EMPLOYMENT TRIBUNALS

Claimant: Mr R Morris

Respondent: The Chief Constable of Lancashire Constabulary

HELD AT: Manchester **ON:** 17 January 2018

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr J Hurd, Counsel
Respondent: Ms A Meredith, Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:
The claimant's claim of detriment due to a protected disclosure contrary to section 47B Employment Rights Act 1996 is out of time; it was reasonably practicable to bring the claim in time; further, it was not brought within a reasonable time thereafter.

REASONS

1. The claimant brings a claim under section 47B of the Employment Rights Act 1996 of whistle-blowing, and a preliminary hearing was listed to determine whether time should be extended so that the Tribunal has jurisdiction to hear the claimant's claim, it having been presented 14 days out of time.

Claimant's Submissions

2. The claimant submits that he was too ill to consider bringing a legal claim and that in any event for a large period of time he was unaware he could do so. On these grounds it was not reasonably practicable to present his claim before the due date of 11 July 2017. In respect of the later period the claimant submits that it was reasonable to delay until 25 July in order to obtain legal advice, for the legal adviser to consider the claim and for funding to be obtained from the Police Federation.

Respondent's Submissions

3. The respondent submits that the claimant's illness was improving after May, and that he knew at the latest by 6 July 2017 that he had a legal claim and that he could have put his claim in by the time limit of 11 July 2017. If that is not correct then he did not put it in within a reasonable time thereafter, as no proper explanation has been given for the delay in terms of actual evidence from 14 July to 25 July.

Witness and Bundle

4. There was an agreed bundle to which an email from the claimant's union was added, and I heard evidence from the claimant himself.

The Law

5. Time limits applying to whistle-blowing claims are set out in section 48(3) of the Employment Rights Act 1996. This says that:

> "An Employment Tribunal shall not consider a complaint under this section unless it is presented –
>
> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, or where the act or failure is part of a series of similar acts or failures or last of them; 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."

6. Accordingly, in effect there are two considerations. Firstly, the Tribunal has to decide whether it was reasonably practicable or not to put a claim in within the original time limit, and if it decides that it was not it has to go on to decide whether the claim was then presented within a reasonable time thereafter.

7. A number of cases were cited to me, in particular **Trevelyans (Birmingham) Ltd v Norton [1991] EAT** which established that:

> "Where an employee has the knowledge of the right to bring a claim there is an obligation to seek information and advice about the enforcement of those rights. Ignorance of time limits may well be held not to be reasonable if the claimant was aware of the right to claim but made no further enquires about how or when to do so."

8. In **Schultz v Esso Petroleum Company Limited EAT [1999]**, which the claimant relied on, it was said that:

> "The Tribunal were wrong in concentrating on the fact that the claimant was well at the beginning of the limitation period but not at the end. It is natural that concentration should be on the claimant's state of health at the end of the process when the claim has actually to be put in or go out of time."

9. The respondent says that case can be distinguished as in this case the claimant was more ill towards the beginning of the period and less ill towards the end of the period.

10. Both parties cited **Asda Stores Limited v Mrs S Kauser**. In that case it was deemed reasonable of the claimant to await the outcome of a criminal investigation where she had genuinely believed that she had to do so before issuing proceedings. However, after those enquiries were complete the claimant still did not present her claim for three days and the respondent successfully appealed the Tribunal's decision that it was not reasonably practicable to put the claim in within those three days.

11. In addition, "where the delay is occasioned by the legal advisers or by skilled advisers that is not a reason for extending time; quite the opposite. It is a matter of suing those advisers for negligence if indeed the situation gives rise to negligence" (**Dedman v British Building and Engineering Appliances [1974] Court of Appeal** and **Northamptonshire County Council v Entwistle EAT 2010**).

12. It has also been established more recently in **Cullinane v Balfour Beatty & others EAT [2012]** that advice from skilled advisers comes within the **Dedman** principle. Trade union representatives count as advisers in this context.

13. In **Palmer & another v Southend-on-Sea Borough Council [1984]** the Court of Appeal stated that:

> "Reasonably practicable does not mean reasonable which would be too favourable to employees, and does not mean physically possible which would be too favourable to employers, but means something like reasonably feasible."

