EMPLOYMENT TRIBUNALS

Claimant: **Mr D Ings**

Respondent: **Priory Healthcare Limited**

Heard at: **Southampton** **On: 3 May 2019**

Before: Employment Judge Maxwell

Representation
Claimant: Mr Ryan, Representative
Respondent: Mrs Reid, Solicitor

JUDGMENT

1. The Claimant was employed by Priory Healthcare Limited and the parties to the proceedings are amended accordingly.

2. The Claimant having been dismissed with effect from 29 May 2015, his claim made on 4 October 2018 about dismissal and the events leading to that was not presented within 3 months.

3. Time is not extended:

    3.1. the Claimant has not proven that it was not reasonably practicable for him to have presented his claims within 3 months;

    3.2. it is not just and equitable to extend time.

4. The Tribunal has no jurisdiction to determine the Claimant's claims and they are dismissed.

REASONS

Issues

5. This preliminary hearing was listed to determine:

    5.1. who the Claimant's employer was and / or the correct identity of the Respondent;

    5.2. whether the claims were brought within 3 months of the matters complained of;

    5.3. if not, whether time can be extended to allow them to continue;

    5.4. whether any of the Claimant's claims have little reasonable prospect of success and whether a deposit order should be made under rule 39 of the Employment Tribunal Rules which may require the Claimant to pay a sum of £1,000 as a condition of proceeding with any such claims or arguments.

Background

6. By a claim form presented on 4 October 2018, the Claimant brought complaints against Priory Central Services Limited ("Priory Central"), arising from his employment at Priory Hospital Southampton which he said ended on 17 July 2018. Claims were pursued under the **Employment Rights Act 1996** ("ERA") and **Equality Act 2010** ("EqA"):

    6.1. unfair dismissal [ordinary ERA section 98 and automatic for making a protected disclosure - ERA section 103A];

    6.2. disability discrimination;

    6.3. victimisation;

    6.4. breach of contract;

    6.5. unlawful deduction of wages;

    6.6. holiday pay.

7. The Claimant engaged in ACAS EC between 11 September and 18 September 2018 and if he was correct about the date of dismissal, then his complaints about dismissal, or events running up to dismissal, would have been in time.

8. By a response presented on 29 October 2018, the Respondent denied the claims, pleaded an effective date of termination ("EDT") of 28 May 2015, contended the Claimant had been employed by Priory Healthcare Limited

("Priory Healthcare") and sought to amend the identity of the respondent accordingly; the Claimant opposed that amendment.

9. The very extensive procedural history is summarised in the case management orders made by EJ Livesey on 12 March and 26 April 2019.

Preliminary Matters

10. The parties were reminded of the orders made by EJ Livesey and the issues which fell for determination today. I indicated that I would decide the first three issues, before going on to consider the Respondent's application for a deposit order.

11. The Claimant's visual and hearing impairments were explored. The Claimant said he routinely used a magnifier, had not brought that with him today, but was confident his bifocals would suffice. His hearing impairment is tinnitus. The Tribunal advised the Claimant he should say if at any point he was having difficulty reading documents or hearing what was said; in the course of the hearing, several passages from documents were read to the Claimant to ensure that he understood their contents before answering questions.

Documents

12. The Respondent provided a bundle of documents running to 91 pages, prepared in accordance with the order of EJ Livesey.

13. In default of EJ Livesey's order, the Claimant provided a number of additional pages this morning, which the Respondent did not object to being included.

14. The Claimant did, however, object to a single additional page the Respondent sought to add, being a printout from its payroll system showing a calculation for holiday pay made in in June 2015. Mrs Reid explained that the Respondent had previously disclosed all of the payslips, which ran to May 2015. Very recently her client provided the printout for June 2015, wherein there was a calculation of the Claimant's holiday pay, but no payslip because once credit was given for sums already paid, no balance was due to paid to him. I decided to admit this document, in case it was relevant to the time limits issue on the Claimant's holiday pay claim. The Claimant's stance in opposing this document's admission was inconsistent with his simultaneous wish to have his own documents admitted late and when I asked Mr Ryan whether, aside form the document being late, there was any disadvantage to the Claimant in allowing it in, he said there was not.

