



EMPLOYMENT TRIBUNALS

Claimant Mr D Greig

Respondent Babcock Land Defence Limited

Heard at: Exeter

On: 27 September 2022
(remotely by video hearing)

Before: Employment Judge Goraj

Representation

The claimant: in person

The respondent: Mr M Curtis, Counsel

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL IS that: -

1. The claimant's claim for a statutory redundancy payment is dismissed upon withdrawal by the claimant.
2. The Tribunal does not have jurisdiction to entertain the claimant's complaint of unfair dismissal as it was not presented within the relevant statutory time limit contained in section 111 of the Employment Rights Act 1996 and it was reasonably practicable for it to have been presented within such time limit and/or in a reasonable period thereafter.
3. The Tribunal does not have jurisdiction to entertain the claimant's (contended) breach of contract claim as it was not presented within the relevant statutory time limit contained in Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and it was reasonably practicable for it to have been presented within such time limit and/or a reasonable period thereafter.

4. The Tribunal does not have jurisdiction to entertain the claimant's complaint of disability discrimination as it was not presented within the statutory time limit contained in section 123 (1) of the Equality Act 2010 or such further period as the Tribunal considers just and equitable.

REASONS

Conduct of the Hearing

1. The hearing was conducted as a remote hearing (by VHS) to which the parties consented. There were technical issues at the commencement of the hearing which were however satisfactorily resolved.

The claimant's claim form

2. By a claim form (with attachment) which was presented to the Tribunals on 18 January 2022, the claimant (who says that he was employed by the respondent between 14 July 2008 and 28 April 2021) complained that he had been unfairly dismissed, subjected to disability discrimination and that he was entitled to a redundancy payment and other payments (relating to an alleged misrepresentation by the respondent that he would receive a lump sum payment of 2.5 years' salary if he applied for ill health retirement).
3. The disabilities referred to in the attachment to the claimant's claim form are breast cancer, mental health issues/ panic attacks/ diabetes.
4. The claimant stated at paragraph 15 of his claim form that "This claim was originally submitted on 10/8/2021 but for some reason was not received and I only just found this out and was told to re submit" (page 13 of the bundle).

The claimant's ACAS Certificate

5. The claimant's ACAS Early Conciliation Certificate records that the claimant's EC notification was received by ACAS on 1 June 2021 and that the EC Certificate was issued on 9 July 2021 (by email).

The respondent's response

6. The respondent's response (with attached grounds of resistance) is at pages 20 – 33 of the bundle. The respondent denied the claims save that it accepted that the claimant was, at all relevant times, a disabled person for the purposes of the Equality Act 2010 ("the 2010 Act") because of cancer. The respondent accepted that the claimant had the conditions of diabetes, panic attacks and mental health issues but did not accept, in the absence of further evidence, that he

was, at any relevant time, disabled by reason of such conditions for the purpose of the 2010 Act. The respondent contended that the Tribunal did not have jurisdiction to entertain the claimant's (unparticularised) claims of unfair dismissal and /or disability discrimination as they were presented outside the relevant statutory time limits. The respondent further contended that the Tribunal was unable to consider the claimant's complaint in respect of the ill health retirement lump sum payment as it constituted a complaint of misrepresentation which the Tribunal did not have jurisdiction to determine.

The respondent's application dated 8 March 2022

7. By an application dated 8 March 2022 (pages 37-39 of the bundle), the respondent applied to strike out the claimant's claims on the grounds that they were out of time and/or the Tribunal did not otherwise have jurisdiction to entertain them (the misrepresentation claim) and/or that they, in any event, had no reasonable prospect of success. The respondent applied in the alternative for a deposit order on the grounds that any remaining claims had, in any event, little prospects of success. Following the clarification of the issues the respondent did not pursue its applications to strike out the claimant's claims for having no reasonable prospects of success or for a deposit order.

The Tribunal's letter dated 11 May 2022

8. The Tribunal wrote to the parties by a letter dated 11 May 2022 listing the matter for a preliminary hearing to determine: -
 - (1) Whether the claimant's claims were presented to the Tribunal within the relevant statutory time limits.
 - (2) Whether the claimant's conditions of panic attacks, diabetes, anxiety and depression were disabilities at the material times for the purposes of section 6 of the 2010 Act.
 - (3) Any case management directions required for the future conduct of the case.
9. The claimant was also directed to provide to the respondent/the Tribunal:- (a) a statement providing further details of his disabilities together with any supporting medical evidence and (b) a statement explaining the timing/ the reasons for the delay in submitting his claim form to the Tribunal together with the submission of any associated documents.

The claimant's email dated 17 May 2022

10. The claimant wrote to the respondent by e-mail dated 17 May 2022 in which he opposed the respondent's application to strike out his claims on the grounds that he had originally submitted an application to Bristol (Tribunal) on 10 August 2021 which for some reason had not arrived and when he had contacted Bristol after waiting three months he was told that the claim form not arrived and, in response to his query, that he could reapply. The claimant further stated that when ACAS had informed the claimant that the respondent did not wish to discuss the matter, he had submitted his paperwork "strait after" that conversation (page 47 of the bundle).

