EMPLOYMENT TRIBUNALS

Claimant: Mr G Roberts

Respondent: Lancashire County Council

Heard at: Manchester (by CVP) **On:** 3 February 2021

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr K McNerney (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of unfair dismissal was brought out of time and is dismissed.

2. The claimant's complaint of disability discrimination was brought out of time and it is not just and equitable to extend the time for bringing that complaint.

3. The claimant's application for a redundancy payment is dismissed on withdrawal.

REASONS

Introduction

1. The claimant brings claims of unfair dismissal and disability discrimination. At the preliminary hearing he confirmed that he wished to withdraw his claim for a redundancy payment. The central issue at the hearing was whether the unfair dismissal and disability discrimination claims should be allowed to proceed. It was agreed that both those claims were brought outside the relevant time limit.

2. The hearing was held by CVP videolink. Both parties were able to participate fully. Both parties had copies of the electronic bundle of documents of 108 pages.

There was no written witness statement from the claimant. Instead he gave oral evidence in chief in response to my open questions. Mr McNerney then cross examined the claimant. I heard oral submissions from Mr Roberts and from Mr McNerney. I gave oral judgment and the claimant requested these reasons in writing.

Preliminary Issues

3. There were two preliminary issues. The first is that there was no medical evidence in the bundle of documents. I considered whether I should postpone the hearing to allow the claimant to provide medical evidence for the period relevant to my decision. The claimant however confirmed that he had had no appointments with his GP regarding his depression after his dismissal. The only relevant medical evidence would be his repeat prescriptions for medication. The claimant could (and subsequently did) give oral evidence about the medication he was taking. Given that, I decided the appropriate course of action to avoid delay was to proceed with the hearing.

4. The second preliminary issue we dealt with was clarifying the claimant's disability discrimination claims. After discussing his case with the claimant we identified three alleged acts of disability discrimination.

5. All three are alleged failures by the respondent to make reasonable adjustments required by sections 20 and 21 of the Equality Act 2010 ("the 2010 Act"). The first two failures relate to two job interviews carried out by the respondent after the claimant's then job was identified as being redundant. The first an interview for two posts carried out by September 2019: this was the joint interview for the posts of Assistant Operations Manager and what the claimant referred to as a "promotional role". The second interview was the second interview for the Assistant Operations Manager role which took place a week or so later. In brief, the claimant alleges that the respondent's employees who conducted the interviews should have realised from his behaviour at the interviews that he was a disabled person due to depression. He says they should have made adjustments by taking into account the impact of depression on his performance at those interviews and in deciding whether he should be appointed to the vacancies to which those interviews related.

6. The third act of discrimination relates to the decision to dismiss the claimant. The claimant says the respondent failed to take into account and make adjustments for the claimant's depression in reaching that decision.

7. It was agreed that the claimant's dismissal took effect on 19 December 2019. The claimant's claim form was not lodged with the Tribunal until 3 August 2020, early conciliation having been carried out on 24 July 2020. Taking the date of dismissal as the latest possible act of discrimination, that meant that the usual three months' time limit for bringing an unfair dismissal or disability discrimination claim expired on 18 March 2020. Allowing for a one-month extension because of the early conciliation procedure, the latest date by which the claim should have been lodged at the Tribunal was 18 April 2020. That meant that the claims were lodged 3 ½ months out of time. What I had to decide was whether the claims should be allowed to proceed even though lodged out of time.

Relevant Law

8. At the hearing, with Mr McNerney's consent, I explained to the claimant that there were two different legal tests I needed to apply when deciding whether the claims should be allowed to proceed despite being lodged out of time.

9. In relation to the unfair dismissal claim, the question is whether it was not reasonably practicable for the claimant to have brought his claim in time. That is a relatively strict test. Section 111(2) of the Employment Rights Act 1996 states that if a claim is brought out of time it must be brought "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".

10. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** Court of Appeal).

11. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

12. The test for the disability discrimination claims is different. Section 123 of the Equality Act 2010 says that a claim, where it is brought out of time, may be allowed to proceed if it is brought within "such other period as the Employment Tribunal thinks just and equitable".

13. In **Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434** the Court of Appeal considered the extent of the discretion to extend time on a just and equitable basis. The Tribunal has a "wide ambit". However, 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 a failure to exercise the discretion. 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.

14. In terms of the extent of the discretion, I brought the parties' attention to the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**. At paragraph 25 of that Judgment the Court of Appeal stressed that:

> "Factors which are almost always relevant to consider when exercising any discretion whether to extend time are:
>
> (a) The length of and the 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."

15. The Court of Appeal in that case also made clear that there was no justification for reading into section 123 of the 2010 Act a requirement that the Tribunal had to be satisfied there was good reason for the delay, let alone that time could not be extended absent an explanation from the employee. However, the reason for the delay is a relevant matter to which the Tribunal can have regard.

Findings of fact

16. The claimant's claim form set out two reasons for the delay in bringing his claims to the Tribunal. The first was health issues and the second was the impact of the pandemic. During his evidence he confirmed that at the latest from May/June 2020 he was aware of the time limits for bringing a claim, indeed he said that he had a conversation with his daughter around that time when he said that it was too late to bring a claim and she had encouraged him to do so. This is not a case where the delay, or at least the whole of the delay, can be attributed to ignorance of the Tribunal process and the time limits applicable to claims.

17. The first reason given for delay was the claimant's health. He suffered a family bereavement and was signed off work for 4 weeks from 8 July 2019 to 6 August 2019. The claimant accepted that the sick note did not refer to depression. The respondent's case is that it referred to exhaustion. However, I accept the claimant's evidence that from July 2019 he suffered with depression. I accept his evidence that from around that time he was prescribed antidepressants consisting of a single dose which he took at night.

18. The claimant's evidence was that although he returned to work in August 2019 his performance suffered. However, I accept Mr McNerney's submission that the evidence showed the claimant was able to fully function at work from August 2019 onwards. There was no suggestion that he was subsequently absent from work due to his depression. It is also clear from documents in the bundle, including in particular the notice of appeal against selection for redundancy dated 10 October 2019 (page 83 of the bundle) that he was able to draft relatively complex documents about his situation despite being on medication. That notice of appeal does not refer to the claimant's depression.

19. The claimant's evidence, which I accept, was that he continued to take the antidepressant medication until around February 2020 when he decided to stop. His evidence, which I accept, is that it takes a while for the medication to work its way out of the system-perhaps two months. The claimant confirmed that after he left the respondent's employment he did apply for jobs and attended two interviews, one of which was with the respondent.

20. The second matter relied on by the claimant was the impact of the pandemic. Specifically, he explained that his daughter is a nurse who works nights, and this means that from Sunday through to Wednesday he has care of her four children. His evidence, which I accept, was that this is a 24-hour job. He did not suggest, however, that he had any childcare responsibilities for the remainder of the week. I find that while this childcare burden did place a burden on the claimant, it was not one which applied throughout the week.

Conclusions

The unfair dismissal claim

21. Taking into account my findings of fact, I conclude that while the claimant did suffer with depression from July 2019 onwards, that did not prevent him from functioning fully, both during his period at work after August 2019 and subsequent to his dismissal in December 2019. I do not suggest that the depression would have had no impact on the claimant and recognise that it might well have made it more difficult for him to fully function. However, it seems to me that this is not a case where the impact of the depression was such as to prevent it from being reasonably practicable for the claimant to bring an unfair dismissal claim. He was able to function at work, prepare relatively complex documents like his notice of appeal (p.83) and apply for and attend at job interviews. His notice of appeal (p.83) does not refer to his depression.

22. Even if the claimant is correct that the medication he was taking meant that it was not reasonably practicable for his to lodge his claim, he had stopped taking that in February 2020. Allowing a couple of months for the medication to work its way out of the system, any barrier to lodging a claim linked to the medication would have ended by the end of April 2020 but early conciliation was not started until July 2020.

