



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Wainscott

**Respondent:** The Commissioners for HM Revenue and Customs

**Heard at:** Manchester

**On:** 14 June 2018

**Before:** Regional Employment Judge Parkin

## REPRESENTATION:

**Claimant:** No attendance, written representations received

**Respondent:** Mr S Lewis, Counsel

## JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal was presented outside the statutory time limit, but it was reasonably practicable for it to be presented within time. It is dismissed for want of jurisdiction; and
2. The claimant's disability discrimination claims were presented outside the statutory time limit and it is not just and equitable for the Tribunal to consider those claims at a full hearing. They are dismissed.

## REASONS

### 1. The claim

By his claim presented on 22 December 2017, the claimant claimed unfair dismissal and disability discrimination in respect of the termination of his employment on a date he put forward as 29 May 2015, together with matters leading up to that termination. No explanation for the delay in presenting his claim was provided.

### 2. The response

By its response presented on 7 February 2018, the respondent contended that the claimant's employment ended on 27 May 2016 and denied that the Tribunal had jurisdiction to hear his claims because they were time-barred. In any event, the

respondent denied unfair dismissal, contending it had acted reasonably in dismissing the claimant for capability reasons, and denied disability discrimination.

**3. The preliminary hearing**

A preliminary hearing was listed to consider whether the claims were presented out of time and if so whether time should be extended to enable the claims, or part of them, to proceed to final hearing.

**4. The claimant's representations**

By letter dated and received by email on 13 June 2018 the claimant wrote to the Tribunal as follows:

“Hi,

I have received the notice of preliminary hearing on 14 June 2018 at 10.00am, unfortunately due to work commitments I will not be able to attend, is it possible for the hearing to go ahead without me being present? I can't risk being sacked from another job due to taking time off. My claim was made late due to costs and also I had been caused a lot of stress and worry by HMRC and the manager who was overseeing the dismissal process, Andrew Crawley. No adjustments were made when I returned to work following deafness being diagnosed and when I broke my foot this then went to dismissal. I had contacted HMRC's staff welfare who told me on both the deafness and the broken foot that adjustments should have been put in place and none were, hence my claim to disability discrimination. On appeal when I said to the appeals officer placing me on a stage 2 warning placed me on a ban from being ill for two years, I was told by them that was not how it worked, my response was that was precisely how it worked. I then consulted Cath Eggert, HMRC's disability member, who checked my detail and told me no adjustments had been put in place for my deafness and my manager was following incorrect procedures.

The dismissal process then went on for 3 months causing me no end of stress, I raised complaints about the stress and made complaints about this but HMRC continued with the process, I consulted staff welfare throughout who just told me go back to my manager and tell them to stop the process they were following as adjustments should have been put in place and they weren't. The whole dismissal process left me feeling suicidal and left me with mental health issues.

I didn't raise sooner at a Tribunal due to costs and my own health issues and also I had already had an abusive letter sent by someone in HMRC.

Could the Tribunal look at the details in my absence and I will accept the decision made.”

5. The Tribunal accepted the claimant's email as written representations despite the late notification a day before the hearing and a copy was provided to the respondent's representative at the preliminary hearing.

## 6. The respondent's representations

The respondent provided two documents: a copy of the claimant's dismissal letter dated 29 February 2016 giving 13 weeks' notice of termination of employment effective on 27 May 2016, which included reference to the claimant's right to make a claim to an Employment Tribunal and set out the 3-month time limit; and a letter dated 9 June 2016 giving the outcome of the claimant's appeal against dismissal, which was unsuccessful, again reminding him of the right to make a claim to an Employment Tribunal and the time limit. The respondent contended that the claimant's effective date of termination was clearly 27 May 2016, not the date of outcome of his appeal, and that his claim presented on 22 December 2017 was therefore over 18 months late, after the claimant had notified ACAS under the early conciliation process on 16 November 2017 with an Early Conciliation certificate issued on 15 December 2017. Thus, even allowing for any early conciliation extension of time the claim was well over 14 months out of time. Time limits were generally to be enforced strictly as confirmed by the authority of **Robertson v Bexley Community Centre** and should not be extended unless there was a good reason for doing so, with the onus firmly upon the claimant to establish this, since a decision to extend time was an exception and not made as a rule.

7. Under section 111(2) of the Employment Rights Act 1996 it was for the claimant to satisfy the Tribunal that it was not reasonably practicable for his complaint to be presented within three months, and moreover that it was brought within a reasonable further period. This was a judgment of fact and judgment for the Tribunal and the "reasonably practicable" had been interpreted as meaning "reasonably feasible".