The claimant's subsequent statements and information

11. The claimant subsequently submitted the following statements and information :- (1) the claimant's written statement "of a timeline of events"(under cover of an email dated 26 May 2022 (pages 49-50 of the bundle) (2) an updated version of (1) adding further information at page 54 of the bundle (3) copy of emails relating to the claimant's dealings with a barrister in March 2021 (pages 55-57 of the bundle) (4) the claimant's statement of disabilities and associated medical evidence (under cover of an email dated 21 June 2021) (pages 58-60 of the bundle). In this statement (page 60) the claimant identified 3 disabilities namely severe anxiety and depression, PTSD, and arthritis.

12. The claimant provided further clarification of his claims in an email dated 6 July 2022 (page 62 of the bundle) and further medical evidence/ information in his email dated 28 July 2022 (pages 77 – 78 of the bundle) and the following medical notes/ reports:- (a) sick note dated 22 September 2020 at page 67 (b) occupational health report dated 11 January 2021 at pages 74-76 of the bundle (c) the medical report dated 14 May 2018 at pages 78 -81 of the bundle.

Documents and witness statements

13. The Tribunal was provided with a bundle of documents which had been prepared by the respondent ("the bundle"). The claimant confirmed that he did not wish to add any further documents to the bundle.

14. The claimant provided, at the request of the Tribunal, a copy of the claim form which the claimant contended that he had prepared on 10 August 2021 together with a document which the claimant described as a record from his computer showing the date when he had created the document.

15. The claimant initially contended that he had documentary evidence to show that he had submitted the above claim form to the Tribunal on 10 August 2021 (as referred to in his claim form and other documentation

referred to above). The claimant was however unable to provide any such evidence and subsequently contended in his oral evidence (as referred to further below) that he had, mistakenly, believed that he had submitted the claim form on 10 August 2021 and did not discover his error until November 2021 or January 2022 (as addressed further below).

16. On 28 September 2022 (the day after the hearing), the claimant sent an email to the Tribunal (which was copied to the respondent) attaching a copy of his mobile telephone bill for January 2022 and drew the Tribunal's attention to a telephone call to 01179298261 (to the Bristol Employment Tribunals) for 5 minutes and 30 seconds on 18 January 2022 (at 14.29) which the claimant contended supported his oral evidence regarding his contact with the Bristol Tribunals regarding the submission/ resubmission of his claim form (and clarified the date of contact). The Tribunal exercised its discretion to admit this document, which had been copied to the respondent's solicitors, as it was satisfied that it was in accordance with the overriding object to do so as it assisted the Tribunal in establishing when the claimant made oral contact with the Bristol Employment Tribunals.
17. During the course of the hearing, the Tribunal caused investigations to be made in the Bristol Tribunal office to establish whether there was any documentary evidence of any contact from the claimant. The Tribunal was informed that the office had been unable to locate any evidence of any such contact.
18. The respondent provided, at the request of the Tribunal, a copy of the respondent's letter dated 27 January 2021 advising the claimant of the outcome of his application for ill health retirement including that his employment would terminate on 23 April 2021 (subsequently revised to 28 April 2021).
19. The respondent's representative provided a written opening statement to assist the Tribunal / the claimant.

Witness Evidence

20. The witness statements of the claimant contained in the bundle (as identified above) were treated as the claimant's witness statements for the purposes of this Preliminary hearing and in respect of which the claimant gave evidence on oath (including in particular with regard to his medical conditions). The respondent did not rely on any witness evidence.

The Issues

21. The Tribunal identified with the parties the claims/ issues in this case (as required for the purposes of the determination of the preliminary issues as referred to above).

The claimant's complaint of unfair dismissal

22. It was agreed by the parties that the claimant's employment with the respondent terminated on 28 April 2021 (which date is therefore the effective date of termination for the purposes of the Employment Rights Act 1996 ("the Act")).

23. The claimant contended that he had been expressly and/or constructively dismissed by the respondent in respect of the termination of his employment on 28 April 2021 on ill health grounds. In summary, the claimant contended that if he was expressly dismissed by the respondent (in the light of the respondent's letter dated 27 January 2021) the following matters rendered any such dismissal unfair or if he was constructively dismissed, the following are the alleged breaches of the implied term of trust and confidence upon which he relies for such purposes.:-

(1) The failure of the respondent to take reasonable care of the claimant's health and safety including to:- (a) provide appropriate levels of contact and support following the claimant's diagnosis of breast cancer and/or (b) to facilitate timely access to occupational health. The claimant contended that his health (and in particular his mental health) deteriorated as a result of such failures. The claimant further contended that if the respondent had taken the above steps his health would not have deteriorated, and he would have been able to return to work.

