



EMPLOYMENT TRIBUNALS

Claimant: Mr S Slater

Respondent: Jaguar Land Rover Limited

Heard at: Manchester

On: 10 January 2020

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Mr J Searle, Counsel

Respondent: Ms R Kight, Counsel

JUDGMENT

1. The date of termination of the claimant's employment for the purposes of time limits in all the complaints brought in these proceedings was 11 December 2018.
2. The complaints of unfair dismissal and of breach of contract in relation to notice pay were presented outside the time limits specified in section 111 Employment Rights Act 1996 and Article 7 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 respectively when it was reasonably practicable for them to have been presented within time. Those claims are dismissed.
3. The complaints brought pursuant to the Equality Act 2010 were presented outside the period specified by section 123(1)(a), and they were not brought within such other period as the Employment Tribunal thinks just and equitable under section 123(1)(b). Those claims are also dismissed, and the proceedings are at an end.

REASONS

Part One: Introduction

1. Having undergone early conciliation between 1 April and 1 May 2019, the claimant presented his claim form on 13 June 2019. He brought complaints of unfair dismissal and of breach of contract in relation to notice pay arising out of his dismissal from his post as a Group Leader due to long term sickness absence. He also brought a number of complaints of disability discrimination about the way he had been treated, relying on the disabling conditions of depression and inflammatory bowel disease. In summary, his case was that the respondent had discriminated against him and treated him unfairly by insisting that he have contact with Occupational Health and management during a period of absence from April 2018, despite medical advice from his doctors that such contact was making him more ill.
2. The claim form asserted that the dismissal took effect on 15 March 2019 when a letter of dismissal dated December 2018 was emailed to him.
3. The response form was filed out of time on 27 August 2019, but subsequently time was extended by Employment Judge T V Ryan, and it was accepted. The salient point for present purposes was that it asserted that the effective date of termination was 11 December 2018 when the letter of dismissal had been delivered by hand to the claimant's home address. The response form asserted that all the complaints were brought out of time.
4. Employment Judge Ryan considered matters at a preliminary hearing on 13 September 2019. This hearing was arranged to decide the effective date of termination, to deal with any consequent applications for an extension of time, and thereafter to deal with case management matters should they arise. It was also intended to determine whether the claimant had been a disabled person, but that was conceded by the respondent before the hearing.
5. At the hearing I had the benefit of an agreed bundle of documents running to just over 100 pages. Any reference to page numbers in these Reasons is a reference to that bundle unless otherwise indicated.
6. I heard evidence on oath from Mr Slater and from the respondent's Human Resources Case Management Adviser, Ashleigh Peterson, both of whom had provided a written statement in advance. I also had the benefit of a signed statement from the claimant's wife, Rachael Slater, which was accompanied by copies of some text messages. I was informed that the need for evidence from Mrs Slater had only arisen because it was apparent to the claimant from Ms Peterson's statement that she was saying she had delivered the relevant letter at 7.00pm on the evening in question, and Mrs Slater's statement addressed this. It did, however, offer some additional information as well. She was unable to attend because she works as a teacher and could not get time off at short notice.

7. Having heard the evidence, I had the benefit of oral submissions from counsel, firstly in relation to the effective date of termination, and then in relation to the applications for an extension of time.

Part Two: Effective Date of Termination

The Issue

8. It was agreed between the representatives that the effective date of termination and the date upon which any discriminatory dismissal took effect would be the same date: the date upon which the claimant was notified that his employment had ended, or the date on which he had a reasonable opportunity of finding that out. It was also common ground that any questions of time limits about whether there had been a continuing act in the discrimination complaints were to be left to the final hearing if the claim were to proceed. I was therefore concerned only with time limits running from the last allegedly discriminatory act, the dismissal.

9. There was also no dispute about the legal framework applicable to identifying the effective date of termination whether for the purposes of section 96(1)(a) Employment Rights Act 1996 for the unfair dismissal complaint, common law for the breach of contract claim, and for the purposes of identifying the discriminatory act under the Equality Act 2010. Mr Searle accepted that if the letter had been delivered through the claimant's letterbox on the evening of 11 December 2018, that would be effective to terminate his contract from that day. The issue between the parties was simply a factual dispute about whether the letter had been delivered or not.

