



## EMPLOYMENT TRIBUNALS

**Claimant**

**Mr D Fymruk**

v

**Respondent**

**London Borough of Islington**

### PRELIMINARY HEARING

**Heard at: Watford**

**On: 27 September 2019**

**Before: Employment Judge Manley**

**Appearances:**

**For the Claimant: In person (with assistance from his partner Ms Smith)**

**For the Respondents: Mr Gray-Jones, Counsel**

### RESERVED JUDGMENT

1. It was reasonably practicable to present the complaints of unfair dismissal and unlawful deduction of wages (holiday pay) before the time limit expired. The tribunal has no jurisdiction to hear those complaints and they cannot proceed.
2. It is just and equitable to extend time to allow the disability discrimination complaint to proceed.
3. A case management preliminary hearing will shortly be arranged to finalise a list of issues and to make arrangements for further hearings.

### REASONS

#### Introduction and issues

- 1 The claimant presented a claim for unfair dismissal, disability discrimination and holiday pay on 31 October 2018 which was the same day that ACAS had been notified under the early conciliation procedure and was also the date on the ACAS certificate. The matter was automatically listed for a case management preliminary hearing but, upon receipt of the response form which pointed out that the matter had been presented out of time, that was converted to an open

preliminary hearing to determine whether the matters could proceed. Unfortunately, that hearing had to be postponed because there was no available judge and that was the matter that therefore was heard on the above date. In brief, the date from which time would run was 12 July 2018. A claim would have to be made within three months of that date allowing, of course, for referral to the ACAS early conciliation process before 11 October 2018. There is a slight difference in the time limit with respect to the holiday pay as the last payment was not made until 26 October meaning there was a slightly later time limit for that on 25 October.

2 The issues for determination were as follows:-

- a) If the unfair dismissal and unlawful deduction of wages complaint was not made within the three month time limit, is the tribunal satisfied that it was not reasonably practicable to present the claim before the end of the period of three months (allowing, if appropriate, a period for early conciliation). If the tribunal is satisfied that it was not reasonably practicable, what further period would be reasonable?
- b) If the claim for disability discrimination was not made within the three month's time limit, is it just and equitable to extend time to allow the claim to proceed?

### **The hearing**

- 3 The claimant is hard of hearing. He has severe hearing loss estimated at 98%. His level of educational achievement is relatively low. He told me that he attended a special middle school, was then at a mainstream school, but he passed no examinations. He explained to me that he can understand what is being said as long as he can lipread and the words used are not too complex. We discussed how to manage this hearing. The claimant informed me that he would not be assisted by a British sign language interpreter but asked that we use basic language and allowed time for him to process the questions. Some assistance was given to the claimant by his partner, Ms Smith, but she was also giving evidence and it was therefore not appropriate for her to help him when he was giving evidence. The tribunal had set up an induction hearing loop, but the claimant said that he did not think that that had particularly assisted him.
- 4 The respondent had sent their outline legal arguments to the claimant and had prepared a bundle. I had witness statements from the claimant and Ms Smith and from a former manager, Mr Meadows. Mr Meadows' witness statement was not relevant for the question of whether time should be extended but the claimant's and his partner's were both relevant. I read those before I heard cross-examination. We took breaks to allow the claimant to absorb information and this meant that we ran slightly over time and I felt that it was necessary to reserve my judgment.

### **The facts**

- 5 The claimant worked for a total of 16 years as a ground maintenance person based at the time of his dismissal at St Pancras & Islington cemetery. He

worked for OCS before transferring to the respondent in 2017. For some time in 2017/2018 the claimant was “acting-up” as a supervisor whilst recruitment was ongoing for that post. This meant that he had day-to-day supervision over several colleagues. From time to time he raised concerns about this, perhaps informally, with his manager.

- 6 On 19 January 2018 the respondent became aware of serious concerns about the claimant raised by two of his colleagues. One related to the alleged use of racially abusive language and the other related to alleged inappropriate physical contact. The claimant was suspended from work on 22 January 2018 and on 1 February 2018 he raised a grievance against those two colleagues. The claimant was getting assistance with his problems at work from his girlfriend/partner, Ms Smith. During the hearing it also emerged that his sister-in-law was helping draft some of the documents. Neither Ms Smith nor the claimant mentioned this in their witness statements, but I accepted their evidence that there had been this help.
- 7 Ms Smith contacted the Citizens Advice Bureau for advice fairly soon after the claimant’s suspension. She also contacted ACAS having seen reference to their helpline on the internet. The claimant had assistance to write documents which he sent to the respondent including the statement that he made in relation to the allegations against him and his fairly detailed grievance. The claimant denied making any sort of racially abusive comments. He accepted there had been some physical contact but said that that was the culture of the workplace. Matters were investigated and a disciplinary hearing was arranged for 22 March 2018. That disciplinary officer decided that he needed to interview more people and he did so, the response indicates, after that date.
- 8 The claimant had become unwell and the respondent decided to seek the advice of occupational health about his ability to attend a disciplinary hearing. It was said that he was not well enough to attend work but that he could attend a hearing. The claimant also had a family bereavement around this time.
- 9 The claimant told me that he was very unwell in this period and there are documents within the bundle that show that he was seeking the assistance of his doctor’s surgery with respect to his mental health. There was a referral to a community mental health team, but it looks as though the claimant did not follow that up, although a later explanation seemed to indicate that he had some trouble following the process. The claimant did not take medication but has latterly had counselling which he continues to use. The claimant was informed that the disciplinary hearing would proceed on 9 July 2018 and would continue even if he was not able to attend. The claimant did not attend, and the decision was that he should be dismissed, dismissal taking effect on 12 July.
- 10 The claimant immediately indicated an intention to appeal and that was sent on 16 July 2018. In that letter (page 71) he referred to an employment tribunal “*on the grounds of constructive dismissal partly due to the discrimination against my disability*”. Although there was a response to that appeal, for reasons not understood or given, the appeal hearing did not proceed until much later, even