(2) The disclosure, in or around September 2020 of a medical report without the claimant's prior consent.

(3) The respondent's misrepresentation that he would receive a lump sum payment of 2.5 times his salary if he applied for ill health retirement (and in respect of which he did not become aware of the true position until after he had received notice of the termination of his employment from the respondent).

24. The respondent denied the above allegations including that it had made any misrepresentations regarding the monies to which the claimant would be entitled on ill health retirement and contended that the claimant had, in any event, been at liberty to withdraw his application for ill health retirement if he was unhappy about the monies which he would receive.

Disability discrimination claim

25. At the commencement of the hearing the respondent continued to dispute that the claimant was a disabled person at any material time for the purposes of section 6 of the 2010 Act save in respect of cancer (breast cancer). After hearing oral evidence from the claimant and further discussions with the parties it was however agreed that :- (a) the disabilities upon which the claimant relies for the purposes of this case are anxiety/ depression/ post-traumatic stress disorder/ panic attacks and (b) the claimant was a disabled person by reason of such conditions as at 28 April 2021.
26. The claimant's complaint of disability discrimination was further clarified as a claim pursuant to section 15 of the 2010 Act (discrimination arising). Further :- (a) the unfavourable treatment was identified as the termination of the claimant's employment on 28 April 2021 by reason of ill health retirement and (b) the something arising in consequence of the claimant's disability was identified as the claimant's inability to return to work /his ill health retirement because of the deterioration in his mental health (anxiety/ depression/ PTSD/ panic attacks) because of the respondent's failure to provide appropriate contact and/or support/ timely access to occupational health following the claimant's diagnosis of breast cancer in 2019.
27. The respondent denied the allegations however it was unable to provide a more detailed response to the claim as now identified without further instructions from the respondent (including with regard to any justification defence).

Redundancy payment

28. The claimant confirmed that he is not pursuing a redundancy payment claim which was, by consent, dismissed upon withdrawal by the claimant.

Claim in respect of the lump sum payment

29. The claimant contended that, in or around November 2020, he was told by the respondent (Ms Timmis) that if he took ill health retirement he would receive (in addition to his civil service pension) a lump sum payment from the respondent of 2 ½ times his salary and in reliance of which he applied for and took such retirement. The claimant pursues this claim as a breach of contract claim. The respondent denied the allegations. The respondent further contended that the Tribunal did not, in any event, have jurisdiction to determine this claim as it is a complaint of misrepresentation (which has to be pursued in the civil courts) and cannot therefore be brought as a complaint of breach of contract in the Employment Tribunals. This issue was not listed for consideration at this Preliminary Hearing. In the circumstances, it was agreed that this aspect of the claimant's claim would be treated (without prejudice to the respondent's contention that the Tribunal did not have jurisdiction to determine the claim as it was one of

misrepresentation) as a breach of contract claim for the purposes only of determining the position with regard to statutory time limits

THE FACTS

30. The Tribunal has found the following facts, on the balance of probabilities. These findings are made strictly for the purposes of determining the outstanding issues relating to time limits.
31. The claimant was employed by the respondent from July 2008 until 28 April 2021. At all relevant times the claimant was employed as a driver specialist based at the Ashchurch Army Camp. The Ashchurch Camp was closed between June – October 2019 following the discovery of asbestos on site.
32. The claimant was diagnosed with breast cancer in December 2019. The claimant was absent from work due to ill health/ because of covid shielding from December 2019.
33. In or around October/ November 2020 the respondent discussed with the claimant the possibility of applying for ill health retirement. The claimant was supported at this time by his trade union representative. The claimant subsequently applied for ill health retirement.
34. On 27 January 2021 the respondent wrote to the claimant informing him that his application for ill health retirement had been approved (at the lower tier) and that the last day of his employment would be 23 April 2021 (subsequently revised to 28 April 2021). The parties agree that the last day of the claimant's employment was 28 April 2021.
35. As the claimant was not happy with the treatment which he had received from the respondent he decided to obtain legal advice. In March 2021, the claimant contacted a barrister who provided him with preliminary employment advice and associated support, including regarding the possibility of bringing a claim in the Employment Tribunals and endeavouring to facilitate further support from the claimant's Trade union, as evidenced by the claimant's statement and the documents at pages 54- 57 of the bundle. The claimant further confirmed in his oral evidence that the barrister had advised him that there was a 3-month time limit for bringing claims in the Employment Tribunals but did not advise him of the procedure for completing or filing a claim. The Tribunal accepts the claimant's evidence concerning such matters. The claimant did not obtain any further professional advice for financial reasons.
36. The claimant subsequently contacted ACAS around the end of May 2021 and the early conciliation period commenced on 2 June 2021. The early conciliation period concluded on 9 July 2021 with the issue of the ACAS Early Conciliation Certificate (page 1 of the bundle). The claimant acknowledged in his witness statement that he was informed

by ACAS at that time that he had 3 months in which to submit the paperwork to the Employment Tribunals (page 50 of the bundle).