Witness Evidence

15. The Tribunal heard witness evidence from Mr David Ings, the Claimant. A short adjournment was necessary soon after he was sworn in, because when asked by the Tribunal whether he had read his witness statement, the Claimant said no. The Tribunal instructed the Claimant to read his statement carefully as on returning he would be asked whether its contents were true and he should note any amendments he wished to make. Following this adjournment, the Claimant was again asked whether he had read his statement and again said no, instead he said Mr Ryan had read it to him. The Claimant was reminded this document would become his evidence under oath and for the avoidance of any doubt, the Tribunal read the contents aloud to the Claimant, slowly, pausing at regular intervals for him to confirm the content was correct. At the end of this process, the Claimant was asked whether all that had been read to him was true and accurate, he said it was.

16. Mrs Laura Fehilly, gave evidence for the Respondent, confirming the truth of her statement on affirmation.

Written Submissions

17. I received and considered:

    17.1. the claimant's:

        17.1.1. 'prehearing skeleton argument';

        17.1.2.'prehearing submission';

        17.1.3.'application for addressing pre-hearing complaints' - which Mr Ryan confirmed were further submissions he wished me to take into account;

        17.1.4.'application for the respondent's response to be struck out' - I explained that I would consider the representations therein insofar as they were relevant to the issues which it fell to me to determine, but would not consider striking out the response at this hearing;

    17.2. the respondent's skeleton argument.

18. At the conclusion of the hearing, on reserving my decision, I advised the parties that they must now await the decision and were not permitted to make any further submissions or provide any further evidence in connection with the same.

Hearing Management

19. The information provided to the Tribunal on the morning of the hearing about the parties' representatives recorded Mr Ryan as Counsel. When asked whether he had told the clerk this, Mr Ryan said he was "counsellor" to the Claimant. I explained that Counsel meant Barrister, that it was an offence to put yourself forward as a Barrister if you were not one and that if he is asked at any future hearing about his capacity, Mr Ryan should simply say that he is a representative or a lay representative (i.e. not legally qualified). Mr Ryan is a former colleague of the Claimant at the Priory Hospital Southampton and has previously pursued his own claims in the Tribunal against the Respondent and / or other companies in the same group.

20. During re-examination of the Claimant, the Tribunal intervened to ensure that questions asked arose from cross-examination, were not leading and remained relevant to the issues.

Facts

21. Prior to the commencement of his employment, the Claimant was sent and signed a contract of employment. The heading included "Priory Group - contract of employment". Thereafter followed the date of issue, expiry date of offer and:

> **"Name of employer: Priory Healthcare Ltd"**

22. In cross-examination, it was put to the Claimant that the contract provided his employer was Priory Healthcare Limited and he replied "I can see that". In re-examination, Mr Ryan drew the Claimant's attention to the header of the contract where it refers to "Priory Group" and then where it gives the name of employer, before asking whether he was clear who his employer was, to which he replied he was not. The Claimant had expressed no doubt on this point when asked about it in cross-examination and his answer in re-examination not only tended to contradict his previous response, but was also rather stilted in its delivery. I was not persuaded by the Claimant's later evidence on this point. I am satisfied that when the Claimant accepted this offer of employment, not only was Priory Healthcare Limited in fact his employer, as objectively the offer could not be construed otherwise, but furthermore he knew his employer would be Priory Healthcare Limited. For reasons set out below, the Claimant's new-found doubt on this appears somewhat self-serving.

23. The Claimant attended an induction on 10 March 2014, which included an explanation of the Priory Group of companies and where Priory Healthcare fitted into that.

24. The Claimant's employment did not go smoothly and his probationary period appears to have been extended. By a letter of 20 May 2015 from Mrs Fehilly, which said he had failed to attend an earlier meeting, the Claimant was called

to a probation review meeting on 28 May 2015. The letter also advised that if he did not attend a decision may be made in his absence. The possible outcomes were stated as: employment confirmed as permanent, probation extended, or dismissal. The footer of the letter included "Priory Healthcare Limited trading as the Priory Hospital Southampton". The Claimant agreed he received this letter.

25. The Claimant did not attend the 28 May 2015 meeting, providing instead a Med3 from his GP stating he was not fit for work from 22 May to 30 June 2015 because of "low mood / depression". The Med3 said nothing about whether he was fit to attend a probation review meeting.