though the claimant, or more accurately Ms Smith, wrote reminding the respondent about the appeal.

- 11 Ms Smith's evidence was that she was in communication with ACAS via the helpline at this point. They discussed the appeal and she was told by ACAS that she should wait 14 days for the respondent to come back to her about the appeal. Her evidence is that at no time did ACAS mention a time limit to make a claim to the employment tribunal. She estimated that she might have spoken to ACAS on the phone about 10 times, although it appears that most of that was before the claimant was dismissed. After a delay, during which time Ms Smith herself was unwell and attending hospital waiting for a diagnosis, she rang ACAS on 31 October 2018. It was at that point that she was told that the claim was out of time but that she could proceed to see whether the claim would be accepted. Her evidence was that on that very day she started the early conciliation process, received the certificate and put in the claim form.
- 12 I heard evidence that Ms Smith and the claimant had also spoken to a solicitor who gave an estimate of £14,000 to progress the claim. Ms Smith's evidence was that none of the people she discussed matters with mentioned the three month time limit. I was not sure, nor was Ms Smith entirely clear, when the visits to these organisations occurred. It is possible that they occurred before the dismissal, although she did believe that one of the visits to that solicitor or another one might well have been after the tribunal claim had been lodged as she thought it was in connection with an order made by the tribunal.
- 13 Ms Smith was also asked, as was the claimant, about use of the internet. The claimant's evidence, which I accept, is that he is able to use the internet at a basic level and that he does not carry out research on the internet. Ms Smith did carry out some research on the internet, but that led her to other sources of advice rather than carrying out research herself with respect to time limits.
- 14 I accept that it is unusual for someone not to be aware of time limits and indeed for this number of advisors to fail to mention it to Ms Smith. However, I found Ms Smith's evidence truthful and honest. She said there would be no reason for them to wait to present a claim until 31 October. They had understood that they needed to wait for the appeal. I accept that Ms Smith was not told about the time limit until ACAS mentioned it to her on 31 October and she put in the claim immediately. I accept that the claimant himself had no awareness of any time limit and all the paperwork submitted on his behalf was prepared by Ms Smith with his active involvement. Some of the time, early on in the process, the claimant's sister-in-law was also involved. I also accept that Ms Smith did not notice the time limit when she looked on the internet because she was just looking for places to go for advice.
- 15 I accept that the claimant had significant health concerns at this time. He had lost a job which he had held for some years and was worried about his future job prospects. It was clear that he was seeking assistance with his mental health. I also accept that Ms Smith herself had some periods of ill health over this period of time.

## The law and submissions

- 16 The relevant sections of the legislation are not in any doubt. It is the same test for unfair dismissal and unlawful deduction of wages (holiday pay). S.111(2) Employment Rights Act 1996 (ERA) states that the complaint must be made “*within three months of the effective date of termination or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable to present the complaint before the end of three months.*”
- 17 At s.23 of ERA and the Working Time Regulations contain the same provisions for time limits for the holiday pay claim.
- 18 Case law makes it clear that the burden of showing that it was not reasonably practicable for the claim to be presented within the time limit rests on the claimant. I should consider the claimant’s knowledge of the possibility of making a claim when I am considering whether he or those helping him knew of the time limit. It is settled law that awaiting an outcome of an internal appeal does not usually make it not reasonably practicable to present the complaint in time (Palmer v Southend on Sea Borough Council [1984] ICR 372). There are a number of cases about the situation where the claimant has taken advice, either from a skilled adviser such as a solicitor (Deadman v British Building & Engineering Appliances Ltd [1974] ICR 53) as compared with other advisers such as those at the CAB (Marks & Spencer plc v Williams Ryan [2005] ICR 1293). The case of Paczkowski v Sieradzka [2017] ICR 62 gives guidance on what considerations come into play for these situations.
- 19 There is, of course, a different test under s.123 of Equality Act 2010 (EQA) for the complaint of disability discrimination. That simply says that the complaint needs to be presented within three months of the date of the act to which the complaint relates or “*such other period as the employment tribunal thinks just and equitable*”.
- 20 As far as a discrimination claim is concerned, there is wider discretion to extend time here. I am reminded however that time limits are still applied strictly and it is only in relatively limited circumstances that time should be extended (Bexley Community Centre v Robertson [2003] EWCA Civ 576). British Coal Corporation v Keble [1997] IRLR 336 gives some guidance with respect to how I should exercise my discretion. They are as follows:
- “(a) *The length of and reasons for the delay;*
  - (b) *The extent to which the cogency of the evidence is likely to be affected by the delay;*
  - (c) *The extent to which the parties sued had co-operated with any request for information;*
  - (d) *The promptness with which the claimant had acted once he or she know of the facts giving rise to the claim;*