The preparation/ submission of the claim form in August 2021

37. The claimant stated in his written witness statements (at pages 50 and 54 of the bundle) that :- (a) he sent his claim form to the Tribunal office in Bristol on 10 August 2021 (b) after waiting nearly 3.5 months he contacted the Bristol office to see what was happening at which time he was informed that there was no record of his application and (c) he had a record of it being sent within the 3 month "window".
38. When asked by the Tribunal during the hearing to provide the evidence upon which he relied to show that he had submitted his claim to the Employment Tribunals on 10 August 2021, the claimant provided the documents referred to at paragraph 14 above which consisted of (a) an undated claim form (which appears to contain on the claim form the same/ substantially the same information as that contained in the attachment to the claim form which was subsequently submitted in January 2022) and (b) what appears to be a computer properties document which shows the creation of a PDF document entitled "employment tribunal1" on 10 August 2021 at 13.24 (which is hereafter referred to as "the claim form dated 10 August 2021") which the claimant contended is the claim form referred to at (a) above. The Tribunal is satisfied, on the balance of probabilities, that the document which was created on 10 August 2021 is the claim form dated 10 August 2021.
39. The properties document provided by the claimant also records the creation of further documents including: - (a) a PDF document entitled "Form 086#8#2811020New Client Applica..." dated 12 August 2021 at 15.06 and (b) a word document entitled "Foot notes for tribunal of David Greig on dated 29 September 2021 at 13.22". The Tribunal has not had sight of these documents.
40. The claimant accepted during the hearing that he did not have any evidence to show that he had submitted the claim form dated 10 August 2021 to the Employment Tribunals on 10 August 2021 and contended instead that he had mistakenly believed that it had been submitted that day. The claimant stated in his oral evidence that :- (a) he believed that he had submitted the claim form dated 10 August 2021 to the Employment Tribunals on line that day by downloading the claim form from the Government website, completing it and pressing the red reset form button at the end of the form which he mistook for a send button (b) that he did not read the printed check list/ other information at page 15 of the claim form dated 10 August 2021 including the guidance for submission/ the statement that "You have opted to print and post your form" / the advice regarding the normal 5 day working time scale for acknowledging receipt of the claim form and the advice to contact the relevant office if confirmation of

receipt had not been received within 5 days. The claimant sought to explain such misunderstanding / failure to read the relevant information on the basis that he was not in a good state of mind at the relevant time. The claimant also contended in his submissions that there was no logical reason for him to have not sent the claim form on 10 August 2021 having spent money on professional advice and having gone through the ACAS process.

41. Having carefully considered the claimant's oral evidence/submissions, the Tribunal is satisfied that the claimant did not submit the claim form dated 10 August 2021 to the Employment Tribunals that day (either online or by post). When reaching such conclusion, the Tribunal has taken into account that not only is there no record of the claim form dated 10 August 2021 been sent or received but also that the claimant's position has now changed so that notwithstanding the assertions in his written witness statements (pages 50 and 54 of the bundle) that he had sent the paperwork off to the Tribunal office in Bristol on 10 August 2021 he now relies on a "mistaken belief" that he had sent the claim form dated 10 August 2021 to the Tribunals on line on 10 August 2021.
42. The Tribunal has therefore gone on to consider whether it is satisfied, on the balance of probabilities, that the claimant had a genuinely held mistaken belief that he had submitted the claim form dated 10 August 2021 to the Employment Tribunals online at that time. Having given the matter careful consideration, including having had regard to the available documentary evidence together with the claimant's oral evidence and above-mentioned submissions the Tribunal is not satisfied, on the balance of probabilities, that the claimant had such a mistaken belief.
43. When reaching this conclusion, the Tribunal has taken into account in particular: -
 - (1) The Government website for submitting Employment Tribunal claims gives claimants the option of submitting a claim form on line (by completing and submitting an online form) or by post (by downloading, completing, printing and posting the claim form).
 - (2) The claimant's claim form dated 10 August 2021 is a downloaded version of the form for posting (rather than a copy of an online claim form) as it states at page 15 thereof that "You have opted to print and post your form". It also advises potential claimants that on line claims are processed much faster than those submitted by post and provides, as an alternative, the website address for submitting the claim on line.
 - (3) The Tribunal is not satisfied that the claimant could reasonably have believed that he was submitting the claim form dated 10 August 2021 online in the light of the matters set out at paragraph

(2) above and further as the options at the end of the claim form are clearly stated as “print form” (in blue) or “reset form” (in red) (which clears the claim form). Moreover, the claimant has not provided any medical evidence to suggest that the claimant’s ability to read, complete or submit the claim form dated 10 August 2021 was impaired at that time. Further the claimant was able to complete a detailed claim form on 10 August 2021.

