EMPLOYMENT TRIBUNALS

Claimant: Mr R Dold

Respondent: Bridgehead Software Ltd

Heard at: Croydon by cloud video platform **On:** 18 January 2023

Before: Employment Judge Nash

Representation
Claimant: Mr Hanning, solicitor
Respondent: Mr Humphreys of counsel

JUDGMENT

1. The claimant's application to postpone the hearing was refused.

2. The tribunal does not have jurisdiction to consider the complaints of unfair dismissal, breach of contract, and under the Public Interest Disclosure Act 1998 because they were presented outside of the statutory time limit when it was reasonably practicable to do so.

3. The tribunal does not have jurisdiction to consider any complaints subject to the same statutory time limit and reasonably practicable test because they were presented outside of the statutory time limit when it was reasonably practicable to do so.

4. The tribunal does not have jurisdiction to consider claims under the Equality Act 2010 because they were presented outside of the statutory time limit and it is not just equitable to extend that time limit.

REASONS

1. Following ACAS conciliation on 29 April 2022 only, the claimant presented his claim to the tribunal on 30 May 2022.

2. At this hearing the parties chose not to give evidence.

3. The tribunal had sight to a bundle prepared by the respondent to 239 pages. During the hearing the claimant was given permission, by consent, to rely on four screenshots which were added to the bundle.

The Claims

4. It was accepted by the claimant's solicitor that the claim form was confused. The claimant had drafted his claim without legal input and it was lengthy, repetitive and unclear. It referred to a number of matters over which the tribunal has no jurisdiction, such as data protections legislation. However, the following claims were provisionally identified:-

    a. Unfair dismissal
    b. Age discrimination
    c. Sex discrimination
    d. Disability discrimination
    e. Public Interest Disclosure Act
    f. Breach of contact.

Preliminary Issue

5. The claimant had applied the day before the hearing, 17 January 2023, to postpone the hearing. The respondent opposed the application. Both parties made oral representations before the tribunal.

6. According to the Court of Appeal in *Teinaz v London Borough of Wandsworth 2002 ICR 1471, CA* the tribunal must exercise its broad discretion on applications to postpone judicially, and 'with due regard to reason, relevance and fairness' and according to the over-riding objective, see *Pye v Queen Mary University of London EAT 0374/11*.

7. The tribunal had regard to the Presidential Guidance on postponements and considered :-

    - the degree of prejudice to the other side
    - whether the case has previously been postponed or adjourned and the length of time the case has been waiting to be heard.

8. The hearing had not previously been postponed. This preliminary hearing was listed over seven months after the claim was presented.

9. The tribunal reminded the parties of the provisions of rule 30A of the Tribunal Rules as follows:-

30A.— Postponements
(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.
(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—
(a) all other parties consent to the postponement and—
(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
(ii) it is otherwise in accordance with the overriding objective;
(b) the application was necessitated by an act or omission of another party or the Tribunal; or
(c) there are exceptional circumstances.

10. It was agreed, therefore, that the postponement could only be granted if there were exceptional circumstances. The explanation given was that the claimant had only instructed solicitors the day before the hearing. They needed time to prepare the case and obtain evidence, potentially including medical evidence.

11. Mr Hanning frankly accepted that the claimant was at fault for leaving it so late. He said that the claimant was very upset by the proceedings and felt unable to open any correspondence from the respondent concerning this hearing because he had viewed it as harassment. The claimant now accepted it was not harassment and the correspondence from the respondent in the bundle was, the tribunal accepted, professional and appropriate.

12. In his claim form the claimant stated that he received a diagnosis of being on autism spectrum but provided no further details. Mr Hanning was unable to clarify this any further. Although the claimant stated in his claim form that a medical certificate to this effect was available, neither this nor any evidence going to the autism diagnosis was before the tribunal or any explanation as to its absence.

13. The grounds for the postponement was that it seemed likely or possible that the claimant's medical condition (which was not specifically stated to amount to a disability) had been the reason behind delay in instructing solicitors. It was reasonable to believe that medical evidence might assist the tribunal in the exercise of its discretion to extend time.

