



EMPLOYMENT TRIBUNALS

Claimant : Mr T D Bellingham

Respondent : Eurorail Crash Barriers 2000 Limited

Heard at: Nottingham **On:** Thursday 10 October 2019

Before: Employment Judge Broughton (sitting alone)

Representatives

Claimant : In Person

Respondent : Mr R Hignett : Counsel

PRELIMINARY HEARING RESERVED JUDGMENT WITH REASONS

Judgment

- (1) The application to extend time under section 123 Equality Act 2010 is granted and the claims for disability discrimination will proceed to a hearing.
- (2) The claims for holiday pay and unlawful deduction from wages are struck out as not presented within the relevant statutory time limits in circumstances where it was reasonable practicable to present them in time.

Background

1. The claimant issued a claim received by the Employment tribunal on 5 March 2019. The claim form indicated at box 8 that it was a claim for disability discrimination, unfair dismissal, holiday pay and other payments. Box 12.1 of the claim form was also ticked to indicate that the claimant has a disability namely severe dyslexia.

2. The dates of employment given on the claim form were 18 May 2017 to 31 July 2018. Under section 108 of the Employment Rights Act 1996 claimants are not entitled to bring a claim of unfair dismissal under section 98 unless they have two years qualifying service. The claimant was given the opportunity to provide his reasons in writing why his complaint of unfair dismissal should not be struck out, he failed to make representations and an Order was made striking out the claim of unfair dismissal on 14 August 2019.

3. The respondent filed a response with the tribunal on 22 July 2019. The respondent disputes all the claims and raised a jurisdictional issue namely that the claims have been brought outside of the relevant limitation periods.

4. The case was listed for a Preliminary Hearing on 10 October to determine whether the tribunal has jurisdiction to hear the remaining claims of disability discrimination and a claim for outstanding holiday pay and unlawful deduction from wages.

Preliminary Hearing – The Issues

5. At the commencement of the hearing the claimant was reminded that his ordinary unfair dismissal claim under section 98 Employment Rights Act 1996 had been struck out. The claimant advised the tribunal that he could not recall receiving from the tribunal the judgment of 14 August 2019 striking out the claim. During the hearing he had access to his e-mails via his mobile telephone and attempted to check whether the e-mail had been received, he was unable to access emails which predated September however after consultation with his wife, Mrs Bellingham, who was in attendance, he confirmed that the letter providing the strike out warning dated 24 June 2019, had been received by him. We went through the chronology of events and the claimant confirmed that his employment had started on 18 May 2017 and his employment ended on 31 July 2018. It was established therefore that the claimant did not have two years qualifying service in any event. The claimant had been paid a weeks notice.

6. The claimant clearly found it challenging to present his case at the hearing however he could provide some clarity regarding his claims and the dates the acts/omissions complained of took place, which are as follows: -

Disability Discrimination:

6.1 Humiliating treatment on 2 May 2018 (**claim 1**).

6.2 Failure to carry out meetings at his home from 26 March to 30 July 2018 (**claim 2**).

6.3 Putting him under pressure to return to work when he was absent with a disability (**claim 3**).

6.4 The act of dismissal which took place on 31 July 2018 (**claim 4**).

7. The claimant was not able to identify the types of discrimination complained of and although some attempt was made to attach the correct legal claims to the facts as described, the claimant was becoming anxious and the tribunal therefore decided to proceed to deal with the time limit issue in relation to the dates provided and if necessary, have a further case management hearing to identify the types of discrimination.

Holiday Pay

8. The claimant also seeks to bring a claim in relation to unpaid holiday pay. He claims that he was told by the respondent that they would pay him full pay for a month while he remained off work sick but in the event and without his agreement, they treated two weeks of his sick pay period as annual leave and he claims the sum of £594.

9. The claimant brings his claim as an unlawful deduction claim under section 13 Employment Rights Act 1996.

Loan – unlawful deduction of wages

10. The claimant complains that the respondent had loaned him the sum of £594.00 which was then deducted from his final salary on termination and he claims that this was an unlawful deduction.

