Neutral Citation Number: [2022] EAT 29

Case No: EA-2019-000778-DA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 September 2021

Before :

JOHN BOWERS, QC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MR B KING	**Appellant**
- and -	
GEMALTO UK LIMITED	**Respondent**

- -
- -

Mr Bachu (instructed by Advocate (formerly known as Bar Pro Bono)) for the **Appellant**
Mr Sammour (instructed by Steeles Law Solicitors Limited) for the **Respondent**

Hearing date: 14 September 2021

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JUDGMENT

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SUMMARY

DISABILITY DISCRIMINATION

The Employment Tribunal decided that it was reasonably practicable for the complaint to be presented before the end of that period of three months. The Tribunal decided that the Appellant knew that he had he had a right to bring a claim, the right to bring a claim was time-limited and that he knew that time was important. Proper advice had been given but the Appellant had not as he was advised to do "kept an eye on ACAS" The EAT rejected the suggestion that the ET had not taken all the circumstances of the Appellant into account in reaching its decision.

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JOHN BOWERS QC, DEPUTY JUDGE OF THE HIGH COURT:

1. The appellant appeals the judgment of Employment Judge Gray, written reasons of which were sent out on 27 June 2019. The claimant was employed as a personalisation operative on or around 6 December 1999 until his summary dismissal on 8 August 2018. The claimant's ACAS certificate was issued on the same date as ACAS were contacted on 13 November 2018, as the claim was issued there. As is well known, the statutory provision on late claims is section 111(2) of the Employment Rights Act 1996, which provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination or 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. This period is subject to extension for ACAS, early conciliation.

2. These principles should be stated at the outset in relation to the appeal. Firstly, it is trite law that the question of reasonable practicability is normally an issue of fact for the tribunal, as set out by May LJ in **Palmer v Southend on Sea Borough Council** [1984] IRLR 119, and he added that it is "seldom that an appeal from a decision of the employment tribunal will lie". Secondly, a tribunal decision does not have to reach high standards of legal draftsmanship and should be viewed as a whole (**Paczkowski v Sieradzka** [2017] ICR 62, HH Judge Eady at paragraph 30) but clearly the parties must know why they won or, on the other hand, lost. Thirdly, the claimant bears the burden of showing that it was not reasonably practicable to claim in time, although the cases make clear that generally a benevolent interpretation should be adopted of the provision in favour of the employee. Finally, the tribunal should consider the substantial cause of the failure.

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3. Effects

3. I now set out (because I am going to come back to them) the crucial findings by the employment tribunal and the conclusions reached, taking them in order:

> "11. The Occupational Health report by Dr R Roope … does not suggest the Claimant was impaired to the extent of having a disability, noting he suffers from anxiety and depression at the milder end of the range …
>
> 12. The GP records … refer to stress and depression …
>
> 13. The Claimant accepted in cross-examination that his circumstances at the point of lodging his appeal against his dismissal … and putting in his claim form … as to his health and his wife's circumstances, were similar, although his priority was on sorting out his wife's care and their finances.
>
> 14. The Claimant accepted in cross-examination that he had support from his union, Unite, through the dismissal and appeal, and also before that too, with his earlier grievance in 2017.
>
> 15. The Claimant accepted during cross-examination that he knew he could bring a claim to the Employment Tribunal when dismissed.
>
> 16. The Claimant accepted during cross-examination he could access the internet either via his smart phone or his home computer and knew how to make searches, albeit he said his level of IT/Tech expertise was limited.
>
> 17. The Claimant confirmed in oral evidence that at his disciplinary hearing on 8 August 2018 his union representative (Ms D Watson) said to him that he had to 'keep an eye on ACAS'. He confirmed that she also said to him 'don't forget to give them a ring'. The Claimant also explained that he would have expected his union to have sent him reminders, such as text messages, telling him to contact ACAS. The claimant clearly understood it was important to contact ACAS, albeit he says he wasn't told by his union the exact time period within which to do it."

4. The tribunal then set out the law and referred to five separate cases, in the course of which, towards the end of some of the paragraphs, they make further comments, although I think it is fair to say that these really map the findings of fact already made. I should refer to paragraph 23a:

> "a. In today's hearing the Claimant accepted that he knew he could bring a claim to the Employment Tribunal when dismissed. The Claimant also had the means to research time limits via the internet.
>
> b. … it is apparent based on the findings of fact that the Claimant knew about a time limit. The Claimant also had the means to research time limits via the internet.
>
> […]

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> d. … There is nothing to suggest this in his witness evidence, which focuses on his union not telling him about the exact time limit. Further, the medical evidence relating to the Claimant that I have been referred to (the Claimant's GP notes and the OH Report) say the Claimant was not medically impaired …
>
> e. … There is nothing to suggest this in his witness evidence, which focuses on his union not telling him about the exact time limit. I do not consider this case authority [*Marks & Spencer Plc v Williams-Ryan* [2005] ICR 1293] therefore assist in determining today's matter."