(4) There is no reference to any such mistaken belief/ the reasons now given for such belief in the claimant’s claim form or in the written statements which the claimant prepared for this hearing (pages 50 and 54 of the bundle). The claimant stated at paragraph 15 of the claim form submitted on 18 January 2022 that the claim was originally submitted on 10/8/2021 but for some reason was not received (page 13 of the bundle).

(5) The claimant took no steps until 18 January 2022 to ascertain whether the claim form dated 10 August 2021 (which he says he believed was submitted that day) had been received by the Tribunal (see paragraph 44 below). The claimant sought to explain such delay on the grounds that he was told by ACAS that there might be a lengthy wait because of the effects of covid on the Tribunal system. The Tribunal is not however satisfied that this explains the 5 month delay in making contact particularly in the light of the advice on page 15 of the claim form dated 10 August 2021 to contact the Tribunal if a claimant had not received confirmation of receipt of a claim form within 5 working days of posting/ on line submission.

Contact with the Tribunal

44. The claimant contended in evidence that he had contacted the Employment Tribunals in Bristol by telephone in November 2021 or January 2022 (he could not recall which) to ascertain what had happened to his claim form dated 10 August 2021 at which time he was told that they had no record of his application/ that it came to light that the paperwork had been misplaced and further that he was advised to “resubmit his paperwork” which he did the same day. The claimant subsequently submitted a copy of his mobile telephone records for January 2022 which evidenced that he had contacted the Employment Tribunals in Bristol by telephone on 18 January 2021 as referred to previously above.

45. The Tribunal is satisfied in the light of the telephone records submitted by the claimant (as referred to above) that the claimant made telephone contact with the Bristol office on 18 January 2022 (rather than in November 2021). The Tribunal is also satisfied, on the balance of probabilities that there was a discussion regarding the submission of a claim form which was subsequently submitted by the claimant that day. The Tribunal is not however satisfied, on the balance of

probabilities, in the absence of any available documentary evidence of the conversation together with the findings at paragraph 43 above, that there was a discussion regarding the submission/ receipt of the claim form dated 10 August 2021.

SUBMISSIONS

46. The Tribunal has given careful consideration to the submissions of the parties which are briefly summarised with the Tribunal's conclusions below. The parties rely on the same submissions for the unfair dismissal and breach of contract claims.

THE LAW

47. The Tribunal has had regard in particular to the legal provisions and authorities which are referred to below.

Unfair dismissal

48. The Tribunal has had regard in particular to sections 94, 95, 97, 98 and 111 of the Employment Rights 1996 ("the Act").

49. The Tribunal has reminded itself in particular of the following: -

- (1) A Tribunal shall not consider a complaint of unfair dismissal unless it is presented to the Tribunal within a period of three months beginning with the effective date of termination (which the parties agree in this case was 28 April 2021) as extended by the ACAS Early Conciliation period (EC notification received on 1 June 2021 and EC Certificate issued on 9 July 2021) which extended the time limit to 3 September 2021 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 claim to have been presented within the three-month period (as extended by the ACAS EC procedure).
- (3) It is for the claimant to satisfy the Tribunal, on the balance of probabilities, that it was not reasonably practicable for the claim to have been presented within such three month period (as extended by the ACAS EC period). Reasonably practicable means reasonably feasible.
- (4) Where a claimant has done something that in the normal course of events would have resulted in the claim being presented within the relevant period but owing to some unforeseen circumstance this did not happen, it will not have been reasonably practicable for the claimant to have presented the claim in time. The question of whether the condition has been satisfied is a question of fact to be determined by the Tribunal on the evidence before it. An

unexplained failure of a claim form to reach the employment tribunal office will not however excuse a late claim unless reasonable steps have been taken in the circumstances to see that the claim was presented in time.

- (5) The test of what is reasonable for the purposes of the further period referred to at paragraph (2) above requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in the circumstances.

Breach of contract claim

50. The Tribunal has had regard in particular to Articles 3 and 7 of the Employment Tribunals (Extension of Jurisdiction) England and Wales Order 1994 ("the 1994 Order"). The time limit provisions contained in Article 7 are in line with those which apply to unfair dismissal claims.

Disability discrimination claim

51. The Tribunal has regard in particular to section 123 (1) of the 2010 Act together with the helpful comprehensive recent review of the relevant authorities in the EAT Judgment of **Wells Cathedral School Limited (1) & Mr M Stringer and Mr M Souter (1) and Ms K Leishman (2) (case no EA-2020-000801-JOJ-previously UKEATPA/0836/20/JOJ)**.

52. The Tribunal has reminded itself in particular of the following: -

23.1 Pursuant to section 123 (1) of the 2010 Act, a complaint of discrimination may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint related or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period -123 (3) (a) of the 2010 Act. The relevant act in this case is the termination of the claimant's employment (28 April 2021) and the relevant date for the purposes of time limits is therefore 3 September 2021 as stated previously above.