11. The claimant's case is that the unlawful deductions were made from his last salary which he received on 31 August 2018.

The Legal Principles

Unlawful deduction claims- section 13 Employment Rights Act 1996

12. Section 23 of the Employment Rights Act 1996 provides that an employment tribunal shall not consider a complaint under section 13 unless it is presented before the end of the period of three months beginning with –

Section 23 (2)

(a) *In the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*

(b) *In the case of a complaint relating to a payment received by the employer, the date when the payment was received.*

13. Section 23 (subsection 4) provides as follows:

*“Where the employment tribunal is satisfied that it was **not reasonably practicable** for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is brought within such further period as the tribunal considers **reasonable**.”*

14. Whether it was reasonably practicable for a claimant to bring the claim in time is a question of fact and therefore a matter for the tribunal to decide.

15. The burden of proving that presentation of the claim in time was not reasonably practicable rests on the claimant. He must show precisely why it was that he did not present his complaint in time: **Porter v Bandridge Limited [1978] ICR 943 CA.**

16. If the claimant fails to argue that it was not reasonably practicable to present the claim in time the Employment tribunal will find that **it was** reasonably practicable: **Sterling v United Learning Trust EAT 0439/14.**

17. Where a tribunal is satisfied that presentation in time was not reasonably practicable that does not automatically decide the issue. The tribunal must then go on to decide whether the claim was presented within *such further period as the tribunal considers reasonable*.

Disability discrimination claims

18. Under section 123(1)(a) Equality Act 2010, claims of discrimination may not

be brought after the end of;

Section 123 (1)

- (a) The period of 3 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*.

19. To establish whether a complaint of discrimination has been presented in time it is necessary to determine the date the act complained of took place. Other than perhaps the discrete act of discrimination which the claimant refers to having taken place on 2 May 2018, the complaints of discrimination are potentially complaints relating to a continuing act.

Section 123 (3) provides that for the purposes of this section;

- (a) conduct extending over a period is to be treated as done at the end of that period*
- (b) failure to do something is to be treated as occurring when the person in question decided on it.*

20. In the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when that person does an act inconsistent with doing something or if the person does an inconsistent act on the expiry of the period within which he or she might have reasonably have been expected to do it: section 123(4).

21. Employment tribunals have the discretion to hear out of time claims within whatever period they consider to be *just and equitable*: **Trust House Forte (UK) Limited v Halstead EAT 213/86**: the EAT held that the complaint that the claimant had not received very good advice was a fair one but it did not make it impracticable for her to present their claim in time. On the discrimination claim the EAT noted that the discretion given to tribunals to allow claims if they thought it just and equitable to do so was a wide one.

22. The Court of Appeal in **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA**: held that the judge's findings, that C had misled her solicitors as to the facts material to establishing the 'trigger point' that started time running, and had done so because of her mental ill health, were plainly open to him on the evidence, and led him to conclude that C's situation constituted 'an exceptional circumstance' making it just and equitable to extend time

23. **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** the Court of Appeal provided the following guidance on the application of section 123(1)(b) Equality Act:

"There is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, the tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule."

24. It is therefore for the claimant to convince the tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

25. Section 123 Equality Act does not set out a list of specific factors which the tribunal is required to consider when exercising its discretion.

26. In **Southwark London Borough Council v Afolabi [2003] ICR 800** the Court of Appeal confirmed that whilst the checklist in Section 33 of the Limitation Act 1980 provides a useful guidance for tribunals, it need not be adhered to slavishly.

