



EMPLOYMENT TRIBUNALS

Claimant: Mr I Mangumba

Respondent: Asda Stores Limited

Heard at: Leicester **On:** Friday 27 January 2017

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimant: Mr G Nyamhondoro, Lay Representative

Respondent: Miss A Hextell, Solicitor

JUDGMENT

The Employment Judge gave judgment as follows:-

1. The Tribunal does not have jurisdiction to hear the complaint of unfair dismissal. It is dismissed.
2. The Tribunal does not have jurisdiction to hear the claim of disability discrimination. The claim is dismissed.

REASONS

Background and Issues

1. The Claimant presented his claim to the Tribunal on 10 June 2016. He had been employed by the Respondent as a Warehouse Operative from 21 July 2003 to 18 September 2015. The Claimant had made his early conciliation notification to ACAS on 11 May 2016 and they had issued the certificate on the same day.

2. The Respondent's had filed their ET3 on 28 July 2016. They pointed out that the Tribunal did not have jurisdiction to hear the complaints as they were out of time.

3. They submitted:-

3.1 The Claimant did not have sufficient grounds to show that it was not "reasonably practicable" to bring the unfair dismissal claim in time, and;

3.2 It would not be just and equitable pursuant to Section 123 of the Equality Act 2010 to allow the Claimant to bring the discrimination claim out of time.

4. My colleague Employment Judge Ahmed conducted a closed telephone Preliminary Hearing on 14 September 2016. He identified that the Claimant relied upon a mental impairment as the relevant disability and that it was accepted by the Respondent that the Claimant suffered an episode of what it calls "transient, psychotic disorder" back in 2010.

5. At that hearing the Claimant, via his lay representative, said that it was not reasonably practicable to present the claim in time because he had been sectioned under the Mental Health Act between 12 April and 8 June 2016. No medical evidence had been supplied in support of the contention. Employment Judge Ahmed pointed out that on the face of it that would be irrelevant in any case as the claim was already out of time.

6. The Claimant was asked to provide a witness statement setting out the circumstances of the delay and explaining why the Tribunal should have jurisdiction to hear the claim. It was pointed out that we would need medical evidence which should be disclosed prior to the hearing.

7. The Claimant accepts that both the claims are out of time. He should have contacted ACAS by 17 December 2016 for the claim to be in time and then submitted his claim within a month of the issue of that certificate.

8. I had to determine:-

8.1 In respect of the unfair dismissal claim, whether it was reasonably practicable for the Claimant to present the claim within 3 months and if it was not, was it presented within such further period that was reasonable.

8.2 In respect of the disability discrimination claim, whether it would be just and equitable to extend time.

Evidence

9. I heard evidence from the Claimant who gave a witness statement containing his explanation for not filing his claims in time and also an impact statement. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle.

Facts

10. The Claimant was employed as a Warehouse Operative by the Respondent from 21 July 2003 to 18 September 2015. The Respondent's accept the Claimant suffers from a mental impairment. As described in the records from his doctor (page 90) he suffered:-

- An acute transient psychotic disorder on 7 July 2010
- A single manic episode in full remission on 17 April 2013
- A single manic episode in full remission on 20 July 2015

11. As described by the Claimant he has been sectioned on two occasions and spent six months in Bradgate Mental Unit in Leicester from 22 April 2010 to 14 October 2010 and then again from 13 April 2016 to 8 June 2016.

12. The Claimant had attended a disciplinary hearing on 18 September 2015 and the Claimant was informed that given that the Respondent believed him to be guilty of having unacceptable levels of down time/unexplained gaps in his time and performance records, and given his live warning for misconduct, his employment was terminated on that date with pay in lieu of notice. He was informed of his right of appeal.

13. He exercised his right of appeal on 25 September 2015 (page 83D). The Claimant made no mention in the appeal letter of any mental impairment.

14. The Claimant received the confirmation of the outcome of the disciplinary hearing on 16 October 2015 (pages 83E-F). It can be seen that in the disciplinary hearing the Claimant made no reference to any issues with regard to his mental impairment at that time.

15. The Claimant then attended an appeal hearing on 22 October 2015. The notes of the hearing are at pages 83G-U. I have read the notes of that hearing and it can be seen that the Claimant fully participated in that hearing. Mr Gravestock conducted the appeal and adjourned the hearing and then tried to discuss the matter with the Claimant on a number of occasions through October and November 2015. No reference was made by the Claimant to any mental impairment that was preventing him from contacting Mr Gravestock and he wrote to the Claimant on 24 November 2015 to inform him that he had decided to make the decision without further discussion. Mr Gravestock wrote to the Claimant on 20 December setting out the outcome of the appeal hearing and confirming that the dismissal would be upheld.

16. Mr Mangumba described to me how his mental health had deteriorated after his dismissal but he has produced no medical evidence to support that contention. Furthermore on 2 December 2015 he flew to Zimbabwe via South Africa and told me that he had visited a preacher there. He had been able to make the travel arrangements with the help of his sister who he lives with and returned to the United Kingdom on 27 December 2015.

17. On his return he contacted Mr Gravestock again by e-mail on 5 January 2016 (page 85). The letter says:

“Good afternoon Matt

As you were aware I have been away to Africa for a few weeks, I just arrived last week. I have received a letter with your decision. Unfortunately I need more time to gather evidence of the call that I made to Jane Davis which she is denying, unfortunately my network provider are still working on issuing me this information which I feel is crucial to this matter. I will send my letter of appeal ASAP while I am waiting for this information. The delay is beyond my control. Hope to receive the information as soon as possible.

Regards

Innocent Mangumba.”

18. There is no mention in the above letter of any mental impairment that he was suffering from at that time which would explain the delay in him contacting Mr Gravestock, presenting a claim to the Employment Tribunal or contacting ACAS.