Findings of Fact

10. The claimant was off work continuously from April 2018, initially certified unfit for work due to depression. Throughout the rest of 2018 and early 2019 he saw his General Practitioner regularly. The symptoms of depression were severe. A fit note in April 2018 (page 48) recorded that his medication had been stepped up. A letter from his GP of 8 May 2018 recorded a "major dip in his depression illness" and that he was "very vulnerable". Assistance was sought from Mental Health Services. On 5 June 2018 the GP wrote that the claimant had "got very much worse recently" and that his antidepressant therapy was being upgraded.

11. In September 2018 a diagnosis of fibromyalgia was confirmed which was impacting significantly on his mental health. By correspondence of 9 November 2018 a Senior Nurse Practitioner from Secondary Mental Health Services confirmed that the claimant had been under their care since 3 September 2018, and had been referred for home support due to concerns regarding further deterioration in his mental health.

12. By a letter of 6 November 2018 (pages 67-68) the respondent invited the claimant to a disciplinary hearing on 9 November to answer allegations of gross misconduct relating to prolonged unauthorised absence. The allegations related to a failure to maintain contact with the company or attend Occupational Health or absence review meetings. There was also an accusation about the lack of a valid

sick certificate for absence since the end of September. A disciplinary hearing previously scheduled for 1 October had been postponed.

13. That letter was delivered by hand on the morning of 7 November 2018 by someone from Jaguar who knocked on the door, handed the letter to the claimant and told him he should contact his line manager.

14. The claimant was not happy at being contacted in this way. The following day at just after 4.00pm he emailed a friend who was a semi-retired solicitor, Mr McClorry, providing him with a copy of the letter. The claimant had been taking advice from Mr McClorry regularly about the situation as it went on. With Mr McClorry's assistance he formulated an email to the company at just before 10.30pm on 8 November saying that he would not be attending the disciplinary hearing the following day. In that email he protested about the letter being delivered by hand on 7 November, and said that he felt his "private safe place" had been violated. He said that it was causing him further stress and anxiety and problems with his mental health issues.

15. The disciplinary hearing on 9 November did not go ahead.

16. Around this time the respondent wrote to the claimant to say that his statutory sick pay from the respondent would cease on 8 November, and he would have to contact the Jobcentre. The letter appeared at page 74. The claimant received it, and did contact the Jobcentre, but he did not complete the form which the respondent wanted him to send back to enable him to receive company sick pay.

17. On 20 November 2018 a letter was issued by the company and sent to the claimant by recorded delivery informing him that there would be a disciplinary hearing on 29 November. He was informed that if he did not attend it might proceed in his absence. It was apparent to him that he might be dismissed without being there.

18. At just after 7.00am on the morning of 29 November the claimant sent a brief email to his line manager (page 78) saying he would not be attending the meeting due to his medical condition.

19. The meeting went ahead in his absence. His trade union representative, Mr Carver, attended on his behalf.

20. There appeared in the bundle at pages 80-81 a dismissal letter dated 11 December 2018. It summarised the allegations and explained that there would be a dismissal for gross misconduct without notice or pay in lieu of notice. Reasons were given. The letter said:

"As you were not present at this meeting you will be deemed to have been dismissed as of the date of receipt of this letter, which will be hand-delivered to you."

21. The letter enclosed a copy of the minutes and gave the claimant the right to appeal within five working days of having been informed of the decision.

22. The respondent's case was that the letter was put through the claimant's letterbox at home at around 7.00pm that evening. Ms Peterson gave evidence that although she had had no involvement in the case, her colleague, Kate Love, told her that there was an envelope containing notice of dismissal and asked her to put it through the claimant's letterbox because she lived in the same area as the claimant. It was a day when she was at college during the afternoon, and when driving home from college she drove to the claimant's address, using her satellite navigation system, and pushed the letter through his letterbox. Her statement said that she checked that the number of his house was correct and she recalled that the house had lights which were turned on. She presumed someone was in to receive it but did not check.

23. In contrast the claimant's position, supported by his wife's statement, was that no letter was received. The house is a new build and relatively small. The lounge where the claimant and his wife would watch television is not far from the front door, and the lounge door would always be open. The claimant was accompanied at all times by his dog who would run to the door and bark if anything came through the letterbox. He said that when opened and closed the letterbox made a sound which could be heard anywhere in the house. He said no letter had been received that evening.

24. I will return to this key dispute of fact in my conclusions.

25. No notice of appeal was received from the claimant. He saw his GP Practice three times between 14 and 20 December (pages 62-64). On 14 December the GP note (page 64) recorded the claimant saying that he felt he had been put back significantly by a colleague hand delivering his letter in November. There was no record of any dismissal letter arriving three days earlier. A note of a consultation on 18 December (page 63) recorded that the claimant had a "will do later mentality".