27. The relevant factors in Section 33(3) of the Limitation Act 1980 deals with the exercise of discretion in civil courts and personal injury cases and requires the Courts to consider: -

- *The prejudice* which each party would suffer as a result of the decision reached
- *Regard to all the circumstances of the case*, in particular the length of and reasons for delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the parties sued has cooperated with any request for information, the promptness with which the claimant acted once he or she knew of the facts, giving rise to the cause of action, and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

28. In Southwark the Court of Appeal suggested there were two factors which are almost always relevant when considering whether to exercise the discretion:-

- *The length of and reasons for the delay*
- *Whether the delay has prejudiced the respondent*

29. In **Drewery v Carphone Warehouse Limited ET case number 3203057/2006** the claimant had been in contact with ACAS. Following his dismissal, he contacted his local job centre and after expressing concern over his dismissal, he was referred to ACAS. ACAS advised there was little point in pursuing a tribunal claim until after his internal appeal against dismissal was concluded. ACAS did not advise him of the three-month time limit for making an appeal. The appeal hearing was delayed and the claim was presented out of time. The tribunal found that it was not reasonably practicable for the employee to have presented his claim in time. Whilst his ignorance of the time limit would not have excused his late claim, he contacted the job centre and ACAS. The latter he considered to be an authoritative body and relied on ACAS's advice to await the outcome of his appeal. The Employment Tribunal held that if such misleading advice had been given by an independent adviser the claim would probably have been rejected but with an organisation such as ACAS, it was to be expected that callers would be informed of the limits on its role.

Evidence

30. I heard oral evidence from claimant as to the reasons why the claims had not been brought in time and oral evidence from Mrs Bellingham.

31. The claimant's oral evidence was that he had taken advice from ACAS in **November** 2018, ACAS had informed him that he did not have a claim for unfair dismissal. He then took advice from a solicitor (at the firm representing him in connection with a personal injury claim) who advised him that he may have a claim for unfair dismissal relating to health and safety or discrimination and a claim for unlawful deduction of wages. He could not recall when he obtained this advice but believed that it was '*perhaps two or three days*' after speaking to ACAS. The claimant then went back to ACAS and was told by a manager that he had been given incorrect information by the first ACAS advisor. Mr Bellingham could not recall when he had spoken to ACAS the second time, his recollection was that it would have been perhaps a week later. The claimant went on to explain that he had been told that there was going to be an investigation by ACAS into the initial advice he had received. Mr Bellingham referred to having received a letter from ACAS which confirmed this however he had not brought with him, his recollection was that he received this sometime after **21 November**. The claimant by this stage understood that a claim for discrimination was already out of time however he believed that if ACAS admitted that they had provided him with incorrect advice this may support an out of time application to the tribunal. *The claimant's evidence was that the investigation by ACAS took about 2 months* and he believes he received a follow up letter from them in about December 2018 or perhaps January 2019.

32. The claimant stated that he went to see ACAS originally because he believed he had been unfairly treated and understood that ACAS was the '*first place he had to go to.*' When asked how he had known that he needed to contact ACAS, he said that he had been told this by the solicitor. That was not consistent with his evidence that he had sought advice from the solicitor *after* speaking first to ACAS however, I do not find that the claimant was being dishonest rather he was presented as trying to recall events but became flustered and confused over the chronology.

33. Mrs Bellingham gave oral evidence and informed the tribunal that her husband had received two ACAS certificates, however she had not brought those with her.

34. Mrs Bellingham described the claimant as getting himself into "*knots*" trying to recall events and that the correct sequence of events was as follows; that on the first occasion when the claimant had contacted ACAS he was advised that he had not worked for the company for two years and hence could not pursue a claim of unfair dismissal. ACAS had advised that he could bring a claim for the unlawful deduction of wages and they were asked if they wanted a certificate to enable them to pursue that claim. Mrs Bellingham's evidence was that she had spoken with claimant at the time and he had decided against it, he felt that; "*there was no point pursuing a claim for holiday pay; because there were bigger things concerning him*" and he was concerned that the respondent may issue a counter claim.

35. Mrs Bellingham's recollection was that the initial contact with ACAS was in about September 2018 and that ACAS did liaise with the respondent but she was not sure when the first certificate was issued.