5. The conclusions by the tribunal are set out at paragraph 28:

> "a. the substantial cause of Mr King's failure to comply with the time limit is that he says he was not told of the exact time limit (and was not subsequently reminded of it) by his union.
>
> b. I have not seen any witness [or] documentary evidence that suggests there was a physical impediment preventing compliance, such as illness on the part of the Claimant. The medical evidence relating to the Claimant that I have been referred to says the Claimant was not medically impaired.
>
> c. The Claimant knew he could bring a claim to the Employment Tribunal when dismissed. From his own evidence today, the Claimant knew he had to contact ACAS and knew that time was important and of the essence, otherwise he would not have expected to be sent reminders by his union."

6. This next sentence is controversial and has been modified by the Tribunal in circumstances which I will address in a moment:

> "I am not persuaded that the Claimant did not know of the time limit within which he had to act.
>
> d. There is no evidence to suggest that the Respondent had misrepresented any relevant matter to the Claimant.
>
> e. There is no evidence to suggest the Claimant had been advised incorrectly or that there was any substantial fault on the part of his adviser which led to the failure to present the complaint in time."

7. Then the tribunal sums up at paragraph 29:

> "For these reasons I find that it was reasonably practicable for the Claimant to submit his claim in time …"

8. I will now treat each of the three succinct grounds put forward by the appellant separately, although grounds 1 and 2 do run together. Ground 1, as modified in a 3(10) hearing before HH Judge

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Tayler, is: there was no or no proper evidential basis for the finding (if it is a finding) at paragraph 28c of the written reasons that the claimant knew of the time limit of three months, this matter not having been put to the claimant in cross-examination and being contradicted by his witness statement at paragraph 22. Notes of evidence on this point were sought of the judge, and the judge responded around 8 January 2021 stating:

> "It was not expressly put to the claimant that he did not know the time limit for lodging a claim, but the claimant's answers to other questions raised in cross-examination confirmed he did not know it was three months:
>
> > 'Not aware of specific date of three months. I knew I had to contact ACAS. Not aware needed to contact before 8 November 2018.'
>
> The claimant did not accept or confirm that he knew the time limit, the three months, but it was found he knew there was a time limit. Therefore, any reference in the written reasons to the time limit should be a reference to a time limit."

9. As Mr Sammour on behalf of the respondent submits, an error of that sort is capable of being rectified under the slip rule, and it is not an error of law. The appellant's counsel appropriately accepts this but says it leads on to another matter or rather two which are linked to some extent with ground 2, namely: these questions should have been answered by the employment judge. Firstly, in finding that the claimant did not know about the three months' time limit, was the claimant's ignorance of it reasonable, and/or in finding that the claimant knew there was a time limit, was it reasonable for the claimant to take no steps to establish what it was? I accept Mr Sammour's point that the appellant does not have permission to appeal on either of these grounds, given the slimming down of the grounds before HH Judge Tayler, and indeed the order made on that occasion makes clear that none of the other grounds referred to in the original Notice of Appeal can be taken. What I go on to say is in the alternative, if I am wrong about this point in other words if they are able to be taken on appeal here.

10. Mr Sammour says that the tribunal needed to make what he calls clear, factual findings on these two matters in order to decide whether the failure to inform the claimant of the time limit was

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reasonable and relies amongst other cases on **Wall's Meat Co Ltd v Khan** [1979] ICR 52, **Marks & Spencer v Williams-Ryan** [2005] ICR 1293 and the **Paczkowski** case to which I have already referred, particularly at paragraphs 27 and 29. He also says, more radically, and this is also not in the notice of appeal, that it was incumbent on the tribunal to ask questions to tease out the answer to this. He says that the judge could have answered such questions in accordance with the overriding objective in rules 2(b), (c) and (d) of the **Employment Tribunals Rules of Procedure 2013**. I do not accept this. Although there are some very unusual circumstances in which it behoves a judge to raise particular matters which are not raised in the pleadings, I think in relation to reasonable practicability in the circumstances of this case, the responsibility is that of the party to raise it. It should be mentioned that the appellant (then the claimant) was represented at the hearing by counsel, although it is also fair to say that he was not so represented at the time of putting in the ET1.

11. Overall, I think that the employment tribunal did indeed generally consider these questions. It is necessary to bear in mind, and it is somewhat difficult to trace the findings, but I am satisfied that, as Mr Sammour submitted, they did decide that the appellant knew (a) that he had a right to bring a claim (paragraph 15), (b) he needed to contact ACAS (paragraph 17 of the judgment taken from paragraph 22 of his witness statement), (c) the right to bring a claim was time-limited (paragraph 23b) and (d) that he knew that time was important (paragraph 28c). I also accept that this case is somewhat unusual in that it is not capable of being framed as an incorrect advice case, because it is really a case of an absence of advice, and the circumstances in which (if at all) the claimant asked the trade union for advice are obscure. Ms Watson was not called at the tribunal, nor was an email sought from her.