23. When it comes to the impact of the pandemic, I accept that the childcare burden on the claimant would have meant that it was not reasonably practicable for him to prepare and lodge his claim on the days when he had responsibility for his grandchildren. However, that did not apply to 3 days out of every week. Even allowing for one of those days being recovery time from the childcare burden I find that that was not in itself nor in combination with the impact of the claimant's depression enough to make it not reasonably practicable to bring a Tribunal claim.

24. That means that the unfair dismissal complaint must be dismissed because it was brought out of time and there is no reason why it was not reasonably practicable for it to be brought in time.

The disability discrimination claims

25. When it comes to the disability discrimination claim the test I need to apply is different. The reason for the delay in bringing the claim is a relevant factor which I need to take into account, but there is no strict threshold akin to the reasonably practicable test which applies to unfair dismissal claims. I need to look at matters in the round and also take into account the prejudice to the respondent if I were to allow the claim to proceed.

26. In general terms there clearly is prejudice to the respondent if I were to allow the disability discrimination claim to proceed because it would have to defend a claim which it would otherwise not have to. That general prejudice is counterbalanced by the fact that if I did not allow the claim to proceed the claimant would lose the opportunity to pursue that discrimination claim.

27. Mr McNerney suggested that I should take into account the merits of the claim and suggested that it had very little merit. I do accept that for a disability discrimination claim to succeed the claimant would have to overcome a number of hurdles, including satisfying the Tribunal that he was at the relevant time a disabled person for the purposes of the 2010 Act, that the respondent had actual or constructive knowledge of that disability and that the allegedly discriminatory acts were in breach of the 2010 Act. However, I have not heard any evidence about the substance of the claim, and therefore I do not feel able to take into account the merits of the claim when deciding whether it is just and equitable to allow it to proceed. This is not a case where the claim is so obviously on its face without merit that I need to take that into account.

28. A factor that I do need to take into account is the practical prejudice to the respondent if I were to allow the complaint to proceed. Mr McNerney accepted in submissions that there may be less practical prejudice to the respondent in this case than in others. This is not, for example, a case of alleged harassment where the Tribunal would have to make its findings of fact based solely on oral evidence about what was said by one person to another. Instead, this is a case which involves a documented redundancy process and it seems safe to assume there would be at least some notes of the interview meetings to which the claimant's first and second complaints of discrimination relate.

29. However, I accept Mr McNerney's submission that some of the issues a Tribunal would need to decide in this case would require oral evidence. In particular there will need to be evidence from the respondent's employees who were on the panels which conducted the interviews. That is because the Tribunal will need to decide whether the respondent had knowledge of the claimant's disability and also whether he was placed at a disadvantage at those interviews because of any disability. Those matters are not likely to be fully captured in the written documentation because it rests in part on the panel's perception of how Mr Roberts appeared at those interviews. It does seem to me, therefore, that there will be specific practical prejudice to the respondent in that the delay in bringing proceedings will inevitably lead to memories about what happened at those interviews fading. That is more so because the claimant did not raise these issues with the respondent at the time. As I noted above, his depression is not noted in his notice of appeal.

30. Stepping back and taking all factors in the round, therefore, I find that although there were reasons for the claimant's delay in lodging his claim in the form of his depression and childcare commitments, those were not substantial ones in the sense of presenting a significant barrier to the claim being brought earlier. The amount of the delay is 3-4 months. That will inevitably have some impact on the memories of those involved in the incidents complained of. The requirement for finality in litigation is also something which I must also weigh in the balance. Taking all those matters in the round I have decided that although finely balanced it is not in this case appropriate to exercise the discretion to grant a just and equitable extension. The disability discrimination claim is dismissed.

Employment Judge McDonald

Date: 1 March 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 March 2021

FOR THE TRIBUNAL OFFICE