14. In **Asda Stores Limited v Kauser EAT [2007]** it was said that:

> "The relevant test is not simply a matter of looking at what was possible to ask whether on the facts of the case as found it was reasonable to expect that which was possible to have been done."

Findings of Fact

The Tribunal's findings of fact are as follows:

15. In April 2015 there was an incident involving a colleague which the claimant witnessed where the colleague unlawfully assaulted someone they had detained on suspicion of committing a criminal offence. On 7 May 2015 the claimant disclosed to a more senior officer what had happened. The matter was then taken up by the Crown Prosecution Service ("CPS") and the colleague was prosecuted for assault. He successfully appealed against the outcome of his first trial but was convicted again his second trial, with the claimant giving evidence on both occasions. The claimant brings a claim that as a result of reporting the matter to his colleagues he has suffered numerous detriments from 7 May 2015 to 12 April 2017.

16. In June 2015 the claimant submitted a detailed report regarding treatment he considered detrimental which occurred on 13 June 20165 having been told that he could make an official complaint or report the matter to a senior officer.

17. The claimant was absent from work sick from8 April 2016. He said this was because he learned that the colleague referred to above had attended an inspector's

leaving party and had made derogatory comments about the claimant at that party. The claimant, however, did not attend that party and learnt about it second hand.

18. The claimant's GP's notes showed that a comment was made on 10 April 2016:

> "The claimant blew the whistle on another colleague and now feels colleagues are against him."

19. In his evidence the claimant said he did not believe he had used that expression ("blew the whistle"), it was the doctor's interpretation of the information he had given him about what happened.

20. As a result of the claimant going off sick Inspector Khan visited the claimant at home on 12 April 2016, and that now comprises the last alleged act of detrimental treatment.

21. On 13 April 2016 the claimant contacted the Chair of Lancashire Police Federation, Rachel Hanley. He then met with her on 5 May 2016. He said this was mainly a welfare meeting, particularly discussing his pay as it was due to be cut in half. I note from the email that was disclosed today that Ms Hanley says she has notes from this meeting, however these have not been disclosed, and neither has Ms Hanley given evidence.

22. The claimant was particularly concerned at this point in time that the claimant had invited him to a case conference almost immediately he had gone off on sick leave. This was to be a case conference to discuss his sick leave and he did not feel well enough to attend and was alarmed that such a meeting had been arranged so soon after he was absent.

23. There was also a discussion about the claimant going on a welfare break at premises in the Lake District owned by the union to which the union had access.

24. The claimant advised, and this is recorded in his mental health assessment by an independent psychiatrist, that he was drinking heavily at this time, approximately a bottle of whiskey every other day, and he was unable to sleep otherwise. He says he found it difficult to think clearly or concentrate on anything.

25. On 17 May 2016 the claimant was recorded as having told his GP that he had testified against a fellow officer and since then colleagues had ignored him.

26. He attended a mental health assessment on 22 May 2016 and the report of that assessment stated that the claimant had advised that:

> "He had ongoing stress at work for the past 2½ years since he 'whistle-blew' on a colleague who was also a family friend."

27. That report stated that he said his concentration and motivation was good, although the claimant said today the concentration referred to driving although the report does not say that.

28. On 13 May 2016 the claimant reported that he had thought about committing suicide and had actually taken a rope out with him to woods, although he did not feel that he would do this now.

29. The claimant was taking 50mg of sertraline at this point in time, an anti-depressant.

30. On 5 July 2016 it was reported from a meeting with GP that he was feeling better and that he was looking to retire on medical grounds. The union was involved and requesting medical records. He was given advice on how to obtain these. The claimant could not remember when this was first discussed but it obviously must have been discussed before this meeting with his GP.

31. The same day the claimant met with the Force Medical Adviser whose records noted that the claimant had whistle-blown and had since felt bullied and isolated. The claimant reported that the Force Medical Adviser recommended that he seek legal advice. The claimant thought at first under questioning that this was in relation to his pay, as the medical adviser had spoken about the Equality Act, and one can only assume that the medical adviser thought if he qualified as disabled he might be able to argue for full pay for longer; however this is speculation. Other factors suggest that the legal advice the FMA was advising the claimant to seek was either additionally or solely about a potential whistle-blowing claim.