26. A letter of 28 May 2015, which the Claimant agreed he received, informed him "your employment with Priory Group has been terminated with effect from 28 May 2015". The footer again included "Priory Healthcare Limited trading as the Priory Hospital Southampton". I am satisfied, objectively, that when the Claimant received this letter, most likely on 29 May 2015, it was effective to terminate his employment with Priory Healthcare Limited.

27. When asked about the 28 May 2015 letter in cross-examination, the Claimant appeared uncertain in reading the text. For the avoidance of doubt I read the following passage to the Claimant:

> **As a consequence therefore your employment with Priory Group has been terminated with effect from 28 May 2015. You will be paid one week's pay in lieu of notice plus any annual leave to which you are entitled. Your P45 and any monies owing will be forwarded to you.**

28. In answer to Mrs Reid's questions, the Claimant said that he understood this letter terminated his employment. He also said he knew he had a right of appeal against that decision, which he exercised. The Claimant expressed no doubt about the meaning of this letter or its effect. He did not say that it was ineffective for any reason.

29. In re-examination, the Claimant was asked about the 28 May 2015 letter. Answering Mr Ryan's questions, the Claimant said that Priory Central was his employer and that company should have dismissed him. The Claimant could easily have given that evidence in response to questions asked by Mrs Reid and did not. Once again, the Claimant's answers seemed to be given in a rather stilted manner and I did not find them to be persuasive.

30. The Respondent's letter of 29 May 2015 reminded the Claimant of his right to appeal against dismissal.

31. In a short handwritten note of 30 May 2015, the Claimant appealed against his dismissal. A letter of 15 June 2015, invited him to attend a "Probationary Termination Appeal".

32. The Claimant attended the appeal hearing on 23 June 2015 accompanied by his trade union representative, Steve Osborne. Mr Ryan stated repeatedly

that the Claimant was misled by the Respondent into attending this meeting on the pretext it was for the purpose of discussing his protected disclosures. In his witness statement, the Claimant says he was instructed to "attend a work meeting on the pretense [sic] part of Protected Disclosures investigation". I reject entirely the suggestion the Claimant did not know that he was attending an appeal against dismissal hearing, as that is flatly contradicted by what was written at the time, both by the Claimant and the Respondent. The Claimant attended an appeal accompanied by a trade union representative. The content of that meeting, as reflected in the handwritten and typed notes, is consistent with an appeal meeting. The Claimant's current position is unrealistic and artificial.

33. The notes of the appeal meeting record that the Claimant's appeal was dismissed. I do not accept that any discussion about the possibility of bank work in the future if the Claimant's health improved led him to believe that his employment was continuing. The Claimant was, objectively, dismissed and, furthermore, clearly knew that was the position. I am reinforced in this conclusion by the absence, thereafter, of any step taken by the Claimant consistent with continuing employment and his letter to the Respondent of 1 October 2016, in which he asked for a copy of his personnel file and referred to his "termination date May 2015".

34. In 2016 the Claimant took up new employment with an unrelated employer. When Mrs Reid put to the Claimant that subsequent to his dismissal he had taken up new employment, he said he had, then he didn't think he had. When reminded he had declared this fact in his claim form, the Claimant changed his evidence again and said he had. The Claimant also agreed with Mrs Reid's proposition that he would not have got himself a new job if he had believed his was still employed at Priory Hospital Southampton.

35. At no point prior to 2018, did the Claimant ever query the identity of his employer or the fact of his dismissal.

36. By a letter of 25 January 2018, the Claimant wrote to Priory Group Limited, attaching a 'grounds of complaint' document, purporting to bring claims against that company, Priory Central, Priory Healthcare and Unison. The document began by asserting that the Claimant was employed by Priory Central between 10 April 2014 and 19 June 2015. This was the first time the Claimant had ever questioned the identity of his employer; also, notably, at that point he still accepted a 2015 EDT. In cross-examination, the Claimant was asked about the circumstances giving rise to this letter and said he had received legal advice. When asked by the Tribunal from whom this advice was taken, the Claimant said it was a friend who was a solicitor. Asked directly whether that person was Mr Ryan, the Claimant said it was not.