14. The tribunal found that it was possible that medical evidence might shed light on the claimant's mental processes following termination and accordingly the reasons for any delay. But this was only a possibility; there was no evidence that the claimant's condition might have had an effect on his ability to instruct solicitors or commence legal proceedings. No medical evidence was provided, even going to the claimant's diagnosis.

15. Further, the evidence in the bundle was inconsistent with the claimant being unable or disadvantaged in seeking legal advice or taking steps in proceedings.

There were several references in the claim to his intending to instruct solicitors. This was not something from the material before the tribunal, of which he was unaware or had a mental block about. He was aware of the existence and role of solicitors in legal proceedings. He said that he was willing to use them.

16. Finally, there was no explanation as to why the claimant was able to instruct solicitors eventually, and no indication that that something changed the previous day, except the fact of the oncoming hearing.

17. The tribunal accepted that some of the prejudice to the respondent might be partly mitigated by a costs order. However, there was also the prejudice of the case continuing. The hearing today would resolve the time point, which might dispose of the case today, or permit the parties to move forward with the litigation.

18. Delay was not in line with the over-riding objective. Both parties were legally represented. The claimant was present at the hearing and, if he wished, could give evidence as to the effects of his autism.

19. Therefore, the tribunal could not identify exceptional circumstances which would permit it to grant a postponement. The claimant contended without any medical corroboration that his medical condition might have affected his ability to comply with time limits and instruct a lawyer. He had referred on more than one occasion to instructing a lawyer but had failed to do so until the day before.

20. The second grounds related to the drafting of the claim form, which Mr Hanning accepted was unclear. The respondent denied that there was any prejudice to the claimant by way of the incoherent drafting because - for the purposes of this hearing - the tribunal should take the claimant's claim at its highest and proceed on the basis that time for all complaints started to run at the date of termination. (The respondent reserved its position as to any earlier acts if the claim proceeded.) The tribunal agreed to proceed on this basis.

21. However, Mr Hanning contended that the claim as drafted was incoherent and might contain matters which post-dated termination. Therefore, the respondent's concession that time started to run no earlier than termination did not in fact protect the claimant from the prejudice of having an incoherent claim form which would benefit from legal re-drafting.

22. In the view of the tribunal, this did not amount to exceptional circumstances. Firstly, there was no evidence before the tribunal that the claimant had a medical condition which prevented or impaired his instructing solicitors earlier than the day before the hearing who might have put the claim in order. Further, the statement of case was lengthy and detailed. It went into very considerable detail about events in 2020 and 2021. In contrast, there were a few very brief and unparticularised references to January and February 2022. There were brief references to matters such as picking up the claimant's property, receipt of the P45 and final monies due, speaking to the respondent's healthcare and pensions providers. But there was no indication that these were acts of discrimination on

which the claimant relied. Finally, it was not said expressly on the claimant's behalf that he did rely on any of these as acts of discrimination.

23. Accordingly, there was little if any prejudice to the claimant in proceeding on basis that time in all complaints started to run at the date of termination. Therefore, the drafting of the claim form did not put him at a material disadvantage such as to constitute exceptional circumstances.

24. The tribunal accordingly refused the claimant's application for a postponement.

The Issues

25. The issues for this hearing were:-

    a. Whether the claims were brought in time, and if not,
    b. Whether it was just and equitable for the tribunal to extend time (in respect of the Equality Act claims)
    c. Whether it was not reasonably practicable to bring the claims in time and if not whether they were brought within such time as was reasonable (in respect of all other claims)

26. It was agreed that the hearing was listed to consider time as a substantive point and that this was not a strike out hearing to consider if the claims had no reasonable prospect of success on time grounds.

The Facts

27. The facts relevant to the issues are briefly stated.

28. The respondent business provides software to the healthcare sector and has about forty-five employees.

29. The claimant started work as a quality assurance engineer on 29.07.10.

30. On 24.08.20 the claimant was signed off sick and remained so until termination. He did not return to work after this date.

