



EMPLOYMENT TRIBUNALS

Claimant

Mr D Chojnacki

v

Respondent

DHL Services Ltd

PRELIMINARY HEARING

Heard at: Leeds

On: 31 January 2019

Before:

Employment Judge Rogerson

Appearance:

For the Claimant:

Ms B Perry (Lay Representative)

For the Respondent:

Ms A Smith (Counsel)

Interpreter:

Mrs A Inga Chichon

RESERVED JUDGMENT

1. The complaints of unfair dismissal, notice pay and holiday pay were presented out of time in circumstances where it was reasonably practicable for those complaints to have been presented in time. Time for presentation is not extended and those complaints are accordingly dismissed.
2. The complaints of disability discrimination were presented out of time. It was not just and equitable to extend time to the date of presentation and those complaints are also dismissed.

REASONS

1. The Tribunal saw documents from an agreed bundle and heard evidence from the claimant and from Maggie Stubbs (HR Business Partner). From that evidence the following finds of fact were made:
 - 1.1. The claimant was employed by the respondent from 1 July 2007 to 11 May 2018, when he was dismissed with 10 weeks' pay in lieu of notice, on the grounds of capability following an absence from work of 14 months.

1.2. The absence followed an injury at work on 13 March 2017 when the claimant suffered a sprain injury to his wrist. As a consequence of that injury, the claimant was assessed by his GP as 'unfit' to return to work until his dismissal on 11 May 2018. At no point prior to termination was the claimant deemed fit to return in any capacity before the termination of his employment

1.3. As a result, of that personal injury the claimant instructed solicitors to pursue a personal injury claim on his behalf which he has continued to pursue to date.

The claimant describes how prior to his dismissal he was "bombarded" with letters inviting him to attend health review meetings or capability review meetings or seeking an update or occupational health advice. All the letters were sent to the address the claimant had provided of '43 Asterby Road'.

1.4. He refers to the following letters:

21/03/2017	27/08/2017	03/02/2018
28/03/2017	17/10/2017	10/02/2018
02/05/2017	23/10/2017	13/02/2018
22/05/2017	02/11/2017	10/03/2018
20/06/2017	08/11/2017	
01/08/2017	22/01/2018	

1.5. Mrs Stubbs, who has no direct knowledge of the claimant's case has confirmed that managers are expected to keep in regular contact with absent employees to manage the absence in accordance with the respondent's procedures.

1.6. From 1 November 2017, the claimant's entitlement to SSP expired and he went to make a claim for 'Employment Support Allowance' which then became Universal Credit. The claimant, was able, to complete the forms required which he agreed are 'complicated' in order to receive payments for himself and his family.

1.7. In cross examination the claimant was taken to notes of a meeting he attended on 12/02/2018 where he acknowledges he was made aware and understood his continued employment was at risk because of his absence. The notes state "I start to think the company will fire me" and he is told the company could not "wait forever" for him to come back to work.

1.8. The claimant continued to receive letters from the respondent in March 2018 on:

10/03/2018
17/03/2018
20/03/2018

- 1.9. On 21/03/2018, the claimant responded by letter. He requested pay slips for January and February 2018 to support his Universal Credit payment which had been suspended. He requested that accrued holiday pay was paid to him. In that written communication which is the only letter provided by the claimant, he does not inform the respondent that his address has changed. The tone and content of the letter demonstrate he was someone capable of challenging his employer and asserting his rights.
- 1.10. He says that his family situation changed and he decided to move out of the family home at the end of March 2018. He says he informed the respondent about a change of address to '26 Lawrence Road' by writing this address on an envelope in which he was sending correspondence/documents from hospital to the respondent. In cross examination he accepted no notification of a change of address had been provided he simply wrote on the envelopes "this is my new address to correspondence". Although he refers to "envelopes" in the plural he does not have any copies of an envelope confirming this. I do not accept the respondent had effective notice of any change of address.
- 1.11. The hospital letters he sent to the respondent have the address of "43 Asterby Road" and the GP fit notes also records that address. The claimant had keys to that address, he had regular access to the house visiting the property regularly to visit his wife and children. In fact, he says his wife was complaining about the delivery of letters by hand by the respondent's staff at night which confirms that he was aware the respondent was still sending him letters to that address and did not know about any change of address.
- 1.12. The claimant's wife and children went to visit Poland on 30 May 2018 but were living at the address up until that date. He returned to live at that address.
- 1.13. There is a dispute about the dismissal letter and when it was received by the claimant. The respondent says it was hand delivered to "43 Asterby Road" on 15 May 2018. It was reasonable for the respondent to expect the hand delivered letter would come to the attention of the claimant on that day because this was how all previous communications had been sent. The address was the address provided by the claimant confirmed in the last fit note provided from his GP covering the period 1 May 2018 to 31 May 2018.
- 1.14. The claimant says he only knew about the dismissal on about 18 June 2018, after he sent a sick note and hospital discharge letter to the respondent following an operation on his hand on 07 June 2018. These letters were returned on 18 June 2018, with a copy of dismissal letter which he read and a note from the respondent that he was out of time for an appeal.
- 1.15. I found the letter was delivered on the 15 May which is when it would have come to his attention and he would have read it or would have had a reasonable opportunity to read it.
- 1.16. The claimant says on receipt of the letter on 18 June he read the letter that day he could not leave the house he was so distraught that he

