EMPLOYMENT TRIBUNALS

Claimant: Mr P Brittain

Respondent: Nottingham City Homes Ltd

Heard at: Nottingham **On:** Friday 17 February 2017

Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: Mr E Benson, Volunteer, Nottingham Law Centre
Respondent: Mr M Hardiman of Counsel

JUDGMENT ON A PRELIMINARY POINT

1. This claim having been presented out of time, it is permitted to proceed, it being just and equitable so to do.

2. Directions are set out after the reasons to this judgment.

REASONS

Introduction

1. The hearing today is for me to determine whether it is just and equitable to extend time for what is a disability discrimination claim. It is not in dispute that the claim was presented out of time pursuant to Section 123(1) (a) of the Equality Act 2010 (the EqA). Therefore, what I have to determine is whether I exercise my discretion to permit the claim to be presented out of time on the basis of "such other period as the employment tribunal thinks just and equitable" - Section 123(1) (b).

2. Although, I am aware of the legal authorities for the purposes of this exercise, may I say from the outset I am most grateful for Mr Hardiman's written opening submissions in which he refers to some of them. I am also aware that the onus is on the Claimant to persuade me that I should extend time because to permit the extension of time is the exception rather than the rule.

3. In making my decision, I have adopted the guidance which I always find very useful in cases of this nature to be found in ***British Coal Corporation v Keeble & others [1997] 336 EAT***.

Findings of fact

The length and reasons for the delay

4. I have heard evidence from the Claimant under oath; evidence-in-chief by way

of a written witness statement. He has been asked further questions by Mr Hardiman and myself in order that I may understand more about the factual matrix engaged in this case. He has been accompanied by his wife; and although she has not given evidence it is quite obvious (she simply observing at the back of the room) that the whole scenario in terms of what I am about to deal with has been deeply upsetting within the family and very stressful indeed. For reasons which I shall come to from what we now know that could not but be obvious in terms of the scenario. I am most grateful in that respect for the reasonable and sensitive approach taken by Mr Hardiman once we had all the evidence.

5. I have before me a joint agreed bundle. I will refer to it as Bp followed by the page number.

6. The Claimant commenced his employment on 10 January 2010 with the Respondent (NCH) as an electrical technical officer. He was dismissed for capability reasons by letter dated 11 March 2016. (Bp46). The decision had been taken by Mr Pashley. In terms of where prejudice may lie between the parties in exercising my discretion to extend time or not as the case may be, Mr Pashley still remains in the employment of NCH; Dawn Baker, who was the HR person involved, does not but Mr Hardiman has fairly told me that she is contactable should I permit the case to proceed.

7. The Claimant unsuccessfully appealed. The hearing took place on 5 May 2016. The decision was published by letter on 11 May 2016 (Bp 52). The decision to not uphold the appeal was made by Mr Walters. He is no longer in the employment but again Mr Hardiman has made plain that he is contactable. Cross referencing to the Claim (ET1) and it is plain that the appeal is part of the complaint of disability discrimination.

8. Pursuant to s123 of the EqA the proceedings, subject to the ACAS EC (early conciliation) requirement, therefore needed to be presented within three months of the act to which the complaint relates and in relation to conduct extending over a period commencing with the last act relied upon. Thus time at latest would have run out on 10 August 2016. The ACAS EC extension of time provision cannot ride to the rescue pursuant to s140B because the ACAS EC certificate runs between 31 August 2016 and 1 October 2016.

9. Thus when the claim when it was presented to the tribunal on 7 October 2016 it was substantially out of time. That it was out of time was made plain by Mr Benson in the particulars of claim to the ET1.

10. The question then becomes as to why. The Claimant was at the time of his dismissal recovering from cancer; namely merkel cell carcinoma. There is a substantial medical history in this matter all the way through from at least the beginning of 2015 and continuing, as to which see for a summary the report of Dr P A Lawton, Consultant Clinical Oncologist dated 1 July 2016 at Bp 56 - 57. There were complications in the treatment of the cancer, all of which is covered in that report. There was surgical intervention; there was then an infection; complications thereafter as to which the Claimant continues to suffer from limitations in mobility and is in considerable pain in terms of his left leg. There is still something of an uncertain prognosis; he will be the subject of regular check ups for the next 4/5 years.

