



EMPLOYMENT TRIBUNALS

Claimant: Mr A Ryles

Respondent: Network Rail Infrastructure Limited

RECORD OF A PRELIMINARY HEARING

Heard remotely at London Central (by CVP)

On: 22 September 2022

Before: Employment Judge Henderson (sitting alone)

Appearances

For the claimant: In Person

For the respondent: Mr S Purnell (Counsel)

JUDGMENT

1. The claims for constructive unfair dismissal and breach of contract are out of time and the tribunal does not exercise its discretion to extend that time. The tribunal has no jurisdiction to hear those claims and they cannot proceed.
2. The claims for disability related harassment and victimisation are out of time, but the tribunal exercises its discretion (on the just and equitable basis) to allow these claims to proceed. Separate Orders have been made for Case Management Directions.
3. Reasons for this decision were given orally at the end of the hearing. The claimant requested full written reasons, which are set out below.

REASONS

1. This was an OPH listed to consider several issues. However, given the inability of the claimant to be clear about the exact nature of this claims the tribunal was only able to consider the issue of whether the claims (as currently pleaded) had been brought in time.

2. The parties produced an electronic bundle of documents (229 pages): page references are to that bundle. The claimant had sent a written witness statement dated 16 September 2022, which he adopted as his evidence to the tribunal on oath.
3. The hearing was conducted using CVP and throughout the hearing as the claimant was a litigant in person, I explained the process to be followed and explaining the legal terms used in lay language.
4. It was accepted by both parties that the claims had been lodged outside the 3 month time limit.
5. The claimant resigned and his employment was terminated with effect from 6 August 2021: therefore, any claims should have been lodged on or before 5 November 2021. The claimant had contacted ACAS on 8 November 2021 (3 days outside the time limit); the EC certificate had been dated 15 November 2021 and the ET1 had been lodged on 23 December 2021 (some 4.5 months after the EDT)
6. The claimant's evidence was that he was unaware of the employment tribunal and the possibility of bringing claims and the time limit, until early November 2021. The claimant's witness statement said "*as soon as [I] was mentally able*" he had contacted ACAS who advised him to commence early conciliation.
7. In his oral evidence the claimant said that he had spoken to a friend (a solicitor specialising in employment law) who had contacted ACAS on his behalf on 8 November. I note that this is inconsistent with the claimant's written witness statement which said "I (i.e. the claimant himself) contacted ACAS". Further, the claimant's written statement makes no reference to his lawyer friend but says he has been unable to access sound legal support due to his financial situation.
8. The claimant said that his friend had known when he contacted ACAS on 8 November that the claims were out of time but did not tell the claimant as he did not wish to upset him, given his mental health issues. There was no written evidence produced from the lawyer friend.
9. The claimant's evidence was that from just before the end of his employment until around November 2021 he had been severely depressed with suicidal ideation. He said that there had been ongoing medical intervention but the claimant did not produce any contemporaneous medical evidence to support this statement. There had been a PTSD diagnosis in May 2022, which was included in the hearing bundle (page 114)
10. The claimant made reference in his witness statement to the relevant test for the tribunal being whether the claims had been brought "promptly". This is not the correct test. The claimant's witness statement is dated 16 September 2022 and therefore his friend (the employment law solicitor) should have been able to help to clarify that.
11. For the constructive dismissal claim and the breach of contract claim the test is whether the claimant can show that it was not reasonably practicable for him to

bring the claims within the 3 month time limit and that he brought the claims within a further reasonable time. For the discrimination claims under the Equality Act, the test is whether it would be just and equitable to allow such claims to be brought outside the time limit.

12. The Tribunal was assisted by a helpful note from Mr Purnell summarising the key legal principles and references. This note was shared with the claimant and he was allowed time to consider the note before he made his own submissions. I also explained to the claimant that he was not expected to address the technical legal points/cases but simply to put his own position.