26. On 10 January, or within a day or so of it, the claimant received a pro forma letter at page 84 which was addressed to "Dear Sir/Madam" and which said:

"Please find enclosed your P45 on your termination of employment with Jaguar Land Rover Limited."

27. With the letter was a P45 for the claimant which had been issued by the respondent on 8 January 2019 but which showed his leaving date as 11 December 2018.

28. The claimant did not respond immediately to this. He had seen news items that day or around that time (pages 93-103) which said that the respondent was planning significant job losses. His evidence to my hearing was that he thought the P45 had been issued in error as part of such redundancies. He wanted to seek advice from Mr McClorry, but Mr McClorry was away for a couple of months.

29. Mr McClorry came back in early March. He helped the claimant compile an email of 13 March 2019 (page 90) which began as follows:

"In December I received a P45 dated 11/12/18. There was no letter attached nor have I received any separate communication regarding this."

I have received no information from you informing me of why you have come to this decision. I have not informed you that I was resigning my post.

You have given me no information that would allow me the opportunity to start the appeals process.”

30. The email went on to make a number of points. For present purposes it is significant to note that the claimant was wrong in saying the P45 had arrived in December and that there was no covering letter. It had arrived in January with a covering letter. More importantly, the email made it clear that he interpreted that letter and P45 as conveying that a decision to terminate his employment had been made. That explained why he asked about an appeal process. The email did not assert that he thought that the P45 was a simple mistake because of the redundancy exercise.

31. The respondent replied promptly on 15 March by email at page 89. The email said that the dismissal letter had been hand delivered to his home address on 11 December. A copy was attached.

Submissions

32. On behalf of the respondent Ms Kight submitted that the evidence of Ms Peterson was to be believed over that of the claimant. Ms Peterson had no reason not to deliver the letter or to lie about it. The claimant, however, did have something to gain from pretending that the letter had not been received. He had a history of not responding to correspondence unless there was an appointment date, and the fact he had not mentioned it to his GP was not significant when he had not mentioned the P45 arriving either. There was a discrepancy between what he said in his witness statement about the P45 (that he thought it was an error due to the redundancy process) and what his email of 13 March said. It was clear from the email that he knew that a decision to dismiss him had been made by the time the P45 had arrived. Accordingly even if I were to find that the letter had not been delivered on 11 December, at the latest his employment must have terminated when the P45 and covering letter arrived in January 2019.

33. Ms Kight also submitted that Mrs Slater's evidence should be disregarded as she had not been called as a witness even though most of her statement related to matters that had nothing to do with the point about the letter being delivered at 7.00pm.

34. Mr Searle on behalf of the claimant submitted that the email of 13 March was important because it showed that the claimant had never received the December dismissal letter. The idea that he would have fabricated that email was not plausible. The claimant had mentioned the November home visit to his GP, and the arrival by hand of a dismissal letter would have been even more traumatic for him and he would have mentioned that as well had it happened. The arrangements made by the respondent for communicating the dismissal to him were most unsatisfactory, and he suggested that it was significant that Ms Peterson had not been able to recall any details of the claimant's road or his house. Further, the statement from Mrs Slater confirmed that nothing had arrived at the house that evening. She had

produced text messages with her mother at around 7.30pm which were entirely unremarkable and showed that there was no great upset in the house.

35. As for the P45, Mr Searle submitted that the claimant had genuinely not understood it as termination of his employment until early March when he had the benefit of advice from Mr McClorry.

My Decision

36. Having considered the evidence and the submissions on both sides I deliberated on the core dispute of fact between the parties.

37. Both sides gave apparently credible accounts. Ms Peterson had no involvement in the case other than to agree to deliver the letter on her way home from college, and it was understandable that she did not want to knock on the door and engage with the claimant when she knew that it contained unwelcome news. Further, as an HR professional there was no reason to think she would not have done what was asked. Although she was unable to recall what the street or house looked like, other than that the house was unremarkable, that did not strike me as a significant discrepancy given that this was a brief detour on her way home on an evening 13 months before my hearing.

38. Equally, however, the claimant had behaved since 11 December in a way entirely consistent with no letter having been received. He had not mentioned any such letter to his doctor, nor had he sought to appeal within the time limit as one might have expected him to do. His email of 13 March about the P45 was entirely consistent with no dismissal letter having been received. The fact that he ceased to supply fit notes to the respondent around that time was explained by the fact that the Jobcentre told him there was no point doing that when his company statutory sick pay had run out.