8. The only information provided by the claimant was within his email in which he had relied upon "costs" and health issues. He had given no full particulars about his mental health issues or their severity when they receded or disappeared or how it was said that those issues prevented him from presenting his claim, and no documentary or medical evidence. Not only was it clear that he was currently in work but his ET1 claim form suggested he was working elsewhere at the same time as his dismissal; since he was fit enough to do so and to lodge his appeal against dismissal, the only evidence suggested he was fit enough to both work and present his claim. He had provided no particulars of how the "costs" (if these were Employment Tribunal fees) had prevented him claiming earlier.

9. As to section 123 Equality Act 2010, albeit this was a broader test with a wider discretion for the Tribunal, the claimant had likewise provided no evidence to support the Tribunal extending time. He certainly could not rely upon ignorance of the time limits given the content of the letters to him. Such a long delay was a further factor against permitting the claims to proceed since there was a real risk of prejudice to the respondent in that memories were likely to be stale, risking the holding of a fair hearing still being possible.

## 10. The Law

The Tribunal applied the law, which was correctly summarised in the respondent's submissions. In respect of unfair dismissal, at section 111 of the Employment Rights Act 2010, within Part X:-

- “(2) ...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”

and at section 207B where extensions of time limit are provided to facilitate conciliation before institution of proceedings.

11. In respect of the discrimination claims, the Tribunal applied section 123 of the Equality Act 2010:-

- “(1) ...Proceedings on a complaint within section 120 may not be brought after the end of –
- (a) the period of three 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”,

and at section 140B, a like provision for extension of time limits to facilitate early conciliation.

12. In respect of both the unfair dismissal and discrimination claims, the onus was on the claimant to satisfy the Tribunal that it had not been reasonably practicable to present his claim in time or that it was just and equitable to consider it nonetheless, according to the appropriate test. In **Robertson v Bexley Community Centre** [2003] IRLR 434, the Court of Appeal confirmed that the exercise of the discretion to consider a claim out of time on just and equitable grounds in a discrimination claim is the exception not the rule, since time limits are exercised strictly.

### 13. Conclusion

The facts and timings in this matter were never in serious dispute. The claimant was dismissed on long notice by a letter dated 29 February with effect from 27 May 2016. His appeal against dismissal was heard with the outcome notified to him by a letter dated 9 June 2016. His claim was presented to the Tribunal on 22 December 2017, after a period of early conciliation which ran from notification on 16 November 2017 to issue of the early conciliation certificate on 15 December 2017. The claimant does not gain the benefit of any extensions of time under the provisions of section 207B of the 1996 Act and 140B of the 2010 Act since he did not notify ACAS within the three months from the effective date of termination of employment or, in relation to his discrimination claims, from the the date he received the letter notifying him his appeal was unsuccessful at the latest.

14. His claim was presented well over 18 months outside the statutory time limits which applied. Yet he had not sought to explain the delay in his original claim form

and although he made some attempt to do so in his written representations, he provided no substantial evidence to establish inability to present a claim earlier through such significant ill health that it was not reasonably practicable or feasible for him to do so. Not only had the respondent given him firm reminders of his right to bring a claim to the Employment Tribunal and the strict time limits that applied, but he had apparently been in other employment and had been able to pursue his appeal internally. No substantial reason or excuse based upon health grounds was established by the claimant.

15. Turning to the question of “costs”, the Tribunal infers that the claimant means he was unable to afford the Employment Tribunal issue fee and hearing fee when such fees were in force, as was the case when the claimant's employment was terminated on 27 May 2016. Whilst a detailed examination of the claimant's means might undermine the spirit of the Supreme Court decision in the Unison judgment which ruled that Employment Tribunal fees were unlawful, the claimant has still fallen short of establishing that the presence of that fees regime (which included opportunity for full or part remission based on lack of means) in itself provided a substantial obstacle to him starting proceedings.

16. In all the circumstances, the claimant has failed to show that it was not reasonably practicable for him to present his claim in time and his unfair dismissal claim is dismissed for want of jurisdiction. Similarly, he has failed to establish that it is just and equitable for the Tribunal to extend time and allow his discrimination claims to proceed to a full hearing, and those claims are likewise dismissed.

Regional Employment Judge Parkin

Date 19 June 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10<sup>th</sup> July 2018

FOR THE TRIBUNAL OFFICE

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