withdrew and did not speak to anyone. His wife and family were in Poland. His sister in Poland (who has cancer) persuaded him to come to Poland on 7 August 2018. He says he saw a 'psychiatrist' in Poland then flew back to the UK on 9 August 2018. When he returned to the UK he came back to live at '43 Asterby Road'.

- 1.17. The report he has produced from the 'psychiatrist' refers to 'mixed anxiety disorder' and is dated 30 November 2018. The report does not say that because of the disorder the claimant would have been incapable of seeking advice/presenting a claim. The report appears to have been obtained for the purposes of these proceedings but does not address that issue.
- 1.18. The claimant has one prescription for medication dated 30 November 2018 which is the date of the report. He has no other evidence of any treatment he has received or how that treatment might 'impact' on his ability to present a claim. He said he visited his GP in the UK and told him about the treatment he had received in Poland. His GP was happy to leave it at that because the claimant was being treated elsewhere and the claimant obtained repeat prescriptions from Poland. This is why he says the GP has no records of treatment.
- 1.19. He accepts that he was:
 - (1) Able to access the internet via his phone/other access (library)
 - (2) Able to access legal advice after his dismissal because he asked his Personal Injury lawyers about the dismissal in June 2018 and they told him to see an employment law specialist.
 - (3) Pursuing his Personal Injury claim which has continued from 2017 and is ongoing. He must access the updates himself online but is in contact with his solicitors.
 - (4) Aware of his 'employment rights and duties' he knows about his right to claim accrued holiday pay by the end of March 2018 which is why he claimed it in his letter of 21 March 2018.
 - (5) Aware of the existence of the voluntary organisation that now represents him because he has used their services 2/3 years ago.
 - (6) Able to do a simple Google search to find out ways to access advice and to understand what is required/time limits/ACAS.
- 1.20. The claimant must explain his delay for the whole period of the delay for which he seeks an extension. Time runs from 15 May 2018, the date the letter was delivered which means the claimant had until 14 August 2018 to present his claim and the delay from 14 August 2018 to 15 October 2018 must be explained.
- 1.21. In submissions the delay is 'explained' based on the claimant's personal circumstance of his illness, his families' illness and his ignorance of his rights/how to access those rights.
- 1.22. I do not agree the claimant was ignorant of his rights or how to access his rights until 15 October 2018, when his claim was presented. He wanted to do something about his dismissal on 18 June 2018 and had

asked his Personal Injury lawyers the question “what can I do?”. He complains he was ‘bombarded’ with correspondence (weekly at times) which just stopped until 18 June 2018. It is odd he never queried this when he knew he was at risk of losing his employment. His absence (March 2017 – May 2018) was a lengthy absence and his employers had told him the ‘situation’ could not go on forever. Despite this and the claimants assertive letter of 21 March 2018 he makes no enquiry when (on his case) the contact suddenly stops.

