



EMPLOYMENT TRIBUNALS

Between:

Mr Duncan Pile
Claimant

and The Commissioners for Her Majesty's
Revenue & Customs (HMRC)
Respondent

Record of a Preliminary Hearing by CVP at the Employment Tribunal

Held at: Nottingham

On: 2 December 2021

Before: Employment Judge P Britton (sitting alone)

Representation

For the Claimant: In person

For the Respondent: Mr A Bershadaski, Counsel

JUDGMENT

1. The second claim is permitted to proceed it being just and equitable to extend time.
2. As to both claims, I order the Claimant to pay a deposit of £50 per claim not later than 21 days from the issuing of this Judgement and Reasons them having only little reasonable prospect of success.
3. Direction are hereinafter set out.

REASONS

Introduction

1. I heard a Case Management Discussion in this matter on 26 October 2021. I published a lengthy summarisation thereof and including orders for the purposes of today. For reasons set out therein, today I have to determine whether it is just and

equitable to extend time in relation to the second claim it having been presented out of time.

Summary of material events relevant to the issue

2. The Claimant was dismissed from his employment with HMRC on 18 September 2020. He had been employed since 9 November 2019. He brought a first claim to the Tribunal (2603744/2020) about events which he alleged constituted disciplinary discrimination pursuant to the Equality Act 2020 (the EqA) but not including his dismissal. The claim (ET1 no 1) was in time. The matter came before Employment Judge Ayre on 23 December 2020 at a telephone case management discussion (TCMPH). The Claimant raised towards the end of the hearing his dismissal. Employment Judge Ayre therefore set out at paragraph 6 on page 5 of her published record of that hearing as follows: -

“At the end of the hearing, the Claimant told me that he wanted to pursue a complaint in respect of dismissal also. I explained that he would need to make a written application to amend the claim and send that to the Tribunal and the Respondent. The Respondent will then have the opportunity to comment on the application, the Employment Judge would then decide whether to allow the application to amend”.

3. For my purposes and in terms of the explanation of the Claimant to which I shall come, I will now set out order 5.2 in particular, which E J Ayre made and which related to the requirement that the Claimant file a schedule of loss by 26 February 2021: -

“If any part of the Claimant’s claim relates to dismissal and includes the claim for earnings lost because of dismissal the schedule of loss must include the following information: whether the Claimant has obtained alternative employment, if so, when and what; how much money the Claimant has earned since dismissal, how it was earned, full details of Social Security benefits received as a result of dismissal”.

4. The Claimant duly complied and submitted his schedule of loss on 22 February. I have read that document. Suffice to say that it was actually full further and better particulars of his claims. And it included a section which related to his dismissal.

5. What of course it was not was an application to amend. What then happened is that the Respondent on 8 April 2021 raised this point with the Tribunal and the Respondent wanting confirmation one way or the other as to whether there was to be a claim relating to the dismissal whether it be by amendment or otherwise. In the interim it requested a variation to the directions timetable relating to the three-day main hearing scheduled for February 2022. The Claimant replied immediately saying that he did intend to file an amendment but could he have some extra time and in fact the time he was requesting phased in with the request of the Respondent. He did not set out in that application the explanation that he has put in his witness statement for the purposes of today. It is that he thought that he had already complied with the amendment process as he understood this was the schedule of loss document.

6. As it is, the Claimant then presented a new claim, not an amendment, on 11 May 2021. This is 2601159/2021 (ET1 no 2). Summarised, it is a claim for discrimination based dismissal by reason of him being a disabled person. The Respondent replied (ET3 no 2). First it pleaded why in all the circumstances the dismissal was a fair one and did not constitute disability discrimination pursuant to the EqA. Pointed out was that otherwise the Tribunal had no jurisdiction to determine a claim for unfair dismissal pursuant to s95 and 98 of the Employment Rights Act 1996 (the ERA) as he lacked the required two years qualifying service