11. As a consequence I have no doubt whatsoever (and it is covered by that report and the other reports in the bundle) that from around about the end of 2015,

the Claimant began to suffer from severe depression. In that period he was having the support of Macmillan who gave him some help in that direction but then via his GP he was put with the Primary Care Trust Mental Health Team (known as Wellbeing) and he had sessions of counselling. He would like to have had more but because of shortage of resources, he is now at the back of the queue so to speak.

12. Throughout the period thereafter and continuing he remains on antidepressant medication. From what I have learned today, and using my experience as a Judge, it would appear to me that the medication is strong and I note even so, and in terms of the report of Dr Lawton, that he remains a depressed individual and indeed it is not unusual for people coping with the stress of cancer to suffer from depression.

13. Also by the time of the dismissal, the Claimant was now in a situation where due to abdominal problems it was considered that he might be at risk of bowel cancer. Although Dr Lawton opines in his report that it is unlikely that there is a malignant tumour, the Claimant was not given the all clear until last November.

14. The third factor is that the circa 12 May, so the day after the appeal, the Claimant suffered a collapse. It was thought that he might have had a heart attack. He was therefore taken to accident and emergency and then remained an inpatient for tests for about a day. The upshot of that was that he in due course received a heart monitor and during the period which I am referring to up until circa 5 August, the Claimant was facing that he might have on top of the merkel cell cancer the possibility of additional bowel cancer; and that he might have heart disease. It is therefore not at all surprising that he was clinically depressed.

15. Macmillan had suggested to the Claimant when he was dismissed that they might be able to assist him with a lawyer, but circa that time the Claimant contacted his household insurers. He learned that he was covered, certainly in terms of initial advice. Therefore, he went along with the insurance company placing him in the hands of one of its panel lawyers, Lyons Davison. There was then a delay. Of course during that period, the Claimant was also hoping he might succeed in his appeal. Unlike in unfair dismissal cases, it is not necessarily fatal in terms of the just and equitable test, to wait upon the outcome of an appeal. In any event, he would still have been in time had he acted shortly after the appeal outcome.

16. As at 1 June, so still within time, the Claimant having had considerable problems getting any meaningful advice out of Lyons Davison as to whether or not his case was going to be taken on, he received an outcome, which was that the insurance company would not support his claim and so if he wanted to use Lyons Davison, he would need to pay their fees, which he would not be able to afford. Of course as at 1 June he would still just have been in time. He knew what the time limits were because he had been told that by Lyons Davison, I detect when he first had a conversation with one of their legal team.

17. Faced with that outcome and without the financial wherewithal to fund the claim, the Claimant sat down with his family. Amongst other things, he is devoted to his grandson; he and his wife look after the little boy every Monday. There were all these different health issues; the family's view was that the Claimant simply could not cope with undertaking litigation in relation to his dismissal. The Claimant could not face it; he was worried that if he put himself through that additional stress and he suffered a fatal heart attack, given of course he was worried that he had heart problems at that time, then he would lose seeing his grandson grow up.

18. Having heard all that evidence and Mr Hardiman does not stand in my way, I am absolutely persuaded that there was a fundamental impediment in the way of this Claimant from proceeding, which was his health including his state of mind.

19. Circa 5 August of course he got the all clear on the heart front. He felt a bit better, although his mood remained low. He spoke to a friend who suggested he contact the MP. Of course he had to make an appointment to see her at her surgery. This he did and she wrote around about the 23 August to the local authority (Nottingham City Council), which in term owns NCH, wanting to know what was happening particularly on the pension front, an issue that need not concern me today.

20. The Claimant was also told by her when he saw her (which was about a week or so before that letter) that he should get himself an appointment with the Nottingham Law Centre. This he did and he was able to see Mr Benson on 25 August.

21. Let me stop there and deal with the delay in that respect. As a Judge, I am of course aware that there are few ports of call these days for persons who are without the necessary financial means to obtain legal advice. The Nottingham Law Centre provides it but it runs on a shoestring. Mr Benson, who previously was in legal practice as a qualified solicitor, post retirement, has made himself available to Nottingham Law Centre (for which he is to be commended) so that he holds an advice surgery, so to speak, on a Thursday afternoon. He is the only member of NLC who provides employment advice, the rest deal with such things as housing and benefits and matters of that nature. That of course explains why the Claimant could not get to see him until 25 August.