23.2 There is no presumption in favour of an extension of time. A good reason for an extension would generally have to be demonstrated albeit that the absence of a reason would not necessarily be determinative.

23.3 Tribunals are cautioned against adopting a mechanistic use of the checklist contained in the Judgment of **British Coal Corporation v Keeble [1997] IRLR 336 EAT** as the factors which are relevant in a given case are case sensitive and must be identified by the Tribunal on a case by case basis.

23.4 The fact that there has been no forensic prejudice caused to the respondent by the delay is not, in and of itself, necessarily decisive.

23.5 Whether it is just and equitable to extend time will depend on the Tribunal's weighing in the balance all the factors that it regards as relevant in the case. In some cases, the features may not be enough, in all the circumstances to persuade the Tribunal to extend time but in others they may.

23.6 This is a different, less stringent, test to that applied in unfair dismissal claims where the principal consideration is one of reasonable practicability.

THE CONCLUSIONS OF THE TRIBUNAL

THE UNFAIR DISMISSAL CLAIM

53. The Tribunal has considered first the claimant's unfair dismissal claim.

The submissions of the respondent

54. In brief summary, the respondent contended (applying the two-stage test) that it was reasonably practicable for the claimant to have presented his claim within the three month time limit (as extended by the ACAS EC period) and further, in any event, it was not presented within a reasonable period thereafter.

55. As far as the first stage is concerned the respondent contended in particular that:- (a) the claimant was aware of the relevant time limits (even before time began to run) as well as that he needed to complete and submit a claim form in order to commence proceedings (b) if the claimant had taken reasonable steps to ascertain the position with regard to the presentation of a claim form he would have been aware in particular, that a claim form could have been presented online or by post and further would have read the guidance at the end of the claim form advising claimants to contact the tribunal office if they did not receive an acknowledgement of the receipt of the claim form within five working days (c) the claimant has not provided a satisfactory explanation of the circumstances in which he says that the claim form dated 10 August 2021 was presented/ he believed was presented to the Tribunal including as to how he believed that his claim form had been submitted online in the light in particular of the printed instructions/ options at the end of the claim form. The claimant, in any event, accepted that the claim form dated 10 August 2021 was not submitted and (d) insofar as the claimant relied on his health as a reason why it was not reasonably practicable to present his claim form in time the Tribunal will note that this not

relied upon as a reason in either of his witness statements and is not supported by any medical evidence. The respondent referred the Tribunal to the guidance contained in the case of **Consigna plc v Sealy 2002 ICR1193 CA** relating to delays in receiving a claim form.

56. As far as the second stage is concerned the respondent contended that the claim form was not, in any event, presented within a reasonable period after 3 September 2021. There was a lack of clarity in the claimant's evidence as to whether he had contacted the Tribunal in November 2021 (the 3 ½ months later referred to in his claim form) or in January 2022. The Tribunal was asked to find on the balance of probabilities that the claimant contacted the Tribunal in November 2021 (as this is what he said in his witness statements). In any event, if the claimant did not contact the Tribunal until January 2022 this still did not assist the claimant. The claimant had still failed to present the claim within "a reasonable period thereafter" as he did not contact the Tribunal for a period of 5 months after the date when he contended that the claim form dated 10 August 2021 was submitted notwithstanding that it states on the printed instructions on the claim form dated 10 August 2021 that a claimant should chase it up if he/she does not receive an acknowledgment of receipt within 5 days of submission.

The submissions of the claimant

57. In summary, the claimant contended as follows: (a) there was no logical reason why he would take (and pay for) advice and go through the ACAS process and then not submit the claim form dated 10 August 2021 / wait until January 2022 to submit it (b) he did not read the guidance on the form – he was sure in his mind that he had submitted the claim form dated 10 August 2021 that day (c) he cannot recall the date when he contacted the Tribunal – he believed that it would take some time to receive a response from the Tribunal and (d) it was only when he contacted the Tribunal that he became aware that the claim form dated 10 August 2021 had not been received and was told what he would have to do to resubmit it which he did straightaway.

The conclusions of the Tribunal

58. The Tribunal has considered the matter in accordance with the two-stage test identified above. The Tribunal has therefore considered first whether it was reasonably practicable for the claimant's claim form to have been presented within the relevant time limit that is by 3 September 2021.
59. Having given the matter careful consideration the Tribunal is satisfied on the facts that it was reasonably practicable (that is reasonably feasible) for the claimant's claim form to have been presented to the Employment Tribunals by 3 September 2021. When reaching this

conclusion, the Tribunal has taken into account in particular the following matters: -