37. Mrs Reid asked the Claimant whether it was Mr Ryan who had suggested to him that Priory Central was his employer and he replied "not directly". When asked by the Tribunal what "not directly" meant, the Claimant said Mr Ryan had "mentioned" Priory Central being his employer. When later asked

questions by Mrs Reid about the information in his claim form, including the multiple case numbers cited, the Claimant denied knowing that one of these related to Mr Ryan's claim and said he was not sure where they came from. Asked by the Tribunal who prepared the claim form, the Claimant said it was Mr Ryan. Asked by the Tribunal whether he wished to revisit his evidence about receiving legal advice, the Claimant said he didn't get any legal advice. Asked by the Tribunal whether Mr Ryan helped draft the letter of 25 January 2018, the Claimant said yes.

38. I find that the Claimant had no doubt or concern about the identity of his employer, or the fact of his dismissal in May 2015, at least until circa January 2018, when Mr Ryan "mentioned" this to him.

39. The Claimant agreed with Mrs Reid that all of his complaints related to his employment up to May 2015.

Law

ERA

40. Where a claim is presented outwith the primary limitation period, the Tribunal has a discretion to extend time under ERA, where:

    40.1. it was not reasonably practicable for the claimant to have presented the claim within the 3-month period;

    40.2. the claims was presented within a further reasonable period.

Reasonably Practicable

41. The onus is upon a claimant to prove that is was not "reasonably practicable" for a claim to have presented within the specified time period. This represents a high hurdle to a late claim; see **Saunders v Southend on Sea Borough Council [1984] IRLR 119 CA**, May LJ giving the judgement of the Court said:

    22. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However we think that one can say that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' is to take a view too favourable to the employee. On the other hand 'reasonably practicable' means more than merely what is reasonably capable physically of being done – different, for instance, from its construction in the context of the legislation relating to factories: compare Marshal v Gotham (1954) AC 360. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word 'practicable' as the equivalent of 'feasible' as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic – 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' – is the best approach to the correct application of the relevant subsection.

42. A claimant will not establish that it was not reasonably practicable to bring a claim before an Employment Tribunal simply by relying upon ignorance of the right to bring such a claim, or the time in which that might be done, rather the reasonableness of such ignorance will need to be established. In **Walls Meat Company Limited v Khan [1978] IRLR 499 CA**, Lord Denning MR said:

> **15. I would venture to take the simple test given by the majority in Dedman's [1973] IRLR 379 case. It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights — or ignorance of the time limit — is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences. […]**

EqA

43. Where a claim is presented outwith the primary limitation period, the Tribunal has a discretion to extend time, where it is just and equitable to do so.

44. Separately, where a series of discriminatory acts are found by the Tribunal to constitute a single continuing act of discrimination, the claim will be in time where the last part of the act was within the 3-month period.

Just and Equitable

45. So far as material section 123 of the **Equality Act 2010** ("EqA") provides:

> **(1) Subject to sections 140A and 104B proceedings on a complaint within section 120 may not be brought after the end of—**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **[…]**
>
> **(3) For the purposes of this section—**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
>
> **(a) when P does an act inconsistent with doing it, or**
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

46. An Employment Tribunal applying section 123 has a broad discretion and, pursuant to the decision in **British Coal Corporation v Keeble [1997] IRLR**

336 EAT, the factors relevant to its exercise may include those under section 33 of the **Limitation Act 1980**, in particular:

46.1. the length of and reasons for the delay;

46.2. the extent to which the cogency of the evidence is likely to be affected by the delay;

46.3. the extent to which the party sued had cooperated with any requests for information;

46.4. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.

47. The balance of prejudice between the parties will always be an important factor.

48. There is, however, no presumption that time will be extended; see **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 343 CA**, per Auld LJ:

> **25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. […]**

49. Most recently, the Court of Appeal considered the exercise of this discretion in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**, per Leggatt LJ:

> **18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. […]**
>
> **19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).**

Continuing Act

50. The question of what amounts to a "continuing act" was considered by the Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, per Mummery LJ:

> **52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. [...]Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.**

Conclusion

Identity of Employer

51. The greater part of the Claimant's argument in this matter (before and during the hearing), which it is now apparent had been written by or with the support of Mr Ryan, focused upon the challenging the identity of his employer. This approach was initially puzzling as the Claimant's contract of employment could scarcely have been clearer in naming 'Priory Healthcare Limited' and this was still an active, solvent company. The 'penny dropped', however, when re-examination of the Claimant revealed where this was all headed. Mr Ryan's argument was that in May 2015 there had been no valid dismissal at all, as the dismissal letter was sent by the wrong company, a company that had not been his employer, with the result that he had not been validly dismissed at all in 2015 and his employment had continued beyond that date, going on until July 2018, with the result the claims were in time. This all despite the Claimant in the intervening years having done no work, received no pay, sent in no sick notes, had no contact with his managers and having taken up new employment with a different employer in 2016.