31. On 24 August 2021, the claimant made a subject access request to the respondent under data protection legislation and referred in subsequent communications to deadlines. On 23.9.21 he emailed the respondent in respect of his SAR referring to internet research on the matter, the deadline, and referring the matter to the ICO.

32. The respondent invited the claimant to a long term sickness absence meeting on 23.11.21. The claimant did not attend but provided written representations. By way of a lengthy and detailed letter of 03.12.21 the respondent terminated the claimant's employment with immediate effect on ill health grounds as follows:-

> …, I have concluded that it is appropriate for your employment with BridgeHead to be terminated on the grounds of ill-health (capability) and

> your last day of employment will be today. Your entitlement to company benefits will end today as well."

33. The letter continued:-

> "If you wish to appeal, you should set out in writing the grounds of your appeal and send them to Tony Cotterill by 31 January 2022."

34. The claimant accepted that he received that letter on 3.12.21. It was the respondent's case that the claimant's employment accordingly terminated on 2.12.21. The claimant's case was that he understood that his employment did not terminate until the date by which his appeal was due, 31.1.22.

35. The sums due to the claimant – pay in lieu of notice and holiday pay – were not paid until mid-February 2022. The claimant received a P45 which recorded his leaving date as 31.01.22.

36. The claimant's case was that he tried to submit his claim to the tribunal one month after the date on his ACAS certificate, 29.05.22. However, the website was down. Following discussion with ACAS he succeeded in submitting his claim the next day 30.5.22. The claimant relied on screenshots dated 29.5.22 showing that his internet browser, Firefox, had refused access to the Tribunal website because of security certificate issues.

The Law

37. The law on time limits under the Equality Act 2010 is as follows:-

> **123 Time limits**
>
> (1)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.

38. The law on time limits for all other claims is the same as that for claims of unfair dismissal found in the Employment Rights Act 1996 as follows:-

> **111Complaints to employment tribunal.**
>
> (1)A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
>
> (2) Subject to the following provisions of this section an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
>
> (a)before the end of the period 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.
>
> (2A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a)…

Submissions

39. The respondent provided a fourteen page opening note which it relied upon as written submissions. In addition both parties made oral submissions.

Applying the Law to the Facts

The date of Termination

40. The first question for the tribunal was whether the claims were presented out of time. The respondent invited the tribunal to take the claimant's case as its highest for the purposes of this hearing and proceed on the basis that the relevant date for all claims was the effective date of termination. The tribunal proceeded on this basis.

41. The tribunal considered what was the date of termination. The respondent contended it was 3.12.21, when the claimant received the termination letter, whilst the claimant contended that it was 31.1.22, the deadline for any appeal.

42. The tribunal determined that the claimant's employment was terminated on 3.12.21 for the following reasons. The letter of dismissal was unambiguous and clear – the employment came to an end on 3.12.21. A dismissal takes effect when an employee becomes aware of the dismissal which on the claimant's case was the same day as per *Haywood v Newcastle upon Tyne Hospitals NHS Foundation Trust 2018 ICR 882, SC*. In respect of unfair dismissal, where a contract of employment is terminated without notice, the effective date of termination is the date on which the termination takes effect — S.97(1)(b)/S.145(2)(b) Employment Rights Act 1996.

43. The tribunal understood the claimant's case to be that the employer's subsequent conduct was inconsistent with a date of termination on 3.12.21. The claimant

relied in particular on three matters, that the appeal deadline was 31.1.22, that he was not paid monies owed till mid-February and that his P45 gave a leaving date of 31.1.22.

44. The tribunal did not accept that there was any basis for the termination date to be the date for the appeal deadline. If the claimant had appealed, this would presumably have taken some days, during which the question of his possible re-employment would still be "live". Therefore, a date of termination on the appeal deadline had not rational basis. Further, whilst the tribunal understood the claimant's frustration at not being paid monies owed promptly, this did not have an impact on the date of termination.

45. The tribunal accepted that the date on the P45 was not consistent with the respondent's case that the contract terminated on 3.12.21. However, this could not cancel out the termination which had already occurred on 3.12.21.