12. The law on this subject derives from **Dedman v British Building and Engineering Appliances Ltd** [1973] IRLR 379, but it is perhaps most clearly put in the case of **Riley v Tesco Stores Ltd** [1979] ICR 22 at paragraph 7(3) and 7(5) as follows:

> "Where an employee alleges ignorance of his right or of how or when he should pursue it, or is under some mistaken belief about these matters, an Industrial

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> Tribunal must look at the circumstances of his ignorance or belief and any explanations that he can give for them, including any advice which he took, and then ask itself whether the ignorance or mistake is reasonable on his or his advisors part, or whether it was his or his advisor's fault. If either was at fault or unreasonable it was reasonably practicable to present the complaint in time …
>
> (5) Common sense also indicates that every day that goes by since the introduction of the right of the time limit in 1972 must make it harder for an industrial tribunal to accept evidence that an employee was ignorant of the right or the time limit and employees who wait not for days or weeks but, as here, (Several inaudible words) case for months before presenting their complaint must increase their difficulty in providing that it was not reasonably practicable to present it in time …"

13. The claimant's witness statement says:

> "I wish to make clear that my trade union representative did not advise me about the three months' time limit in which to start employment tribunal proceedings. Through this process I relied heavily on help and support in my union. I would have expected the union to inform me of the time limit and to remind me of whatever needed to be done."

14. I do not accept that absence of advice or incomplete advice where there is the means to discover the correct time limit now easily through the internet, can render it not to be reasonably practicable to comply. I do not accept that incorrect advice was given here, and I accept Mr Sammour's contention that the advice given by the union official was perfectly sound. What seems to have happened is that the claimant did not follow that. He did not "keep an eye on ACAS", and he neglected for more than three months to give them a ring. The respondent prays in aid **Times Newspapers Ltd v O'Regan** [1977] IRLR 101, especially at paragraph 11 in the judgment of Cumming-Bruce J. Although each case is different on its facts, I think the principle there set out does apply in this case.

15. I now move on to ground 3, which is failing to address the cumulative impact of the claimant's circumstances, including his own health and his caring responsibility, his ongoing internal appeal and the fact he was unrepresented at the time in considering whether it was reasonably practicable for him

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to have issued within the time limit. Mr Sammour says this is a perversity challenge and the appellant is simply unhappy with the result. I do not agree with this, because I view it as saying that insufficient reasons have been given, although it is of course important to say that not every piece of evidence needs to be referred to. I also reject his supplementary or alternative submission that a narrow construction could be placed on the ground because of what HHJ Taylor explained in his reasons allowing the appeal to proceed on some grounds, which is at page 51 of the bundle.

16. Mr Bachu quite properly refers to a wide range of evidence that was before the tribunal on the difficulties unfortunately faced both by the claimant and his wife. They include paragraph 22 of the witness statement, question 8.2 of the ET1 claim form, an email from the claimant to the tribunal dated 28 November 2018, the claimant's letter appealing his dismissal, the care supporter's self-assessment, the claimant's GP records and the occupational health report by Dr Roupe. It is submitted that the employment judge failed to consider the cumulative impact of the claimant's circumstances, which Mr Bachu summarises helpfully as the following: the loss of his continuous employment of 19 years; loss of income and financial issues (he was in the process of applying for employment and support allowance and housing benefit); anxiety and depression, treated with antidepressants; caring responsibility as sole carer of his wife, who suffers from paranoid schizophrenia (or did at the time); and he was in the process of an internal appeal. Mr Bachu says that the closest that was got to this was that the claimant was so incapacitated he could not lodge his claim before he did (this is at paragraph 23d) even if he was able to do other things such as sort his wife's care and finances. Mr Bachu says that there was evidence beyond that considered by the employment judge.

17. I do think that this was part of the overall consideration, and the tribunal did deal with the submissions that were made to them. One feature that Mr Bachu complains about was that a finding was not made that Mr King, the claimant, was disabled. I cannot identify any reference to that being suggested to the tribunal, and indeed Mr Sammour says that there is nothing in his notes (he, unlike Mr Bachu, having represented at the hearing). Mr Bachu also says that the case of **University**

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Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12/JOJ was not properly taken into account. It is inevitable that there will be differences between the different cases, and I do not think there is anything in that decision which compels a different result. It is fair to say that a lot of evidence was not specifically referred to, such as the fact that the claimant was in weekly counselling, but the tribunal does not have to go into each and every piece of evidence.

18. It is also fair to say that, as Mr Sammour contends, the claimant did not suggest in his witness statement these various factors had a specific bearing on his failure to present the claim. It is also important to bear in mind that, as decided in the case of **Palmer v Southend on Sea Borough Council**, one reads "practicable" as feasible, and it was feasible for him to present. It is also worth noting that he was able and did present an internal appeal within a couple of weeks of his dismissal, and indeed that was basically the outline of what he presented as his ET1, and that as soon as he found out about the time limit, he presented straight away.

19. So, overall, and stepping back from the individual allegations to looking at this in the round, I think the employment tribunal did consider the evidence and reached a decision which was open to it. Although it is necessary to collect the findings from a whole series of different places in the decision, I think that sufficient reasons were given. A different employment tribunal may well have reached a different conclusion, but that in itself does not give rise to an appeal to this employment appeal tribunal. I accept that the result overall may seem harsh to Mr King, but it is important that time limits are kept to.

20. So, notwithstanding the eloquence of Mr Bachu, I dismiss the appeal.

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