



EMPLOYMENT TRIBUNALS

Claimant: Mr D Evans
Respondent: T J Morris Limited
Heard at: Ashford
On: 19 September 2018
Before: Employment Judge Pritchard

Representation
Claimant: No appearance
Respondent: Miss D Masters, counsel

JUDGMENT

- 1 The correct name of the Respondent is T J Morris Limited and the title to these proceedings is amended accordingly.
- 2 The Claimant's claims of unfair dismissal and disability discrimination are struck out under Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013.

REASONS

1. By way of an ET1 presented on 2 May 2018, the Claimant claims unfair dismissal and disability discrimination. The Respondent resists the claims.
2. By letter dated 12 July 2018, the Respondent made an application for the Claimant's claims to be struck out on the basis that they had been submitted outside the statutory time limit and therefore had no reasonable prospects of success.
3. The case came before me at a preliminary hearing today to consider the Respondent's application. The issue was whether the Respondent could show that the Claimant's claims had no reasonable prospects of success because they had been presented out of time.
4. Notice of Hearing was sent to the parties on 2 August 2018 by email. On the same day the Claimant informed the Tribunal by email that he now had another job, that he was likely to be working on the day of the preliminary hearing, and

that he did not want to take time off. Employment Judge Sage gave instructions that the preliminary hearing would proceed on 19 September 2018, the parties being informed of her decision by email on 5 September 2018. On the same day the Claimant again informed the Tribunal that he did not wish to ask his new employer for a day off work and that he did not want to lose wages. He asked for the date of the preliminary hearing to be re-arranged. Employment Judge Tsamados noted that the Claimant had not provided details of when he would be off work and he too gave instructions that the preliminary hearing would proceed on 19 September 2018. By email dated 13 September 2018 the Claimant emailed the Tribunal and stated as follows:

Don't expect me to show then after reading that! I tried to sort this so I don't have to take time off work and make wages I need for bills and rent. This is a new job too and won't be put in that position, serious complaints will follow

5. The Claimant did not attend the preliminary hearing. In accordance with Rule 47, I instructed the clerk to the Tribunal to make enquiries of the Claimant by telephone. However, there was no reply.
6. The Claimant alleges he suffers from autism.
7. I determined that the preliminary hearing should proceed in the Claimant's absence. It was clear that the reason for his non-attendance was solely his unwillingness to take a day off work; the reason was in no way linked to his alleged autism or any other mental impairment.

Findings of fact

8. The relevant dates are as follows:
 - 8.1. The Claimant's employment commenced on 14 October 2015
 - 8.2. The Claimant's employment ended on 20 October 2017
 - 8.3. The primary time limited expired on 19 January 2018
 - 8.4. The Claimant contacted ACAS on 18 April 2018
 - 8.5. ACAS issued an Early Conciliation Certificate on 20 April 2018
 - 8.6. The Claimant presented his ET1 to the Tribunal on 2 May 2018
9. Counsel referred me to a number of documents in a bundle which I find show the following:
 - 9.1. The Claimant was aware as early as 29 September 2017 that dismissal was a possible outcome of the disciplinary process.
 - 9.2. The Claimant was aware by 21 October 2017 that he had been summarily dismissed.
 - 9.3. The Claimant was contemplating legal action as early as 21 October 2017

- 9.4. The Claimant appears to have taken advice from the Citizens Advice Bureau within the primary time limit.
- 9.5. The Claimant was able to lodge an appeal against his dismissal within the primary time limit.
- 9.6. The Claimant may well have taken further legal advice in November 2017.
- 9.7. The Claimant was able to attend the appeal hearing within the primary time limit.
- 9.8. There is no medical evidence that the Claimant was too unwell/disabled to present a claim within the primary time limit.
- 9.9. The Claimant appears to have been receiving support from his mother about the time of his dismissal.
- 9.10. The Claimant was aware in February 2018 that his appeal had been rejected yet he still delayed bringing a claim until May 2018.