46. The date of termination, which for the purposes of this hearing was treated as the date on which time started to run for all complaints , was 03.21.21. Therefore in order to comply with the statutory time limit, the claimant had to apply to ACAS by 02.03.22. In fact the Claimant started and concluded the ACAS conciliation procedure on 29.04.22 a little over two months late. He then presented his claim a month later plus a day on 30.05.22, one day late. The claims were, accordingly, presented out of time.

Reasonable Practicability

47. The tribunal firstly considered if it was reasonably practicable to present the relevant claims within time.

48. Case law tells us that the meaning of reasonable practicability is not reasonableness and nor is it whether it was physically possible; the question for the tribunal is whether presenting the claim in time was reasonably feasible, see *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA*. According to the Employment Appeal Tribunal in *Asda Stores Ltd v Kauser EAT 0165/07* : '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 have been done'.

49. As the respondent submitted, "The question of what is reasonably practicable should be given a liberal interpretation in favour of the employee *Marks and Spencer plc v Williams-Ryan* [2005] ICR 1293 at paragraph 20.

50. Further, according to the Court of Appeal in *Porter v Bandridge Ltd 1978 ICR 943, CA,* the burden is on the claimant.

51. The claimant's case was that he had proceeded on the understanding that time started to run from 31.1.22. His genuine mistake was reasonable for the reasons set out above. Further, the respondent did not invite him to collect his property until after 31 January, which was a further action inconsistent with his employment terminating on 3.12.21.

52. The difficulty for the claimant was that the letter of dismissal was unambiguous. It used every day lay person's language, "your last day of employment will be today. Your entitlement to company benefits will end today as well." The tribunal accepted that the date on the P45 was confusing. This was an official document which the claimant might expect to be correct. However, at most this meant that the respondent was acting inconsistently with the employment terminating on 3.12.21. The tribunal considered if this inconsistency rendered the claimant's error reasonable.

53. The respondent referred the tribunal to the well-known case of *Wall's Meat Co Ltd v Khan* [1979] ICR 52 as follows:

> "…the impediment [to a timeous claim] may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable…''
>
> And that ignorance or mistake
>
> '…will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made…'

54. The claimant in his claim form stated that he received a diagnosis that he was on the autism spectrum. However, no case was advanced that any such medical condition made it more difficult for him to understand the termination letter or had any impact on how he reacted to the letter. It was said that found it impossible to open communications from the respondent's lawyers prior to this hearing, but there was no suggestion that he did not open the dismissal letter when he received it. Further, that would have been inconsistent with his statement in his claim form that he telephoned the respondent healthcare providers the next day to discuss his entitlement to benefits.

55. The claimant's case was not that his autism – or any other factor - made it more difficult for him to resolve any confusion or error about his termination date. Further, such a case would have been inconsistent with the statements in the claim form and during employment. In his claim form the claimant stated that he was intending to instruct a lawyer. In pre termination correspondence with the respondent, he referred to whether he would need a lawyer, to making a data protection request, to deadlines for data protection, to a reference to the ICO and there were many references to ACAS. He also referred to employment law cases and the Equality Act. He also referred to searching on the internet about dismissals and employment rights.

56. The claimant, on his own account, was able to search and obtain information on employment law and data protection law well before the termination. He referred to seeking advice from ACAS. In those circumstances the tribunal found that he

failed to discharge the burden on him of showing that it was not reasonably practicable to present his claim in time, because it was reasonable for him to make enquiries following the letter of 3.12.21.

57. Accordingly, the tribunal has no jurisdiction to consider the claims subject to the reasonable practicability test.

Just and Equitable

58. The test for the tribunal exercising its discretion under the Equality Act is very different – is it just and equitable to extend time?

59. The test under the Equality Act is often referred to as less stringent than the reasonable practicability test. Nevertheless, according to *Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA*, S.123(1)(b) EqA, 'there is no presumption that [a tribunal should extend time] 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 the discretion is the exception rather than the rule.'