36. The claimant was due to have an operation at Christmas and Mrs

Bellingham explained that they were both very much focussed on that and his rehabilitation. At some point she recalled that they spoke again with a solicitor about their experience dealing with ACAS and were advised that there were 'special circumstances' in which a claim for unfair dismissal could be brought where for example there were issues of health and safety. The solicitor advised that they needed to go back to ACAS and were advised to put in a letter of complaint.

37. Mrs Bellingham states that they then spoke with a different case handler at ACAS who said that the claimant may have a potential claim for discrimination. They were then issued with a second certificate to bring a claim of discrimination but told to wait because they would have to explain to a tribunal why the claim had not been brought out of time. The matter was escalated she believes to a director at ACAS and they waited to receive a letter confirming that they had been given incorrect advice. According to Mrs Bellingham, *the investigation took approximately eight weeks and then they received the letter however it was of no assistance*. The letter failed to confirm that they had been given incorrect advice, it simply repeated that the claimant had insufficient service to bring a claim of unfair dismissal. Mrs Bellingham referred to their difficult circumstances during this period, including the health of the claimant and their financial concerns.

38. Unfortunately, Mr and Mrs Bellingham did not bring the letter from ACAS with them. They could not recall exactly the date of the letter, they thought it was "*about February or March of this year*".

39. On receipt of that letter from the director of ACAS they decided to proceed to file a claim with the employment tribunal.

40. Mrs Bellingham informed the tribunal that claimant had received two certificates from ACAS.

Medical Evidence

41. The claimant had brought with him a copy of a psychological report to evidence that he has learning disabilities (including dyspraxia). The content of this report was not disputed by the respondent nor did the respondent seek to rebut the evidence of the claimant and his wife that he has a learning disability.

42. The claimant also states that the injury to his leg which occurred at work is also a physical impairment that led to the need for surgery in December 2018. He relies on both the physical and mental impairments as disabilities under section 6 Equality Act 2010.

Respondent's Submissions

43. Mr Hignett argued that the reasons put forward by the claimant in a "*nutshell*" do not engage the discretion to extend time on a just and equitable basis. That what the claimant relies upon is "*faulty advice*" from ACAS but that this advice was not accepted in fact the reason for the delay and referred to the conflicting evidence given by the claimant and his wife. The claimant's evidence is that he went to ACAS in November after the primary limitation period has already expired and that in any event the advice was correct, in that he did not have the qualifying service to bring an unfair dismissal claim. The claimant had failed to explain what he did between the termination date of 31 July 2018 when his employment terminated and the end of the 3 months period from that date (i.e. to the end of

October 2018).

44. Further Mr Hignett referred to the increasingly confusing picture which emerged from Mrs Bellingham's evidence because she suggested that a second ACAS certificate had been issued. The certificate produced to the tribunal is dated 21 November 2018 and Mr Hignett argues that in the absence of the second certificate this should be discounted from the tribunal's consideration. Mr Hignett argues that the delay appears to be due to a whole range of factors including "*difficult life circumstances*" which do not engage the discretion.

45. Mr Hignett referred to the Court of Appeal case of **Robertson v Bexley** and submitted that there must be cogent reasons for extending time and that the limitation periods for discrimination claims must be "*enforced strongly*."

46. Mr Hignett did not make any submissions regarding any specific prejudice or hardship that the respondent may suffer because of any extension of time or any difficulty an extension of time may present with respect to the cogency of the evidence. Mr Hignett's submissions were not concerned with the impact on the respondent or the evidence which may arise if the application was granted and did not allude to any hardship or prejudice. Mr Hignett did not assert that a fair trial would no longer be possible and nor did he address the tribunal on the potential merits of the discrimination claims.

47. With regards to the unlawful deduction claims; Mr Hignett made the point that although the limitation period did not begin to run until later ie the date of the last payment of wages from the company on 31 August 2018, the evidence of Mrs Bellingham is that the claimant had the ACAS certificates before the limitation period expired but had elected not to pursue the claim.