(e) *The steps taken by the claimant to obtain professional legal advice once he or she knew of the facts giving rise to the claim.*”

- 21 I have to consider the balance of prejudice but I do not necessarily go through all those factors set out above. (Southwark London Borough Council v Afolabi [2003] ICR 800)
- 22 I heard detailed submissions from the respondent's representative. There were outline legal arguments and then more detailed arguments which reminded me of the tests under the legislation and the cases which assist me with my deliberations.
- 23 The respondent submitted that the claim was out of time and I should not extend time under either test. Having heard all the evidence, the respondent's representative reminded me of several factors. He submitted that the evidence was that the claimant, particularly through his partner Ms Smith, was aware of the right to claim even if they were not necessarily told of the time limit. He questioned whether it would be likely that that number of advisors spoken to on a number of occasions would have failed to mention the time limit. He also suggested that it was strange that the letters written on the claimant's behalf appeared to have an involvement of the sister-in-law who had not previously been mentioned. He pointed out that although the claimant's health might well be a factor, he was not having treatment at the time the time limit expired and was not taking any medication. He submitted that Ms Smith's evidence with respect to her ill health was vague. He pointed out that the letters written to the respondent indicated a fairly sophisticated understanding of employment rights.
- 24 For the claimant, Ms Smith said that she had done her best to get information, but nobody had told her about the time limit. She pointed out that the respondent had failed to progress the appeal and believed that they had also not dealt with the claimant's grievance. She reminded me of her ill health and that the claimant was in essence a litigant in person. She said that she had tried to follow the procedure as much as she was able and had relied on advice given to her. She pointed out that ACAS said that phone calls were recorded, and she was confident that those recordings would show that no-one had mentioned the time limit to her when she spoke to ACAS before 31 October. She said that it was only relatively basic information that she gleaned from the internet.

### **Conclusions**

- 25 This is a difficult matter. I am satisfied that the claimant has significant disadvantages which go beyond those of many claimants, even those who are litigants in person. He appears to have been ably assisted by his partner, Ms Smith, and I accept that, for whatever reason, she did not discover (and by implication neither did the claimant) of the time limit until after it had expired.
- 26 However, this is not sufficient for me to find that it was not reasonably practicable to present the claim in time. Given that there was a clear

understanding of his employment rights as set out in letters sent by the claimant to the respondent, it cannot be said that he or those assisting him were ignorant of his right to bring a claim although they may well have been unaware of the time limits. Whilst I have sympathy for the position that the claimant found himself in and accept the obvious difficulties that he faced at the time, I am not satisfied that it was not reasonably practicable to present the unfair dismissal and the unlawful deduction of wages claim within the time limit which is a strict one. Those matters cannot proceed.

- 27 However, I come to a different result when I consider whether it is just and equitable to extend time for the disability discrimination complaint. It is quite clear to me that the relatively short time period of 20 days is not one which causes any prejudice to the respondent. I say this particularly in light of the fact that the respondent had failed to progress the claimant's appeal until after the claim form was presented. I am satisfied that that is a short delay and I accept the reasons for the delay was that the claimant and Ms Smith were unaware of the time limit. The cogency of the evidence is not going to be affected by such a short delay and I am satisfied that the claimant and Ms Smith tried quite hard to get suitable advice. The claimant is obviously at a relatively significant disadvantage both in these proceedings and perhaps in the disciplinary proceedings with the respondent. There would appear to be little or no question that the claimant would meet the definition of being a disabled person within the Equality Act 2010 and he raised questions about alleged discrimination from the start of the disciplinary process against him. Balancing all these matters, I find that it would be just and equitable to extend time so that the claimant can pursue his claims of disability discrimination against the respondent.
- 28 It will need a further case management preliminary hearing to make sure that the list of issues is drawn up and careful arrangements are made for an effective hearing given the nature of the claimant's disadvantages.

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**Employment Judge Manley**

Sent to the parties on:

.....10/10/2019.....

For the Tribunal:

..... 06/11/2019..