60. The onus is therefore on the claimant to show that it is just and equitable to extend the time limit.

61. A tribunal, in deciding whether to exercise its discretion may have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT*). In particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the plaintiff 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 or she knew of the possibility of taking action.

62. According to *London Borough of Southwark v Afolabi 2003 ICR 800, CA*. two factors which are almost always relevant when considering the exercise of any discretion whether to extend time are the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

63. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other. In *Pathan v South London Islamic Centre EAT 0312/13.*

64. The Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA* reviewed a number of recent cases involving the list of Limitation Act factors cited in *British Coal v Keeble* as follows:-

"The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) [Equality Act] is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time,

including in particular, "the length of, and the reasons for, the delay". If it checks those factors against the list in *Keeble*, well and good; but I would not recommend taking it as the framework for its thinking."

65. The tribunal found that there was potential prejudice to both parties. The obvious prejudice to the claimant was losing the chance to bring his complaints. The tribunal had informed the parties that, this was far from determinative, it would consider whether the prospects of success of the claim were a relevant factor to the question of prejudice. It invited them to make submissions on this point. The tribunal directed itself in line with *Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132*.

66. The tribunal was acutely aware that discrimination cases are fact-sensitive. Assessing the claim was more than usually difficult because, as Mr Hanning for the claimant frankly accepted, the claim form was incoherent, lengthy and repetitive. Mr Hanning clarified that the disability relied upon was not autism but the hernia problem.

67. Nevertheless, the respondent's defence and the basic facts upon which it was based were clear. The claimant was signed off sick from August 2020 and was dismissed some 15 months later at a meeting which he refused to attend. Accordingly, the employer had, at first sight, a non-discriminatory reason for dismissal. In respect of any earlier acts relied upon, they were yet further out of time.

68. Whilst this factor was in no way determinative, the prospects of success of the Equality Act claims were far from certain.

69. There was prejudice to the respondent in exercising the tribunal's discretion to extend time. The respondent would be subject to a tribunal claim. Whilst the claim was yet to be clarified, the claim form referred to events from 2020 and 2021 in considerable detail. It made allegations against a number of people. It was likely that the tribunal proceedings would be complex, lengthy, time consuming and costly. The respondent was unable to identify any additional specific prejudice caused by the two month delay. The tribunal concluded that it was possible that the cogency of the evidence relating to dismissal might be adversely affected by an additional two month delay, but it was not certain. Further, if the claimant relied on events back to 2020 it was unlikely that the cogency of the evidence in that respect would be materially adversely affected by a further two month delay.

70. The tribunal found that the length of delay whilst significant, was egregious. The delay of two months amounted to about two thirds of the statutory time limit. The employment tribunal has short timescales compared to comparable legal jurisdictions, three months to take first step, contacting ACAS.

71. The reasons for the delay were, as set out above, the claimant's error as to the date when time started to run. The tribunal had considered this under reasonable practicability and took the same factors into account when addressing its mind to the distinct just and equitable test.

72. In brief, the claimant's account in his claim form and his correspondence during employment indicated that he was capable of correcting any error or resolving any confusion as to the date time expired, but he failed to do so. He had referred to contacting ACAS before. He was accordingly aware of their existence and expertise. However, he failed to take advantage of this. Again, there was no submission that the claimant's medical condition had an impact on his failure. The claimant was aware of the possibility of taking action from 3.12.21 but on his case took no action or legal advice till contacting ACAS on 29.4.22, some five months later. During that time, he contacted the respondent's healthcare providers on more than one occasion.

73. Taking all the factors into account, in particular prejudice to the parties and the reasons for delay, the tribunal found that the claimant had failed to discharge the burden on him of showing that it was just and equitable to extend time. The letter of dismissal was unambiguous and any confusion caused by the P45 could have been resolved by making enquires as to his employment rights and obtaining legal advice. The evidence and the claimant's own case indicated that he was able to do this, but he failed to do so.

74. Accordingly, the tribunal did not have jurisdiction to consider the Equality Act claims.

Employment Judge Nash
Date 20 January 2023