Claimant's submissions

48. Mrs Bellingham made some submissions on behalf of the claimant which focussed on their difficult personal circumstances, she explained that they were going through turmoil because of the claimant's loss of employment, the financial consequences for the family (including the threat of eviction from their home) and his health issue arising from the injury at work. The claimant had wanted to deal with the employment issues himself but became "*frustrated with the legal jargon*". Mrs Bellingham argues that her husband was confused and that it was an unfair situation, and that they had waited to receive a letter from ACAS explaining that the delay was due to the incorrect advice they had received.

Following the hearing

49. The claimant was given the opportunity to send into the tribunal the letter from ACAS and the second ACAS certificate. Mrs Bellingham sent a letter to the tribunal which she stated was to clarify what she had been trying to explain at hearing; namely that the claimant had contacted ACAS in August 2018. He was advised to complete a form online. Mrs Bellingham had to include herself on the claim in order to help explain the situation to ACAS and this took some time to arrange. ACAS advised that as Mr Bellingham had less than two years' service he could only pursue a claim for unlawful deduction of wages, the respondent when contacted by ACAS, threatened to bring a counter claim. The certificate was issued on the 21 November 2018. The claimant decided not to issue proceedings. Mrs Bellingham reports that it was after this date that they were then told they may have been advised wrongly (she neglects to mention in the letter the date of this

advice was and provides no supporting evidence). A complaint was sent to ACAS which she refers to as having been *“at the same time as helping Tim with his rehabilitation after his foot surgery in December 2018. This takes us to January 2019”*. Mrs Bellingham then writes that she was told that the claimant may have a possible claim for unfair dismissal and discrimination but waited for her complaint to be sent to different departments. She was then sent a certificate around March 2019 *“which I think is the same certificate as November but amended”* however in a follow up email of the 11 October 2019, Mrs Bellingham provided an email from ACAS dated 26 February 2019 attaching a; *“copy of the certificate to allow you to go to the employment tribunal”*.

50. Mrs Bellingham also provided within her follow up letter to the tribunal, a copy of a letter from the complaints department at ACAS which is dated 21 March 2019. It refers to a letter from Mr Bellingham dated 26 February 2019 and confirms that advice was given in November 2018 that without two years' service Mr Bellingham did not have a claim for unfair dismissal. It is to be noted that the respondent was provided by the tribunal with a copy of the letter and enclosures and asked for their comments. The respondent simply confirmed that the November ACAS certificate was the only certificate they had been provided with.

Findings of Fact

51. I find on the evidence, namely the oral evidence of the claimant and Mrs Bellingham and the 21 March letter from ACAS, that claimant was told by ACAS initially that he had no right to bring a complaint in relation to the dismissal, only in relation to the unlawful deduction of wages claim.

52. It is not in dispute that the claimant's employment ended on 31 July 2018. I find based the letter of notification from ACAS, that the date of receipt by ACAS of the notification was not until 8 November 2018, by which time the time limit for the discrimination claim had already expired.

53. Mrs Bellingham states in her follow up letter to the tribunal that the claimant had first contacted ACAS in August 2018, however in oral evidence at the hearing she had said September and the claimant had said November. While I have attached some weight to the content of the follow up letter, I have attached less weight to it than the evidence which was given orally at the hearing, Mrs Bellingham was essentially within her letter attempting to revisit the evidence given orally and the respondent had not had the opportunity to cross examine Mrs Bellingham on this evidence.

54. On the evidence I find that the initial contact by the claimant with ACAS was in November, this is consistent with not only the claimant's own oral evidence at the hearing but the date ACAS record as the date of receipt by ACAS of the EC notification (8 November 2018).

55. I have considered why the initial contact with ACAS was not within time, the claimant refers to being told by a solicitor that he needed to contact ACAS. The claimant was in receipt of legal advice in connection with a personal injury claim against the respondent and therefore had access to legal advice, hence the advice he did receive about his employment rights.