7. Second pleaded was that this claim was in any event out of time. Put simply, there is a three-month time limit for bringing a claim based upon dismissal whether it be under the ERA or the EqA. Time runs from the effective date of termination of the employment. This of course was 18 September 2020. This three-month period can be extended by the period of ACAS early conciliation as per the certificate but only if conciliation started within the three month period. And only then by the period of conciliation. The ACAS certificate for ET1 no 1 runs between 19 August and 17 September 2020. Thus, it would extend time to circa 18 January 2021. Thus on presentation ET1 (no 2) was almost four months out of time. Accordingly, the Respondent requested that there be a preliminary hearing to rule on this fundamental jurisdictional point.

8. As per my published record of the TCMPH unfortunately it got overlooked . That is why it is now being heard today following my orders then made.

The legal framework

9. What I have to decide is whether in all the circumstances it is just and equitable to extend time. I am of course guided by the fundamental principles as set out in ***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 CA.*** There is always a presumption that the time limit should be exercised strictly and so the burden is upon the Claimant to persuade me that in all the circumstances I have material which enables me to properly exercise my discretion to permit him to bring his claim out of time. There is assistance to be found in the case of ***British Coal Corporation v Keeble and others [1997] IRLR 336 EAT.*** It is not a tablet of stone but it is helpful guidance see ***Southwark London Borough Council v Afolabi [2003] ICR 800 CA.***

10. Of course, I have to focus to a significant extent on the explanation of the Claimant as to the length of and reasons for the delay. I also need to balance on the scales other factors: inter alia prejudice to the Respondent.

Findings

11. Taking matters in reverse as to prejudice to the Respondent, it is clearly able to defend this additional claim as is quite clear from its response to ET1(2). And to assist it I do not require that it needs to file further and better particulars. Its defence it absolutely clear.

12. So, I come back to the Claimant's explanation. I bear in mind that it has been conceded by the Respondent that he has a disability by way of depression and anxiety. He has so suffered for at least 10 years. Yes, he is an intelligent man, but presentation is not the same thing as the undercurrent to the actual disability. In that sense, I take into account the statement that has been provided for me for the purposes of today from his partner who is a Psychotherapist. Also, I take into account that the second OH report for the Respondent clearly referred to his depression. And I only have to look at the history of matters as pleaded in relation to events, for instance in ET3(no 1) to see that there were several occasions when the Claimant's mental health issues were clear i.e. tearfulness.

13. I have no reason to disbelieve that the Claimant is reliant upon antidepressants and has been for many years.

14. I also think from hearing from him today that he tends to focus simply on that which he thinks he is obliged to do in relation to the conduct of his case in a somewhat blinkered way, because he cannot cope otherwise.

15. So, what do I conclude? It is that I believe the Claimant when he says that he misunderstood Judge Ayre. He thought that her order relating to schedule of loss would enable him in fact to deal with his amendment. So, if I look at the schedule of loss it in fact is a very full further and better particularisation of not only his then current claim, but it includes the dismissal.

16. Stopping there, it maybe that matters had been unnecessarily muddled in terms of what claims he is actually bringing. It is absolutely clear to me that his claims are: -

16.1. Section 15 EQA 2010, namely unfavourable treatment including the dismissal because of something arising in consequence of his disabilities, namely depression, and also in terms of the pleadings something arising in consequence of his disabilities which also include colitis.

16.2. A failure to make reasonable adjustments pursuant to s20-22. Focussing on what is the provision, criteria or practice (PCP) engaged, and again for clarity in terms of the dismissal of the Claimant, it is obvious. It is that he was obliged to comply with maintaining regularity of attendance and which he did not do. Prima facie this was because of the disabilities. Thus, prima facie the PCP put him at a substantial disadvantage.