39. However, there were three matters that caused me to prefer the respondent's account.

40. Firstly, during his oral evidence the claimant asserted that he did not know what a P45 was. I did not find that a credible claim. He moved away from it under cross-examination and said that he knew what it signified, but asserted that he had thought it was issued in error because of the redundancy exercise which he had read about around that time. However, that was not consistent with what he later said in his email of 13 March when it was clear that the P45 signified that the respondent had taken as a decision to dismiss him, even if the reasons were not apparent. I was concerned that no steps were taken by the claimant or his wife to seek to clarify the position if they genuinely thought in January 2019 that the P45 was simply an error.

41. Secondly, unlike Ms Peterson, the claimant had his own reasons for wanting to deny receipt of the letter. By the time he took matters up with Mr McClorry's help in March 2019 there would be significant problems for him if the letter had been received in December. Most plainly, he would be out of time for an appeal.

42. Thirdly, I declined to attach any significant weight to Mrs Slater's statement as she did not attend in person to give evidence. The significance of her evidence would have been apparent to the claimant and his advisers at the case management hearing even before the precise time on which delivery was said to have been made became apparent.

43. Although the competing positions were finely balanced, for those reasons on the balance of probabilities I preferred the respondent's account and I found as a fact that the letter had been delivered through the claimant's letterbox at his home on the evening of 11 December 2018 when he was there.

44. It may be that knowing that there was a hearing in his absence 12 days earlier, and seeing the respondent's logo on the envelope, the claimant chose to ignore it fearing (rightly) that the letter was in fact notice of dismissal. The reason for his decision to do so is academic, however, because the delivery of the letter gave him a reasonable opportunity to learn of his dismissal and therefore the effective date of termination of his employment was 11 December 2018.

Part Three: Extension of Time

45. Having conveyed orally my decision as to the effective date of termination, I heard submissions from both parties as to whether time should be extended.

46. The facts available to me were those summarised above. In addition the claimant's witness statement asserted that his health had been a factor in the passage of time.

Relevant Legal Framework

47. The time limit for an unfair dismissal complaint appears in section 111(2) 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.**

48. There is a provision in identical terms for breach of contract claims in Article 7 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

49. Two issues may therefore arise: firstly whether it was not reasonably practicable for the claimant to present the complaint within time, and, if not, secondly whether it was presented within such further period as is reasonable.

50. Something is “reasonably practicable” if it is “reasonably feasible” (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372**, Court of Appeal).

51. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

52. As for the discrimination claims under the Equality Act 2010, the time limit for appears in section 123 as follows:-

- “(1) subject to Sections 140A 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;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.”

53. The case law on the application of the “just and equitable” extension (and its predecessor in the Race Relations Act 1976) includes **British Coal Corporation –v- Keeble [1997] IRLR 336**, in which the Employment Appeal Tribunal (Smith LJ presiding) confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in Keeble:-

- “that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –
- (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 cooperated with any request for information;
 - (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

- (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.”

54. In **Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]** the Court of Appeal considered the extent of the discretion to extend time on a just and equitable basis under the discrimination legislation. The Employment Tribunal has a “wide ambit”. At paragraph 25 of the judgment Auld LJ said:-

“it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

55. Subsequently in **Chief Constable of Lincolnshire –v- Caston [2010] IRLR 327** the Court of Appeal in confirming the **Robertson** approach said that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

56. Also relevant is a decision of the Court of Appeal in **Department of Constitutional Affairs –v- Jones [2008] IRLR 128**. The Court emphasised that the guidelines expressed in **Keeble** are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case. At paragraph 50 Hill L J said:-

“The factors which have to be taken into account depend on the facts, and the self-directions which need to be given must be tailored to the facts of the case as found”.

Submissions

57. Ms Kight submitted that all claims were out of time. The primary time limit expired on 10 March 2019. The claimant did not go to ACAS until 1 April. The claim was lodged three months after the primary time limit expired. The assertions about the medical position were not supported by the medical information before the Tribunal today. The claimant had been able to seek legal advice from Mr McClorry, he was a member of the union, he accepted in cross examination he was an internet user, and his wife was there to help him as well. The claimant had been able to go out to the shops and to appointments with his GP in the period after the letter arrived, and was able to read newspaper articles about the respondent and its redundancy proposals. As a teacher his wife would have had time off over the holiday period to help him find out about his rights and start early conciliation. It was reasonably practicable for him to have brought his claim within time.