19. Apart from living with his sister, the Claimant also has two cousins who live close by. He does have family support.

20. On 12 April 2016 the Claimant was hospitalised with a broken ankle after he had tried to commit suicide. As described above he was sectioned under the Mental Health Act at this time. He described that whilst he was in hospital, he discussed his situation with a nurse who encouraged him to do something about what he regarded as his unfair treatment. He finally contacted ACAS on 11 May 2016 whilst he was sectioned and they issued their certificate on the same day.

21. He subsequently presented his ET1 finally on 10 June 2016.

The Law

Unfair Dismissal Claim

22. Section 111(2) of the Employment Rights Act 1996 (“ERA”) provides that an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented to the Tribunal:-

“(1) Before the end of the period of 3 months beginning with the effective date of termination; or

(2) 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 3 months.”

23. The burden of proof in showing that it was not reasonably practicable rests with the Claimant. Ms Hextell referred me to a number of cases, namely:-

- **Palmer and Another v Southend-on-Sea Borough Council** [1984] 1 All ER 945
- **Singh v Post Office** [1973] ICR 437
- **Porta v Bambridge Limited** [1978] IRLR 271

Disability Discrimination Claim

24. Section 123(1) of the Equality Act 2010 provides that:-

“(1) Proceedings on a complaint within Section 120 may not be brought after the end of:-

(a) The period of 3 months starting with a date of the act to which the complaints relates; or

(b) Such other period as the Employment Tribunal thinks just and equitable.”

25. I was referred by Ms Hextell to the following cases:-

- **Robertson v Bexley Community Centre** [2003] EWCA civ 576
- **De Souza v Manpower UK Limited** UK EAT/0234/12/LA

26. There is no presumption that time should be extended. The Tribunal should not extend time unless the Claimant can convince them that it is just and equitable to do so. The Claimant therefore has to provide a persuasive and/or compelling reason as to why the “normal” rules should not apply in his case so as to extend the time limit so that I have jurisdiction to hear his claims.

My Conclusions

Unfair Dismissal Claim

27. I am satisfied that the Claimant’s claim of unfair dismissal should have been presented by 17 December 2015 unless early conciliation was entered into by that date to “stop the clock”. The ACAS early conciliation certificate shows that it commenced on 11 May 2016 and the claim form was received by the Tribunal only on 10 June 2016.

28. As the claim was brought outside the period of 3 months beginning with the effective date of termination, the only question for me was whether it was reasonably practicable for the Claimant to have submitted his claim in time.

29. I am satisfied that the Claimant has had a history of suffering mental breakdowns and had suffered an episode prior to his dismissal and he suffered a further breakdown on 13 April 2016 when he tried to commit suicide. The period of his incapacity between 13 April and 8 June 2016 is irrelevant because he was already out of time. However I note that it was during this period of incapacity that he entered into the early conciliation and presented his claim immediately after it.

30. There is no evidence at all to support his contention that his mental health deteriorated following his dismissal on 18 September 2015 such that he lacked capacity to bring his Tribunal claim. He did not consult his doctor during this period. He also lodged an appeal and attended a disciplinary appeal hearing. Further he made arrangements and flew to Zimbabwe via South Africa on 2 December 2016, only returning on 27 December.

31. All the Claimant needed to do during this period was to notify ACAS of his intention to bring a claim and I am satisfied that there is no reason why he could not have contacted ACAS or indeed presented an ET1 during the relevant time period.

32. There is no evidence that the Claimant was not aware of the correct time scales within which to lodge his claim. He lives with his sister who does not suffer from any mental incapacity and has two cousins who also live in the locality. There is no reason explained to me as to why he could not have done what was necessary to bring a claim for unfair dismissal within the appropriate time period. I am satisfied that the Claimant has not established that it was not reasonably practicable to commence the early conciliation and bring his claim by 17 December 2015.

33. I am satisfied therefore that I do not have jurisdiction to hear the claim of unfair dismissal and it is dismissed.

Disability Discrimination Claim

34. I am satisfied that in the circumstances of this case but it would not be just and equitable to extend the time to allow him to bring a claim because:-

34.1 There is no evidence to suggest that the Claimant was suffering from a mental incapacity between 18 September and 17 December 2015 which did not enable him to present his claim or contact ACAS.

34.2 During that period he pursued his appeal.

34.3 He travelled to Zimbabwe on 2 December and made arrangement for that trip with the help of his sister.

34.4 He was able to file his ACAS early conciliation notification in May when he had been sectioned under the Mental Health Act so there is no reason why he could not have contacted ACAS earlier. It is a straightforward matter for him to do.

34.5. Whilst he was admitted to hospital on 13 April 2016 it was already four months after the time limit for presenting his claim had expired.

34.6 Whilst the Claimant seeks to rely on a case of **Higgins v Home Office and Another** UK EAT/0296/14/LA, I am satisfied that that case is irrelevant. It related to the rejection by the Tribunal of a claim and did not deal with the jurisdiction of a Tribunal dealing with a claim of disability discrimination as I am dealing with.

35. I am satisfied there is no good reason why in this case the Claimant should not have been able to present his claim in time.

36. I am also satisfied that if I allowed this claim to proceed, there would be prejudice to the Respondent. The claim is not just out of time. The matters that he is complaining of occurred some 16 months ago now and there would be significant prejudice to the Respondent's in allowing the Claimant to pursue this claim out of time.

37. In all the circumstances I am satisfied that it would not be just and equitable to extend the time to present his claim of disability discrimination. I therefore do not have jurisdiction to hear that claim and it is dismissed.

Employment Judge Hutchinson

Date 8 February 2017

JUDGMENT SENT TO THE PARTIES ON

13 February 2017

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FOR THE TRIBUNAL OFFICE