- (1) The claimant was aware of his rights to pursue an unfair dismissal claim in the Employment Tribunals and of the relevant time limits by March 2021 (at which time he obtained legal advice) (paragraph 35 above).
- (2) The claimant further accepted that he was advised by ACAS during the early conciliation process of the applicable time limits (paragraph 36 above).
- (3) The claimant downloaded and completed a claim form on 10 August 2021 (the claim form dated 10 August 2021- paragraph 38 above). The claimant has not however, provided the Tribunal with a satisfactory explanation regarding the circumstances relating to the submission of the claim form dated 10 August 2021. The claimant's original case, as stated in his written witness statements, was that he had evidence that the claim form dated 10 August 2021 was submitted to the Tribunals that day. However when we was asked by the Tribunal to produce such evidence he accepted that the claim form had not been submitted that day and sought to explain his position on the basis that he had a mistaken belief that it had been submitted. The Tribunal was not however satisfied, on the balance of probabilities, (for the reasons given at paragraph 42 above) that the claimant had held such a mistaken belief.
- (4) Although the claimant stated in his oral evidence that he was not in a good place on 10 August 2021 there had been no previous suggestion in his witness statements that any medical impairment had played any part in his failure to submit the claim form dated 10 August 2021 that day and/ or any mistaken belief that he had done so. Further, the claimant he did not submit any medical evidence in support of any such contention (paragraph 43 above).
- (5) Further, even if the Tribunal is wrong and the claimant did have a mistaken belief that he had submitted the claim form on 10 August 2021 (which therefore constituted unforeseen circumstances for the purposes of the **Consignia** case) the claimant did not take reasonable steps thereafter to ensure that the claim form dated 10 August 2021 had been received by the Tribunals within the statutory time limit. When reaching such a conclusion the Tribunal has taken into account in particular, that the claimant had been aware since March 2021 of the relevant time limits and further the printed guidance contained at the end of the claim form dated 10 August 2021 clearly advised claimants to make contact with the Tribunals if a claimant had

not received confirmation of receipt within five working days of submission (paragraph 43 above).

- (6) The Tribunal has gone on to consider (in case it is wrong with regard to reasonable practicability) whether the claim form was, in any event, submitted within a reasonable period thereafter. The Tribunal is not satisfied on the facts that the claimant's claim form was, in any event, submitted within a reasonable period thereafter. The claimant's claim form was submitted on 18 January 2022. The statutory time period (as extended by the ACAS EC procedure) expired on 3 September 2021. The claimant has not however provided a satisfactory explanation for the delay (of more than 4 months) in contacting the Tribunal/ submitting his claim form. The claimant has not contended that there was any medical reason for his failure to contact the Tribunal/ submit his claim form. The only reason provided by the claimant was that he believed that the process would take time because of the covid pandemic. The Tribunal does not however consider this to provide a satisfactory explanation for the delay for the reasons already given above.

60. In all the circumstances the Tribunal is satisfied that it was reasonably practicable for the claimant to have presented his claim form within the relevant statutory time limit/ that he, in any event, failed to present it within a reasonable period thereafter and that it does not therefore have jurisdiction to consider his complaint of unfair dismissal.

THE BREACH OF CONTRACT CLAIM

61. The parties relied on the submissions referred to above.
62. As explained above, the Tribunal has treated the claimant's claim relating to the non-payment of the "lump sum" on retirement as a breach of contract claim for the purposes (only) of determining the time issues. This is strictly without prejudice to, and without making any determination, of the respondent's contention that the claimant's claim is in fact a claim for misrepresentation which does not fall within the jurisdiction of the Employment Tribunals.

The conclusions of the Tribunal

63. As stated previously above, the time limit provisions for bringing breach of contract claims are in line with those for unfair dismissal claims. In the circumstances, the Tribunal is further satisfied, for the reasons previously explained above, that any breach of contract claim is also out of time and that the Tribunal does not, therefore, have jurisdiction to entertain any such claim

THE COMPLAINT OF DISABILITY DISCRIMINATION

The submissions of the respondent

64. The respondent acknowledged that this required the Tribunal to apply a different test to that which applies to unfair dismissal/ breach of contract claims namely that the Tribunal has to consider instead whether it is just and equitable to extend time.
65. The respondent contended in particular as follows: - (a) when considering whether it is just and equitable to extend time there is no single factor which is determinative. The key factors which have been identified in the case law are the length and reason for the delay and the balance of prejudice to the parties (b) whilst the respondent accepted that the relevant personnel were still available to give evidence if required, prejudice would still be caused to the respondent if it was required to defend the claim as it would be necessary to give evidence relating to matters which occurred in or around January – 2020 (relating to the support provided to the claimant) and in or around October 2020 (relating to the oral discussions regarding the terms of any ill health retirement) (c) the respondent also relied, for the purposes of the balancing exercise, on the matters relied upon for the purposes of the claimant's unfair dismissal/breach of contract claim including that the claimant was unable to provide a good explanation for the length and/or the reasons for the delay in pursuing his claims particularly in the light of the legal advice which he had obtained in March 2021.