16.3. The third claim is obviously Section 26 harassment by his Line Manager.

17. Going back to the explanation, when the Respondent raised its query on 8 April, why did he not reply to the Tribunal to the effect of, "*I am very sorry I thought I had done this by way of my schedule of loss*". The Claimant repeats his explanation about his mental health and the narrow focus he adopts. Also, he telephoned the clerks at the Tribunal who told him that he had to put in a new claim. I don't criticise the clerks; they are not trained lawyers. In fact what he ought to have done is simply write in

explaining that the schedule of loss was actually now an amendment to include the dismissal and asking for leave to amend as per *Prakash v Wolverhampton City Council EAT 0140/06*. Be that as it may, following the conversation with the clerks, he promptly put in the new claim.

Conclusion on the out of time issue

18. Given those findings, I have accordingly concluded that it is just and equitable to extend time. Accordingly, the second claim is permitted to proceed. It has already been consolidated with the first claim and of course both already have a hearing date early next year.

Deposit order

19. However, that brings me to Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I can at this hearing make a Deposit Order if I consider that the claims or any part of the same have only little reasonable prospect of success. Having read the pleadings and in particular the very comprehensive narrative in the ET3, first I observe that the Claimant had substantial periods of absence in what was a short period of employment. Second, on the face of it the Respondent attempted a whole series of reasonable adjustments but the absences persisted. Third, procedurally it does not seem that the Respondent failed in anyway i.e. the Claimant had a trade union representative at such as the management for attendance meetings as per the Respondent's relevant procedure (MAP). He was invited to attend a final meeting under what I shall describe as stage 3 of the MAP and informed that a possible outcome would be dismissal and that he had the right to be accompanied. Given those steps my analysis is that the Claimant will have great difficulty in persuading a Tribunal that his dismissal was other than inevitable, or that given the efforts of the Respondent prior thereto, the preceding disability discrimination allegations will succeed.

20. Thus, I conclude that the claims have only little reasonable prospect of success. Thus, I am ordering Deposits.

21. I have taken account of the Claimant's means. I note that he is significantly indebted; has little equity in the house which he owns; and ekes out a limited and erratic income as a writer; but nevertheless I conclude that he could pay a deposit which I limit to £50 on each case. I am therefore ordering that he must pay £50 on the first case and £50 on the second case. If he does not pay the deposit the relevant claim will be struck out. If he fails to pay both deposits, then both will be struck out.

22. Finally I explained to the Claimant that the significance of ordering the deposits, is that there are potential costs consequences if he decides to proceed, in that the first stage of the costs threshold is met if he loses the claims, or whichever one he otherwise decides to continue with. This is spelt out in the deposit order which is now issued under separate cover from this Judgment and Reasons.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

Mainstream Directions

1. This case is already listed for **5 days commencing Monday 28 February 2022 before a full Tribunal panel in Nottingham**. I therefore now make the following revised directions to take account of my Judgment today.

1.1 The final bundle covering both claims will now be prepared and served upon the Claimant by the Respondent **by Friday 30 December 2021**.

1.2 Witness statements will now be exchanged **on Friday 28 January 2022**.

31. The reading in period for the Tribunal is adjusted so that **the whole of the first morning** will be a reading in period for the panel alone. **The live hearing will start at 2.00pm** the parties must be in attendance for a prompt start.

1.4 The Respondent will prepare and serve upon the Claimant a chronology and cast list **not later than 7 days** before the start of the of the main hearing.

1.5 **Not later than 3 working days** before the start of the main hearing the Respondent will deliver to the Tribunal in Nottingham the following: -

4 sets of the trial bundle.

4 sets of the combined index witness statement bundle.

The chronology.

The cast list.

The Type of Hearing

2. At present this is scheduled to be an attended hearing. Matters of course are uncertain. If it becomes necessary to convert it to a CVP both sides have the necessary connectivity and they will be notified in due course.

Employment Judge P Britton

Date: 9 December 2021

Notes

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’:

<https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/>

(v) The parties are reminded of rule 92: “Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties and state that it has done so (by use of “cc” or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so”. If, when writing to the Tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Case Nos: 2601159/2021 and 2603744/2020