Reasonably Practicable

13. This is set out in section 111 (2) Employment Rights Acts 1996 (ERA). It is acknowledged that this test sets a high bar for a claimant (**Smith v Pimlico Plumbers [2021] ICR 1194**). The reasonably practicable test does not require any consideration of the question of prejudice suffered by each of the parties (**Beasley v National Grid Electricity Transmissions UKEAT/0626/06/DM**). The claimant's state of mind is relevant but if the claimant did not make such enquiries as should reasonably have been made in the circumstances in seeking information/professional advice then this may count against them (**Wall's Meat Co v Khan [1979] ICR 52**).
14. On the evidence given by the claimant, I find that he has not shown that it was not reasonably practicable in the sense of not being feasible, for him to have brought his constructive dismissal and breach of contract claims within the time limit. The claimant said that he had mental health issues but he produced no contemporaneous medical evidence from August-December 2021 to support this evidence.
15. Further, on the claimant's own oral evidence he had obtained another job on 23 August 2021 working 40 hours per week on shift work. He had applied for, been interviewed and been offered this job before his resignation on 6 August. The claimant confirmed that he had taken no sick leave in his new employment.
16. I understand that the claimant did not necessarily wish to share his mental health issues with his new employer and that he did not want to take sick leave early in his new employment. However, the fact that he was able to work and function in this way means that it would have been feasible for him to speak to his employment lawyer friend to obtain advice over this period and to bring these claims prior to 8 November 2021. It is understandable that he had other priorities and matters to focus on, but that does not mean it was not reasonably practicable for him to obtain information about and to lodge his claims.
17. In considering whether he brought such claims within a further reasonable time I accept Mr Purnell's point made in submissions that even though the claimant was only 3 days out of time in contacting ACAS once he had the EC certificate he could have lodged his ET1 sooner than 23 December 2021. He already had the assistance of his employment lawyer friend and as pointed out by Mr

Purnell the particulars of claim in the ET 1 are brief and would not have taken a considerable time to prepare.

18. The claimant has not discharged the burden of proof and the tribunal does not exercise its discretion to grant an extension of time for these claims.

Just and Equitable

19. There is a different test for claims brought out of time under the Equality Act (section 123 (1)). Time limits are still expected to be exercised strictly (**Robertson v Bexley Community Centre [2003] IRLR 434**)
20. The relevant factors for consideration in exercising the discretion to extend are:
1) the length of and the reason for the delay. There was a delay of 3 days for the claimant contacting ACAS but a delay of 4.5 months in issuing the proceedings.
21. The claimant said that the reason for his delay was his mental health but as mentioned above, no medical evidence was produced for the relevant period. However, Mr Purnell did not challenge the claimant's evidence as regards his mental health.
22. Another relevant factor is 2) whether the delay prejudices the respondent. Mr Purnell referred to the case of **Miller v MoJ UKEAT/000315/LA** (paragraph 13) and the various types of prejudice. This distinguished between the obvious prejudice of allowing a claim which would otherwise be struck out and forensic prejudice.
23. Mr Purnell referred to the ET1 and the claimant's reference to the RAIB report. He said that this would refer to matters going back to 2019 and the claimant's training record. This would mean that there would be an impact on the memory of witnesses (although he accepted that the relevant witnesses were still in contact with the respondent). Mr Purnell said this would establish forensic prejudice against the respondent. However, the further information provided by the claimant of his discrimination claim (pages 19-21) lists dates which occur in 2021 or thereafter. Therefore, I do not accept that there would be such forensic prejudice on the respondent in dealing with the discrimination claims.
24. I accept that the fact that there is no forensic prejudice does not necessarily mean the extension should be granted. However, I do not consider that grant of an extension will mean the investigation of matters that happened many years ago. The final hearing may not be until July 2023 but the respondent could commence taking draft witness statements at this stage so the relevant incidents would only have been about a year ago or less.
25. Other relevant factors are 3) the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action and 4) the steps taken by him to obtain appropriate professional advice once he knew of the possibility of taking action. The claimant said that he was not aware he could bring a tribunal claim until early November 2021. His evidence about how and from whom he obtained legal advice is inconsistent as between his written

witness statement and his oral evidence. However, there was no challenge to his statement that he had mental health issues and there is a subsequent diagnosis of PTSD in May 2022.

26. I accept that even though he was able to find a new job and to continue without taking any sick leave, this did not mean that he had not been experiencing mental health issues. The delay in contacting ACAS was only 3 days. The delay in issuing proceedings was 4.5 months but was not such as to cause any forensic prejudice to the respondent (see above).
27. Accordingly I grant an extension for the discrimination claims on the just and equitable basis. However, for the avoidance of doubt the decision in granting the extension of time on this basis should not be taken as a finding or decision on the issue of whether the claimant's complaints form part of a series of continuing acts. That issue is a matter for determination by the tribunal at the Final Hearing.

Employment Judge Henderson

JUDGMENT SIGNED ON: 30 September 2022

**JUDGMENT SENT TO THE PARTIES ON
30/09/2022**

FOR THE SECRETARY OF THE TRIBUNAL