58. As for the discrimination complaints, the reason for the delay was the claimant had chosen wilfully to ignore the letter that arrived on 11 December. It was part of what his GP had described as a “will do later” mentality – i.e. putting matters off instead of dealing with them. Although the delay had no impact on the cogency of the evidence, where there was no good reason for the delay, and where the claimant could have got legal advice earlier on, there were no grounds to extend time.

59. In contrast Mr Searle submitted that the claim should proceed. He emphasised the claimant's state of health, reminding me of the number of passages in the medical evidence which are quoted in the claim form. The claimant was vulnerable and suffering from a major depression at the relevant time. It was not reasonably practicable for him to have brought his claim within three months.

60. As for the discrimination complaints, Mr Searle emphasised the lack of any prejudice to the respondent resulting from the delay: a fair trial was still possible. Mr McClorry was not formally instructed but was advising as a friend. Mr Searle accepted in submissions, however, that there was no evidence suggesting an improvement in the claimant's health by March 2019.

My Decision

61. I accepted that the claimant was very depressed and anxious throughout this period and seeking regular attention from his GP as well as treatment from Mental Health Services. Nevertheless, he was not acting alone. He was regularly consulting his legally qualified friend, Mr McClorry, for advice. He was a member of the union and could have sought advice there. His wife was able to help him deal with matters. He was an internet user who could carry out research. The medical evidence before me fell short of asserting that he was not in a position to deal with matters such as an Employment Tribunal claim in this period. Indeed, that was an inference I could not properly draw because he was able to deal with matters in April, May and June when the medical position was no different.

62. As for the unfair dismissal and breach of contract complaints, I was satisfied that it was reasonably practicable for the claims to have been presented within time. If the claimant had opened and engaged with the letter which arrived on 11 December he would have been able to seek advice from Mr McClorry, or from an alternative source if Mr McClorry was away, and with the help of his wife research and identify the relevant time limits. He was able to pursue matters with the respondent on 13 March when he sent his email at page 90, and the primary time limit expired only three days earlier. In my judgment it was reasonably feasible for him to have gone to ACAS to initiate early conciliation (online or via a telephone call) on or before 10 March 2019, which would have meant that these claims could have been presented within time. The unfair dismissal and breach of contract claims were dismissed.

63. In relation to the just and equitable extension for the discrimination complaints, I reminded myself of the legal framework set out above. The burden was on the claimant to establish that it was just and equitable to extend time, taking account of all relevant factors.

64. I considered the factors set out in **Keeble**. The length of the delay was three months in calendar terms, although two months if the early conciliation period were ignored. Where the primary time limit is only three months that is a further significant period. This is not a case where the claim was late by only a few days or a couple of weeks.

65. The reason for the delay, in my judgment, was the decision by the claimant to ignore the letter which arrived on his doormat on the evening of 11 December 2018. It matters not whether he decided not to open a letter which he feared would contain a dismissal, or whether he opened it and read its contents. Either way that is not a good reason for subsequently seeking an extension of time from a Tribunal. I accepted that the medical position made it more difficult for the claimant to deal with these matters than if he had been in perfect health. However, as set above I was satisfied that the claimant had not established that the medical position in this case prevented him, with the assistance available to him, from dealing with these matters.

66. It was common ground that the delay had not had any effect on the cogency of the evidence.

67. The respondent was not to be criticised for any delay on its part in responding to requests for information. The claimant had all the information he needed on 11 December 2018. However, he had not acted promptly at that stage. It was just the contrary. In my judgment he had deliberately delayed dealing with the matter. Even when forced into confronting the termination of his employment by the arrival of the P45 and covering letter, there had still been a delay of two months whilst he waited for Mr McClorry to come back. That did not support his case for an extension. He took no steps to obtain professional advice other than waiting for Mr McClorry's return. I accepted the claimant's evidence that he could deal with Mr McClorry because he knew and trusted him, but it would still have been possible for him to have got legal advice from a different source had he so wished.

68. Putting all these matters together I did not consider that it would be just and equitable to allow the claimant this further period to bring his claim. The failure to bring it on time was a consequence of a deliberate decision made by him and the surrounding circumstances did not support his position. The disability discrimination complaints under the Equality Act 2010 were also dismissed.

Employment Judge Franey

14 January 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 January 2020

FOR THE TRIBUNAL OFFICE

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