The claimant's submissions

66. The claimant relied upon the submissions referred to above.

The conclusions of the Tribunal

67. The Tribunal has reminded itself that the test for extending time for the purposes of a discrimination claim is different to that in unfair dismissal/ breach of contract claims, namely that it is required to consider whether, in all the circumstances, the claim was presented in such further period as the Tribunal considers just and equitable and has approached the matter accordingly.
68. Having given the matter careful consideration, the Tribunal considers the following matters to be of particular significance in the balancing exercise to determine whether it is just and equitable to allow the claimant's complaint to proceed: -

The delay in commencing the proceedings

- (1) The delay in commencing the proceedings – the act of disability discrimination complained of occurred on 28 April 2021 (the termination of the claimant's employment). The relevant time limit (as extended by the ACAS EC period) expired on 3 September 2021. The claimant's complaint of disability discrimination was presented on 18 January 2022. The complaint was therefore presented over 4 months after the expiry of the time limit (as extended by the ACAS EC period).

The length and reason for the delay

- (2) The length and reason for the delay – as stated above, the original reason given by the claimant for the delay was that the claim form dated 10 August 2021 was submitted to the Tribunals on that date but was not received at that time and further that he was unaware that it had not been received until he contacted the Tribunal to ascertain the position in January 2022 (when he immediately re- submitted his claim). As further stated above, the claimant subsequently accepted that the claim form had not been submitted on 10 August 2021 but contended however that he nevertheless had had a genuine mistaken belief that he had submitted the claim form dated 10 August 2021 on that date.
- (3) The Tribunals' findings of fact and further its conclusions regarding the circumstances of and the reasons for the delay in the submission of the claimant's claim form (as stated at paragraphs 43-45 above) including that it did not accept, on the balance of probabilities, that the claimant had had a mistaken belief that his claim form had been presented on 10 August 2021 and /or that he had, in any event, provided a satisfactory explanation for the delay for the period between 10 August 2021 and 18 January 2022.

The question of prejudice

- (4) The claimant will be unable to pursue his complaint of disability discrimination in the Tribunals if the time is not extended to allow him to pursue his claim. The respondent will be prejudiced in time and costs if it is required to defend a claim which it would not otherwise be required to defend. Moreover, although the respondent accepted that the relevant witnesses were still available if the matter were to proceed to a hearing it is possible that the cogency of the evidence may be adversely affected given the passage of time as the events in question go back to January 2020.

The balancing exercise

69. When exercising its discretion, the Tribunal has considered the matter in the light of the relevant legal provisions / authorities referred to previously above including in particular that :- (a) section 123 (1) of the 2010 Act provides that a complaint of discrimination may not be brought after the end of the relevant 3 month period or such further period as the Tribunal thinks just and equitable (b) there is no presumption in favour of granting an extension of time with a claimant generally being required to demonstrate a good reason for such an extension and (c) the Tribunal is required to undertake a balancing exercise of all relevant factors.
70. Having given the matter careful consideration, the Tribunal is not satisfied, in all the circumstances of this case, that the claimant's claim has been brought within such further period as the Tribunal thinks just and equitable to allow the claimant to proceed with his complaint of disability discrimination.
71. When reaching such conclusion, the Tribunal has balanced the matters identified above including in particular that if the Tribunal does not extend time the claimant would not be able to pursue his claim in the Tribunals and that the prejudice identified by the respondent was limited to the matters identified at paragraph 68 (4) above. The Tribunal has also taken into account in particular the claimant's explanation that he had a mistaken belief that he had submitted the claim form dated 10 August 2021 at that time and had taken immediate steps to submit/ resubmit the claim form when he discovered the correct position.
72. The Tribunal has however, balanced against such factors the other matters referred to above including that there is no presumption in favour of an extension particularly in circumstances in which the Tribunal it is not satisfied that the claimant has given a satisfactory explanation of the circumstances surrounding the submission of his claim form / the reasons for the lengthy delay including as :- (a) the claimant's claim form was not presented to the Tribunals until 18 January 2022 notwithstanding that the time limit expired on 3 September 2021 (a delay of more than 4 months) (b) that the claimant had been aware of the importance of relevant time limits since March 2021 and had received his ACAS certificate on 9 July 2021 (c) even if the claimant had had a mistaken belief that the claim form had been submitted on 10 August 2021 (which was not accepted by the Tribunal) he had not taken any steps to ascertain the position until 18 January 2022 (over 5 months later) for which he has not provided a satisfactory explanation.
73. Having weighed all of the above the Tribunal is not satisfied that it is, in all the circumstances just and equitable to extend the statutory time limit to allow the claimant's complaint of disability discrimination to proceed. The Tribunal does not therefore have jurisdiction to entertain the complaint.

Employment Judge Goraj
Date: 20 October 2022

Judgment sent to the parties: 25 October 2022

FOR THE TRIBUNAL OFFICE