- 1.23. Whilst I have some sympathy for the claimant’s financial and personal circumstances these circumstances do not explain why the claimant could not have presented his claim in time. A claim can be presented with limited information just an indication of the type of claim (unfair/disability dismissal/holiday pay/notice pay) if that was all he was able to do at that stage. This is not a case where new facts/information have subsequently come to light which the claimant was previously unaware of. He had attended regular meetings and had been managed in a capability process for 14 months. He raised issues about holiday pay in March 2018 and by June 2018 knew he had been dismissed and was paid in lieu of notice.
- 1.24. I asked Ms Perry what the claimant meant in his ET1 (which she drafted) when he states it was “practically” impossible to put the claim in earlier than 15 October 2018. She explained that she was referring to the fact it was practically impossible for her to do it earlier than on the date he attended for advice and she contacted ACAS. She acted promptly on that day and it is the claimant’s delay after dismissal that has caused the problem for him.
- 1.25. Ms Perry in closing submissions refers to the claimant’s illness. She says mental health in the Polish community is not an easy thing to accept/talk about. However, the evidence of the extent and effect of the claimant’s illness and his ability to present the claim earlier is limited. He was suffering with this mental illness but was still able to act on 15 October 2018, by visiting Ms Perry. In June 2018, immediately after dismissal and prior to his visit to Poland, he was able to tell his Personal Injury lawyers that he wanted to do something about the dismissal. He was advised to seek other advice. He knew of Ms Perry’s existence having used her organisation’s services 2/3 years previously.
- 1.26. The test for an extension of time for the Employment Rights Act 1996 complaints (unfair dismissal/notice pay) and the holiday pay complaint (regulation 30(2)(b) Working Time Regulations 1998) is to decide whether it was ‘reasonably practicable’ to present the claim in time. Only if the tribunal is satisfied that it was not reasonably practicable can time be extended by such further as the tribunal considers reasonable. The meaning of reasonably practicable is whether it was ‘reasonably feasible’ (**Asda Stores Ltd v Kauser EAT 0165/07**) In that case Lady Smith explained the test in the following words “*The relevant test is not simply a matter of looking at what was possible but to ask whether on the facts of the case as found, it was reasonable to expect that which was possible to be done*”.

- 1.27. Based on the findings made in this case it was reasonably feasible for the claimant who could have presented his claim in time. Therefore, those complaints were presented out of time and are dismissed.
- 1.28. For the disability discrimination complaints of a failure to make reasonable adjustments and discriminatory dismissal, the date of dismissal is the last act, which means the same period of time needs to be considered. Section 123(1)(b) of the Equality Act 2010, gives the Tribunal discretion to extend time to the date of presentation of the claim if the tribunal is satisfied there are just and equitable grounds to do so. The claimant must persuade the Tribunal to exercise this discretion on those grounds.
- 1.29. The factors to consider are the prejudice which each party would suffer as a result of the decision reached, the circumstance of the case, in particular, the length of and reasons for the delay, the extent which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has co-operated with any requests for information, the promptness with which the claimant acted once he or she knew of the 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 (**British Coal Corporation -v- Keeble 1997 IRLR336**).
- 1.30. The claimant would suffer greater prejudice than the respondent if the claim is dismissed because he cannot continue to pursue those complaints. However, prejudice to the claimant is only one factor to consider. There is a '62 day' delay but it appears that much of the evidence is documentary and this delay is unlikely to prejudice the respondent to a great degree although recollections may fade the longer the delay. The delay however is a long delay when you consider that legal advice was sought about the dismissal when the claim could have been presented in time.
- 1.31. In June 2018 the claimant was directed to seek advice elsewhere and knew of the services he could and did eventually use in October 2018. The claimant has been able to assert his rights against his employer in 2017 and 2018. He was taking legal proceedings against his employer in relation to the personal injury claim which was running alongside his absence and linked to the capability process that had resulted in his dismissal. That is why the claimant took advice promptly from his personal injury lawyer asking him what he should do about his dismissal. He was told to seek advice elsewhere. He knew of Ms Perry's organisation and had used that resource before. A simple google search would have provided him with links to the information he needed about contacting ACAS and making a tribunal claim. The claimant did not act 'promptly' when he raised the possibility of taking 'action' in relation to his dismissal. He has been out of the country for 2 days in August 2018. He has had difficult personal and family circumstances. He has been diagnosed with mixed anxiety disorder. I am not persuaded that as result he was unable to present his claim any earlier than he did.
- 1.32. Although at this hearing the merits of the claim were not explored with the parties in detail the bundle that has been produced contains much of the correspondence that would be relevant to the respondent's

management of the claimant's absence and was relied upon by both parties at this hearing. This shows the claimant was consulted (he says bombarded) during the '14 month' period of his absence, occupational health advice was sought and obtained which confirmed the claimant was not fit to work. His GP was providing fit notes which confirmed the claimant was not fit and that same prognosis continued up until dismissal. The roles on the respondent's site involve manual handling or repetitive computer work which the claimant was unable to do because of his wrist injury. The claimant had confirmed in the meeting minutes at his last review meeting there had been no improvement in his symptoms and he was not fit to return and understood that he was at risk of dismissal. Given the medical prognosis at the time and the information the respondent had from the claimant my view was the claim (if it had proceeded) had little prospects and I would have made a deposit order.

- 1.33. I was not satisfied there were just and equitable grounds for an extension of time to the date of presentation of the claim on 15 October 2018. The complaints of disability discrimination are presented out of time and are dismissed.

15February 2019

Employment Judge Rogerson

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