22. Mr Benson does not take many cases on because of limited resources. Nevertheless he had decided that the Claimant's case was worthy of merit. However he knew that it could not proceed to the employment tribunal until it had first been though the ACAS early conciliation process. So he promptly contacted ACAS. Early conciliation then took place between 31 August and 1 October. Mr Benson has told me (and Mr Hardiman has not got instructions on the point and thus cannot help) that the early conciliation period continued for this period because there was some indication (and I will not go behind the veil) that NCH might be willing to discuss matters in a meaningful way. Of course the whole purpose of the ACAS early conciliation regime is to facilitate conciliation in the hope that it might thus avoid claims coming to tribunal.

23. It follows that I am not persuaded that the delay during that period would be something that would render it such that it adds to the equation, in terms of whether or not the Claimant could have brought his claim before he did. To turn it around another way, it would be just and equitable to permit that ACAS early conciliation period because otherwise what is the point of ACAS early conciliation?

24. The claim was presented to the tribunal on 7 October. The reason for that is that Mr Benson had to find the time to prepare it, given the understandable limit of resources.

25. Given these findings of fact in terms of the length and reasons for the delay it would be just and equitable to extend time.

The balance of prejudice and the interests of justice

26. Of course if I allow the claim to proceed, NCH loses that otherwise it is spared the expense of having to defend it and run the risk that it might be held liable if the Claimant were to succeed. But it is a substantial organisation. Furthermore there is a prima facie case to answer. Thus in terms of the interest of justice the scales lie in favour of the Claimant.

27. The prejudice, as Mr Hardiman was instructed to principally submit, is that such has been the turnover of staff at NCH that key players are no longer in its domain. Therefore, does that mean that the cogency of the evidence, its ability to defend, is now so limited because of the lack of witnesses on the issue, that it must mean that it is prejudiced to the extent that it cannot defend, which it would have been able to do if the claim had been brought in time?

28. I do not know when any of the players so to speak left. What I do know is that there is at least one of them still in the NCH (Mr Pashley). The Respondent was able to give its solicitors sufficient detail to file a detailed Response in terms of the merits of the claim; and Mr Hardiman has honourably told me today that other players (and I have referred to the two key ones) are in fact contactable. I read into that that they can be therefore deployed.

29. Therefore there is no prejudice on this front.

Conclusion

30. Accordingly I exercise my discretion and permit this claim to proceed, it being just and equitable so to do.

ORDERS of DIRECTIONS

The hearing is already listed to take place between 2 and 4 May at Nottingham. The current directions have been stayed pending the outcome of this preliminary hearing. By consent, I now make the following directions.

1. **The discovery process**

1.1 By way of first stage discovery, the Respondent will send by **3 March 2017** to the Claimant its proposed trial index, double spaced and in chronological format.

1.2 By 17 **March 2017** the Claimant will reply thereto, adding at the appropriate space by short description, any additional documents he wants in the bundle. if he has a copy, he will send it to the Respondent with his completed trial index. If he believes it to be in the Respondent's possession or control, he will make that plain requiring that they place it in the trial bundle.

1.3 By not later than **24 March** 2017, a single bundle of documents is to be agreed. The Respondent will have conduct for the preparation of the same. The bundle is to be bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;
- documents which will be referred to by a witness;
- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
  - the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc
  - correspondence between the tribunal and the parties, notices of hearing, location maps for the tribunal and other documents which do not form part of either party's case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should <u>not</u> be sent to the tribunal in advance of the hearing.

2. **Statements**

2.1 By not later than **21 April 2017**, there is to be mutual exchange of witness statements. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. The Claimant's witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated and a description of their attempts to find employment. If they have found a new job, they must give the start date and their take home pay. Witness statements should not routinely include a précis of any document which the tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the tribunal to draw from the document as a whole.

3. **The hearing itself**

3.1 The first morning will be a reading in period; the parties will have agreed a chronology and a cast list. There will be deposited, via the Respondent in good time before the first day of the hearing in order that the tribunal panel has the same to read, in triplicate, the following:

3.1.1 the trial bundle;
3.1.2 a combined witness statement bundle;
3.1.3 the chronology;
3.1.4 the cast list.

3.2 As the first morning is a reading in period, the attendance of the parties is not required; they must be ready to start the live hearing at **2pm prompt**.

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Employment Judge Britton

Date: 7 March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 March 2017
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FOR THE TRIBUNAL OFFICE