52. The fact of the Claimant's P45 or other tax documents referring to his employer as "Priory Central Services" (the company within the group which managed the payroll) is not material. Employment is a matter of contract. The Claimant's employer, as set out clearly in his contract of employment, was Priory Healthcare Limited.

53. For the reasons set out above, I have found the Claimant was employed by Priory Healthcare and he knew that was the case.

Correct Respondent

54. Priory Healthcare Limited is the correct respondent to the claim and the parties to the proceedings are amended accordingly.

Time

55. The Claimant bring claims under ERA and EqA as against his employer; ERA section 230 and EqA section 83(2). The latest event complained of is his dismissal (assuming in the Claimant's favour for the purposes of his EqA claims a continuing act).

56. Whilst the Claimant contends his dismissal took place on 17 July 2018, I have found it was 29 May 2015. The Claimant had until 28 August 2015 to present a claim. The Claimant's claim on 4 October 2018 was more than 3 years out of time ("OOT").

Extension of Time

57. As to whether (for his ERA claims) it was not reasonably practicable for the Claimant to have presented a claim within by 28 August 2015, he has not proven this to be the case. The Claimant has provided no medical evidence beyond the Med3 in May 2015 to suggest he was prevented by ill health from presenting a claim. Subsequent to the GP note, the Claimant wrote to appeal against his dismissal and attended an appeal hearing, where he was supported by his trade union, and actively engaged with the same. Such evidence tends to show the Claimant could have presented a claim then if he had been so inclined. The Claimant's real argument has been over the date of dismissal. Although not put in this way on his behalf, I have gone on to consider whether a mistake about the dismissal date could result in it not being reasonably practicable. For such an argument to work, the Claimant would need to satisfy me that he was genuinely mistaken and that his mistake was a reasonable one. I have found, however, that the Claimant did know that his employment was terminated in May 2015, he was not in fact labouring under any mistaken belief in that regard. This is not a case where the Claimant failed to bring a claim within 3 months because he believed his employment was continuing. Had it been necessary, I would in any event have found such a belief was unreasonable, because it would fly in the face of the contemporaneous correspondence written by both Claimant and Respondent. Furthermore, I would have ruled the period of 3 years is not a reasonable further period, in the circumstances where no step was taken consistent with continuing employment and the Claimant began new employment with another employer.

58. As to whether (for his EqA claims) it would be just and equitable to extend time, I find it would not for the following reasons:

    58.1. no good reason has been given for the delay;

    58.2. whilst it is perhaps possible that Mr Ryan has now convinced the Claimant of his argument about being employed by Priory Central, the Claimant must know that was not what he believed at any point prior to January 2018 and I have rejected his evidence to the contrary;

58.3. furthermore, the Claimant gave partial and disingenuous evidence about when, whether and from whom he sought legal advice about these matters;

58.4. The Claimant could have brought claims sooner, he elected not to do so and now advances and unrealistic and artificial explanation for why he did not;

58.5. the respondent would be severely prejudiced if it had to respond to these very late claims:

58.5.1. they are vague, meandering and difficult to follow;

58.5.2. Ms Fehilly, unsurprisingly, had difficulty answering Mr Ryan's questions about the 23 June 2015 appeal hearing, given it occurred almost 4 years ago;

58.5.3. similar difficulties are likely to be faced by other witnesses who were involved in the Claimant's employment.

59. Whilst an unsatisfactory explanation for the delay in bringing a claim may not of itself serve to bar an extension of time, where as here the Respondent would be severely prejudiced in responding to the same, then then the interests of justice will not be served by extending time.

Jurisdiction

60. The Tribunal has no jurisdiction to determine the Claimant's late claims and they must be dismissed.

_____

Employment Judge Maxwell

Date: 4 May 2019