56. Mrs Bellingham in her letter states that they were then made aware that

they may have received incorrect advice. The claimant and Mrs Bellingham were consistent in their evidence regarding the length of the investigation by ACAS, they both believed that it had taken about 2 months to complete from their complaint being raised. Mrs Bellingham registered a formal complaint in writing on 26 February 2019 which was the same date the claimant had been sent a copy of the email from ACAS attaching a copy of the November certificate; “*to allow you to go to the employment tribunal*”. I find however that based on the oral evidence of the claimant and his wife that he was aware that he could issue a claim in or around the middle to the end of January 2019 (two months before the outcome letter of the 21 March 2019). I have considered why the claimant waited from January 2019 from when he learnt that he had been given incorrect advice to filing the claim on 5 March, which would have been about 6 weeks later; Mrs Bellingham’s explanation for the further delay was that they had waited until their complaint was dealt with by ACAS, hoping that it would support a late application. The response from ACAS was however dated 21 March 2019 but the claim was received by the tribunal on 5 March 2019. This is not consistent with the explanation provided and thus I find that the reason for the further delay was not because the claimant understood that he needed to wait for the letter from ACAS setting out the outcome of the investigation, otherwise he would have submitted his claim on or after 21 March 2019 after he had received the letter. I find that the more likely reason for the delay between January and March, based on the oral evidence at the hearing is that the claimant was more concerned during this period with other matters, such as his serious financial concerns (including the threat of eviction on or around the Christmas period) and his rehabilitation after surgery. The claim by this stage was over 4 months outside of the primary 3 month time limit.

Conclusion

Claims for holiday pay and loan

57. In respect of the claim of unfair dismissal the claimant accepts that he was advised by ACAS in relation to the claim of unlawful deduction of wages and told that he could pursue a claim. It was clear from the evidence of Mrs Bellingham that the claimant had made a conscious, informed decision not to issue the claim because at the time there was too *much else going on* but also, he was concerned that the respondent may issue a counter claim. The tribunal is satisfied that it was reasonably practicable for the complaint to be presented before the relevant period of three months.

Disability Discrimination Claims

58. A tribunal when considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his claim in time.

59. The tribunal is required to weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other.

60. The respondent did not assert that there would be any prejudice or hardship to the respondent of allowing the application to extend time or make reference to any adverse impact on the cogency of the evidence. I am mindful that there are inherent difficulties with any delay however no specific difficulties were raised by

the respondent.

61. There is an obvious prejudice to the claimant of depriving him of the opportunity to seek redress,

62. I have considered the difficulties this claimant more likely than not encountered in obtaining the necessary advice and submitting a claim, given not only the personal and health issues he was dealing with at the time, but I find on the evidence, both his oral evidence and that of Mrs Bellingham and the report provided from the learning disabilities service, that this claimant has some learning difficulties. The claimant clearly became agitated and confused while giving oral evidence. I am not satisfied that the claimant has provided an adequate explanation for the delay, either the initial delay from 31 July through to November when he contacted ACAS, or the further delay from being aware of the alleged incorrect advice in or around January 2019 to 5 March 2019. The explanation of waiting for ACAS to confirm that their advice was incorrect in writing is not consistent with the documents produced by the claimant and the date his claim was issued. Nonetheless, considering all the circumstances of this case, the tribunal has determined that it is just and equitable to allow the claim to be brought within 3 months of this claimant finding out that he was able to bring a claim in connection with the termination of his employment without having two years' qualifying service, which would require the claim to have been brought by the middle of April 2019. The time limit is thus extended and the claim having been brought within that further period, will proceed to a hearing.

63. The claim will be listed for a case management hearing to determine the issues and make appropriate case management order.

Employment Judge Rachel Broughton

Signed: 13 November 2019

Sent to the parties on:

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For the tribunal:

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