



EMPLOYMENT TRIBUNALS

Claimant

Mr K Niles

v

Respondent

Clarify Solution Selling Ltd

PRELIMINARY HEARING

Heard at: Watford

On: 1 March 2019

Before: Employment Judge Bedeau

Appearances:

For the Claimant: Mrs R Hodgkins, Counsel

For the Respondents: Ms M Tutin, Counsel

RESERVED JUDGMENT

1. The claimant's claims of unfair dismissal and disability discrimination as pleaded in the claim form were presented in time and can proceed to a final hearing.

REASONS

1. In a claim form presented to the tribunal on 21 September 2017, the claimant, Mr Kenneth Niles, made claims of unfair dismissal and disability discrimination, unspecified. He stated in his claim form that he worked for the respondent from 16 July 2012 to 12 April 2017, as a business development manager.
2. In the response presented to the tribunal on 3 November 2017, the respondent avers that the claimant was dismissed on grounds of capability and that the claim form was presented out of time. No admissions are made in respect of the claimed disability of prostate cancer.
3. The case was listed by Employment Judge Gumbiti-Zimuto for preliminary hearing in public, for the tribunal to determine whether the claims were presented in time. It was listed to be heard on 2 February 2018, however, on 15 January 2018, the claimant applied for postponement of the hearing as he had recently

suffered a bereavement in his family. The application was unopposed by the respondent and the hearing was vacated and re-listed to be heard on 7 August 2018.

4. On 7 August 2018, Employment Judge Vowles was unable to hear and determine all of the issues before him due to time constraints. He ordered that the issue of the claimant's disability; his application to amend; whether the claims were presented out of time; and whether the disability discrimination claim should be struck out as it could not be sensibly responded to, be heard on 1 March 2019.

The issue

5. With the agreement of the representatives, the issue to determine first would be whether the claim form was presented out of time, and if not whether time should be extended?

The evidence

6. I heard evidence from the claimant. No oral evidence was called on behalf of the respondent. In addition, the parties adduced a joint bundle of documents comprising of 120 pages. Where necessary reference will be made to the documents as numbered in the joint bundle.

Findings of fact

7. The business of the respondent is the provision of business opportunities to its clients. It enters into contracts with its clients to find a certain number of business or sales opportunities each month. An appropriate number of business development managers would then be allocated to work with the client to provide the opportunities required by the client under the contract.
8. The claimant commenced employment with the respondent on 16 July 2012, as a business development manager.
9. On 30 March 2016, he was diagnosed with prostate cancer and was absent from work undergoing treatment which was successful in May 2016. Following his return to work on 23 June 2016, it was agreed that he should work from home until September 2016, when he returned to his normal place of work.
10. The respondent stated that the claimant's performance had declined and despite steps to assist him, there was no improvement. He was invited to a capability hearing on 7 April 2017 and was warned that one possible outcome may be the termination of his employment. The meeting was reconvened on 11 April 2017, when he was told that he would be dismissed but would receive the details in writing. He was asked to return his laptop, keys to the premises and his identity pass. He was unable to hand in his mobile phone until two weeks later.
11. It is the respondent's policy that employees would be informed in writing about their dismissal, giving the date, final salary payment and any other entitlements upon termination of their employment.

12. By letter dated 12 April 2017, sent by Ms Natasha Ruse, head of business unit, wrote to the claimant. Amongst other things, she stated the following:

“Dear Kenneth

Confirmation of dismissal

I am writing to confirm that following the capability hearing held on 7 April 2017 it was decided that your employment with Clarify Solution Selling Ltd should be terminated on grounds of your poor performance...

The following arrangements apply with immediate effect (but maybe varied or revoked in the event of a successful appeal):

1. Your dismissal is effective and your final day of employment is therefore Friday 19 May 2017.
2. You shall receive one calendar month and one week’s pay in lieu of notice in accordance with your contract of employment, subject to normal deductions of tax and National Insurance contributions...” (96A-96B)

13. The letter also informed the claimant of his right of appeal against his dismissal.
14. On 12 April 2017, he wrote challenging what was stated in the dismissal letter in relation to workload, allocation of resources and his work history. (97D-97Q)
15. He informed the respondent that he understood that he was on garden leave until 19 May 2017.
16. Ms Kelly Joyce replied on 8 May 2017, in an email. In the first two paragraphs she stated:

“I have checked back through the documentation and your contract of employment and have noticed that there are two typing mistakes that I would like to draw your attention to and rectify. In the dismissal letter attached, it does state that you are dismissed with immediate effect and a payment will be made in lieu of notice. It then stipulates that you would be employed up until 19 May 2017, but this should have said Tuesday 11 April 2017. The letter states that your final payment will be on 31 May 2017, but you will have noticed that you received your final pay on Friday 28 April (ie notice pay, salary and outstanding holiday pay) and therefore no further payments will be made.