Applicable law

10. Under section 111(2) of the Employment Rights Act 1996 a Tribunal shall not consider a complaint of unfair dismissal unless it is presented to a Tribunal:
 - 10.1. Before the end of the period of 3 months beginning with the effective date of termination or;
 - 10.2. Within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of 3 months
11. Where a claimant contacts ACAS within the primary time limit, time is extended under section 207B of the Employment Rights Act 1996.
12. The burden of proof in showing that it was not reasonably practicable to present the claim in time rests upon the Claimant; see Porter v Bandridge Ltd [1978] ICR 943 CA. If the Claimant does succeed in doing so then the Tribunal must also be satisfied that the time in which the claim was in fact presented was in itself reasonable. One of the leading cases is Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 CA in which May LJ referred to the test as being in effect one of “reasonable feasibility” (in other words somewhere between the physical possibility and pure reasonableness). A number of factors may need to be considered. The list of factors is non-exhaustive but may include the manner and reason for the dismissal; the extent to which the internal grievance process was in use; physical or mental impairment (including illness – see Shultz v Esso [1999] IRLR 488 CA, a case concerning a claimant suffering from a depressive illness, as to the approach for the Tribunal to adopt when determining the “reasonable practicability” question); whether the Claimant knew of his rights; any misrepresentation on the part of the Respondent; any advice given and the substantive cause of the Claimant’s failure to comply.

13. Under section 123(1) of the Equality Act 2010 a complaint may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.
14. Where a claimant contacts ACAS within the primary time limit, time is extended under section 140B of the Equality Act 2010.
15. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.
16. In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered. See: Department of Constitutional Affairs v Jones [2008] IRLR 128 CA; Southwark London Borough Council v Afolabi 2003 ICR 800 CA.
17. As identified in Miller v Ministry of Justice UKEAT/003/004/15 at paragraph 12, there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.
18. Similarly, reasonable ignorance of time limits can be a relevant factor in deciding whether or not it is just and equitable to extend time. See: Director of Public Prosecutions v Marshall 1998 ICR 518 EAT. In such cases, the date from which a Claimant could have become aware of the right to present a worthwhile complaint is relevant.
19. In Apelogun-Gabriels v Lambeth London Borough Council [2001] EWCA Civ 1853 it was said that that the fact that a Claimant deferred commencing proceedings in the Tribunal while awaiting the outcome of internal proceedings is only one factor to be taken into account when considering an application to extend time.
20. In disability cases, the disability itself might be a relevant factor. See for example: Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170, CA.

Conclusion

21. The Claimant failed to contact ACAS within the primary time limit and he is not therefore entitled to take advantage of any extension under the Early Conciliation regime. Both his disability discrimination and unfair dismissal claims were presented over 3 months outside the statutory time limit.
22. Clearly, it was reasonably feasible for the to engage in the disciplinary and appeal process. He was contemplating legal action at an early stage and he sought advice from the CAB. There is no evidence to suggest that the delay in bringing his claim was in any way connected with his alleged mental impairment. Nor is there any evidence to support the Claimant's allegation contained in his ET1 that the Respondent "Prolonged my appeal process on purpose so I couldn't go to the Tribunal". In my judgment, the Claimant has no reasonable prospect of showing that it was not reasonably practicable for him to have presented his claim within the statutory time limit.
23. Even if it was not reasonably practicable for the Claimant to have presented his claim within the statutory limitation period, he did not bring his claim within a reasonable period thereafter. There is simply no explanation for the delay.
24. The Claimant's unfair dismissal claim therefore has no reasonable prospects of success.
25. In my judgment, the Claimant has no reasonable prospect of showing that it would be just and equitable for time to be extended under for the purposes of his disability discrimination claim. Although not overlong, the delay in bringing the claim is not insubstantial. Save for the allegation that the Respondent purposely prolonged the appeal process for which there is no evidence, the Claimant has advanced no reasons for the delay. He knew of the facts giving rise to a potential cause of action at an early stage and took advice from the CAB but he failed to present his claim in time. Although the Respondent is unlikely to suffer "forensic" prejudice, if the case be allowed to proceed the Respondent would suffer the obvious prejudice of losing a limitation defence.
26. In addition, the Claimant's claim of disability discrimination appears to be exceedingly weak. The Claimant was clear during the internal process that he did not know, nor did the Respondent know, of his alleged disability. The employer's knowledge of disability is a pre-requisite in claims of direct discrimination (section 13 of the Equality Act 2010), discrimination because of something arising from disability (section 15 of the Equality Act 2010) and failure to make reasonable adjustments (section 20 and 21 of the Equality Act 2010).
27. The Claimant's disability discrimination claim has no reasonable prospects of success.

Employment Judge Pritchard

Date: 19 September 2018