractual sick pay for the first six months of his sickness absence and thereafter statutory sick pay (“SSP”) from April until September 2011. When his SSP entitlement ran out, he was awarded Employment and Support Allowance in the support group. In March 2012 the Social Security Agency wrote to the claimant’s GP advising that he had been assessed as having “limited or no capability for work”. Around about this time the claimant ceased to submit “sick lines” to the respondent. From 9 September 2011 until April 2013, the claimant remained on the respondent’s payroll but received no pay.
12. HMRC confirmed it was notified that the claimant’s employment with the respondent ceased on 12 April 2013. The claimant did not receive a P45 at that date. The claimant’s Inland Revenue records show that he moved to his current address on 1 November 2011 and it was suggested for the respondent that correspondence about the termination date was possibly sent to his former address and therefore did not reach the claimant. Due to the passage of time the respondent has scant records relating to the claimant’s employment
13. The claimant’s hospital records show that at attendances on 19 February 2013 and 13 February 2015 the claimant described himself as being “unemployed”. I did not find plausible the claimant’s explanation that that by this he intended to convey that he was still employed but on sick leave. At the PHR the claimant accepted that by the latter occasion, he knew that he would never return to work in any capacity. I am satisfied that the claimant’s description of himself as “unemployed” reflects his actual understanding at the time of what was his employment status. He did not seek any advice about his employment rights at this time.
14. The claimant was in contact sporadically with Mr McCully between January 2011 and September 2018 and they were on good terms. When they met the claimant informed Mr McCully that he was not well enough to return to work and indeed that he might not work in any capacity again. He did not suggest at any time the possibility of returning with reasonable adjustments. He did not raise any other issues such as outstanding holiday pay. The respondent did not arrange for the claimant to have an occupational health assessment. It appears that Mr McCully accepted at face value the claimant’s representations about his health and capabilities and that he could not do his job. The claimant accepted in cross examination that he could not and still is unable to perform his duties as a plumber but suggested that he might have been able to do some price work in the office. He did not raise this as a possibility with Mr McCully at any time. In any event I do not

accept that this would have been a realistic proposition given the claimant's own evidence of the physical and mental impact his medical conditions upon him up until the present date. He did not mention in his evidence at the PHR any other possible adjustments that could have been made for him. Furthermore, the claimant told me that he remains completely unfit to work even at the present date due to his lasting and ongoing poor health and has not considered any alternative employment since 2013.

15. Around September 2018, a former colleague told the claimant he had been made redundant and had received redundancy payment from the respondent. The claimant felt "wound up" by this conversation, which triggered him to use this as an opportunity to enquire with Mr McCully if he was "entitled to anything," by which he meant a redundancy payment (even though clearly he had not been made redundant). Mr McCully apparently told the claimant to leave it with him but on receiving no further communication, the claimant sought advice from the Labour Relations Agency. He then wrote to Mr McCully on 23 October 2018 purporting to raise a formal grievance in which he sought clarification of his employment status, a copy of his employment contract and claimed holiday pay for the previous 8-year period.
16. The respondent wrote back that an investigation would be conducted into the matters raised but that preliminary findings indicated that the claimant's leaving date with the company was 12 April 2013. The claimant wrote to the respondent again 13 November 2018 again seeking a response to the matters raised in his first letter but did not receive a response. He made an enquiry with HMRC who advised him as stated above at paragraph 12 above. The P45 in the hearing bundle was not issued until 26 October 2018, albeit stating the leaving date to be 12 April 2013. I did not accept the claimant's evidence that it was a complete shock to learn that his employment had come to an end. The claimant did not seek legal or other employment law advice after receiving this information from HMRC.
17. The claimant lodged his originating claim form with the Office of the Industrial Tribunals and the Fair Employment Tribunal on 22 December 2018 in which he made complaints of unfair dismissal and for notice pay, holiday pay and breach of contract and direct disability discrimination and disability discrimination by way of failure to make reasonable adjustments. The claimant contends that the respondent terminated his employment on 12 April 2013 but he was unaware of this as at the time as he did not receive his P45. It was therefore not possible for him to lodge his claims with the tribunal within the statutory time limits.
18. The respondent, in its Response Form dated 12 February 2019, disputes that the claimant was dismissed by the respondent but contends that the employment contract ended on 12 April 2013 by the operation of the law of frustration by reason of the claimant's inability to perform the contract of employment due to his ill health. In the alternative it asserted that the claims are statute barred having been brought outside the relevant statutory time limits.

## **Conclusions**

19. In the present case it is accepted that the claimant had and still has limited or no capability for any kind of work. From 2011 when he had his stroke, the claimant's medical conditions rendered performance of his employment contract impossible. This remains the case at the date of this Pre-Hearing Review. The claimant's medical conditions amount to a disability within the meaning of the DDA and therefore a duty would have arisen for the respondent to consider the need to make reasonable adjustments. The purpose of an adjustment is to take away or minimise the disadvantage because of the person's disability so they can do their job. I am satisfied on the above facts that it is most unlikely that any adjustments could have been made for the claimant which would have enabled him to do his job or indeed carry out any alternative role. Further, if the claimant had genuinely believed that adjustments could have been made for him, he would have explored these with the respondent prior to February 2013. This was not raised as an issue by the claimant until he lodged his originating claim to the Industrial Tribunal. Therefore, in my view it cannot be argued that there has been a failure to make reasonable adjustments.
20. I therefore conclude, on a balance of probabilities, in the present case the contract of employment came to an end by operation of the doctrine of frustration, through no fault of either party at some point in a period of a few months ending no later than 12 April 2013. This is consistent with the claimant's own description of himself being unemployed on 13 February 2013 even though he had not received his P45. It was therefore not unreasonable in all the circumstances above, for the employer to have treated the employment as having ended on 12 April 2013. For the purposes of this decision the termination date will be deemed to be the latter date.
21. As he was not dismissed by the respondent, the claimant cannot pursue his claims for unfair dismissal, notice pay, or direct disability discrimination and failure to make reasonable adjustments and these are accordingly dismissed.
22. Holiday pay ceased to accrue to the claimant upon the termination of his employment. Therefore, any claim for holiday pay would be limited to unpaid sums alleged to be outstanding at the date of termination. I determine that this claim should have been presented within three months from 12 April 2013. The claimant already regarded himself as being employed by that date. The claims for holiday pay/breach of contract have not been presented within the three-month statutory time limit. The claimant did not seek any legal advice at the time and therefore has not discharged the burden of showing that it was not reasonably feasible for him to present the claim within that time limit. The claim for holiday pay/breach of contract is therefore also dismissed.

**Employment Judge:**

**Date and place of hearing: 23 May 2019**

**Date decision recorded in register and issued to parties:**