In your earlier email you refer to garden leave, but as you are paid in lieu of notice, you are not on garden leave and therefore your mobile phone should have been returned on 11 April 2017. As you didn’t physically have the phone with you on the date your employment was terminated, you agreed to return the phone to the Clarify offices on Tuesday 18 April...” (97A-97B)

17. The claimant appealed against his dismissal on 10 May 2017, quoting breaches of the Equality Act 2010, as a disabled person. (97C)
18. In a letter from Ms Claire Edmunds, chief executive officer, dated 21 June 2017, the claimant was informed that his appeal had been unsuccessful. (99A-99E)

19. The last day the claimant physically worked for the respondent was on 11 April 2017. He did not work his notice and was paid on 28 April 2017. He stated that he felt that he had been discriminated against in relation to his disability because when he met with occupational health on 13 January 2017, it was recorded in the occupational health report, that he might be considered a disabled person under the Equality Act. (88-90)
20. He also stated that when he was told that he was dismissed he felt that he had been unfairly dismissed.
21. He notified ACAS on 6 July 2017 and was informed that the time limit was due to expire either on 20, 21, or 22 September 2017, but could not be sure of the precise date. The Early Conciliation Certificate was issued on 20 August 2017.
22. He obtained employment with another employer on 29 August 2017 and became more focused on his new employment than on pursuing claims before an Employment Tribunal.
23. He stated that he attempted to submit an online application form on 20 September 2017, but the tribunal system would crash each time he clicked the “submit” button. The following morning, 21 September 2017, he called the Employment Tribunal and explained that he was unable to submit his claim the night before due to technical issues. He said that he was advised to try and submit his claim again. He submitted his claim to the tribunal at 9.20pm on 21 September 2017.
24. There is no documentary evidence of the claimant’s contact with the tribunal on 20 September.

Submissions

24. I heard submissions from Ms Hodgkins, counsel on behalf of the claimant and from Ms Tutin, counsel on behalf of the respondent. Ms Tutin prepared very detailed written submissions referring to the relevant authorities. Ms Hodgkins made reference to the more recent Employment Appeal Tribunal case of Luton Borough Council v Hague, UK EAT/01/80/17/JOJ. I do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended

The law

25. Section 111(1) Employment Rights Act 1996 provides that an unfair dismissal claim may be presented to an Employment Tribunal.
26. Section 111(2) states that an Employment Tribunal shall not consider a complaint under this section unless it is presented to the tribunal ---

“(a) before the end of three months beginning with the effective date of termination,
or

- (b) 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 be presented before the end of that period of three months.”
27. Under section 123 Equality Act 2010, a complaint must be presented within three months,
- “starting with the date of the act to which the complaint relates” (a), “or such other period as the employment tribunal thinks just and equitable,” (b) and “conduct extending over a period is to be treated as done at the end of the period,” (3)(a).
28. Time limits are to be applied strictly. The Court of Appeal held that the exercise of discretion on just and equitable grounds is the exception rather than the rule, Robertson v Bexley Community Centre [2003] IRLR 434. The factors the Tribunal may consider in exercising its discretions are: the reason for and the extent of the delay; whether the Claimant was professionally advised; whether there were any genuine mistakes based on erroneous information; what prejudice, if any, would be caused by allowing or refusing to allow the claim to proceed; and the merits of the claim. There is no general rule and the matter remains one of fact.
29. In the case of Abertawebro Morgannwg University Health Board v Morgan EWCA/Civ/EAT/640, it was held by the Court of Appeal, that the Tribunal has a broad discretion to consider factors, such as the length of and reasons for the delay; whether the delay has prejudiced the respondent; and the prejudice to the claimant.
30. Where the dismissal is communicated by letter, the effective date of termination, section 97 Employment Rights act 1996, is the date when the employee reads it or has had a reasonable opportunity of reading it, Gisda Cyf v Barrett [2010] ICR 1475 SC.

Conclusion

31. I considered that central to this case is when does time start to run? An employer must make it clear to an employee when he or she was dismissed from their employment because it affects entitlement to redundancy pay; the effective date of termination in an unfair dismissal claim; loss of wages and so on. Any reliance on ambiguity by the employer is likely to result in a construction more favourable to the dismissed employee.
32. In this case there are four possible dismissal dates: 11 April 2017; 12 April 2017; 8 May 2017 and 19 May 2017.
33. I accept that the claimant in his claim form stated the 12 April 2017 was the date he was dismissed. This is also the date agreed by the respondent. However, the effective date of termination is a statutory construct.
34. The respondent’s practice is to inform its employee of the details of their dismissal in writing. The claimant had details of his dismissal and entitlements upon termination in writing in the 12 April 2017 letter and it stated that his

employment terminated with immediate effect, but his final day of employment would be 19 May 2017. The respondent attempted to clarify the position in the letter dated 8 May 2017, following the claimant's letter.

- 35. The effective date of termination is important where the employee relies on the dismissal as part of his or claim. Time starts to run from the effective date of termination.
- 36. In this case, the respondent in relying on the email of 8 May 2017, placed the claimant in a difficult situation, in that, if he was dismissed on 12 April 2017, as the respondent contends, by 8 May 2017 when the respondent clarified the position, he had already lost four weeks of the three months statutory time limit to which he is legally entitled to before presenting his claim.
- 37. Time starts to run from the date an employee is informed of his or her dismissal. He was told, in accordance with the respondent's policy, that his dismissal would be in writing. He was informed by email on 8 May 2017. In accordance with Gisda that is the date from which time starts to run as the respondent clarified its position on that day. The earlier date prejudiced the claimant's statutory rights.
- 38. The early conciliation certificate was issued on 20 August 2017. Conciliation lasted 45 days. Three months from 8 May is to 7 August 2017. When add the 45 days conciliation, the claim form was presented in time. So, 45 days gets the claimant to 21 September 2017. The claimant will, therefore, be allowed to pursue the claims as set out in his claim form to the final hearing listed on 1-4 July 2019.
- 39. With the parties' agreement I listed this case for a preliminary hearing, in private, to consider the claimant's application to amend on **29 April 2019** for one day.

Employment Judge Bedeau

Date 5/4/19

Sent to the parties on:

.....10/4/19.

For the Tribunal:

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