32. The claimant was asked was he not aware of the possibility of bringing a whistle-blowing claim earlier. He said he was aware of whistle-blowing through cases on the television about NHS whistle-blowers but not consciously aware of actual claims or that he could bring a claim. The claimant says the initial use of the word “whistle-blowing” he does not believe was generated by himself, but after that it appears that that is how he is describing his situation.

33. On 6 July 2016 the claimant spoke again with Rachel Hanley. There was originally a dispute about this. The claimant's witness statement, however, said at paragraph 11, “I do not recall speaking with Rachel after 5 May until 6 July”, but then later at paragraph 14 he said, during my meeting with Rachel” without giving any date. Following cross examination the claimant clarified that paragraph 14 was referring to a discussion with Rachel Hanley on 6 July 2016.

34. The email from Rachel Hanley stated:

> “We spoke on the 6th about half pay issues and Roger also texted me to say he had been advised by the FMA to see the Fed about getting legal advice. We made an appointment to see me on 19 July.”

35. However, the claimant went further in his witness statement and said, again in paragraph 14:

> “During my meeting [this has been clarified as a telephone call] with Rachel she informed me that I may have a claim at the Employment Tribunal. Rachel offered to make contact with the Police Federation solicitors on my behalf to request a call to discuss the matter further.”

36. Rachel Hanley did in fact make such an arrangement for 14 July, and therefore clearly there was contact between the claimant and Ms Hanley between 5 July and 14 July, and there is no reason to believe it was not on 6 July following the claimant's evidence.

37. The time limit for the claimant's claim ran out on 11 July based on the visit by Inspector Khan being the last detriment, as that was 12 April. Of course the claimant might have got an extension had he gone to ACAS before 11 July, but that does not arise here as the contact with ACAS was after the time limit had expired.

38. On July the claimant had a telephone call with a solicitor from Slater and Gordon who routinely act for the Police Federation. She explained she was not formally retained to act for him and it was as general chat, and that she gave him some explanation of the time limits for bringing the type of claim, advised him he needed to apply for legal funding so that she could be retained to advise on the prospects of any claim, and in anticipation of this the claimant arranged to meet with the solicitor on 17 July to discuss the matter further. It should be noted 14th was a Friday and 17th was a Monday.

39. At the meeting on 17 July the claimant provided the solicitor with a number of documents and details of all that had happened since the making of his disclosure. The solicitor advised she would need time to consider the documentation before advising him and the Police Federation further.

40. On 24 July 2016 the solicitor provided a letter of advice to the Police Federation and the claimant was advised to contact ACAS to obtain an early conciliation certificate, he says he instructed his solicitor to do it on 24th and the certificate was issued on 24 July and discharged on 25 July 2016 with the claim being submitted on that date.

41. I had no evidence as to what had happened between 6 July and 14 July, and then between 17 July and 24 July regarding what caused the delays.

Conclusions

42. In respect of the issue of whether it was reasonably practicable to bring the claimant's claim in time, I accept that the claimant's was not well throughout April and May, and had not considered bringing a claim himself and did not properly understand that he could do until his discussion with the Force Medical Adviser on 5 July. The claimant was then advised by his union that he might have a claim, therefore the question arises as to whether between 6 July and 11 July it was feasible for the claimant to have issued a claim.

43. Unfortunately I heard no evidence from the Police Federation adviser as to what was discussed on 6 July, and in what capacity she was advising the claimant. She appears to be quite senior as she was Chair of Lancashire Constabulary Police Federation; however it is unclear what her experience and locus was. I have heard no evidence from her as to what advice she gave to the claimant on 6 July, and what time limit understanding she had. I find that she was a skilled advisor she was acting as the Police Federation representative for the claimant and although the Federation is not strictly a union she did act in a similar capacity to a trade union advisor as she did discuss with him various potential legal issues such as attending the case

conference, seeking early retirement, and the half pay situation. She was aware he might have an employment tribunal claim but whether that was a whistle-blowing case or a equality act case is not completely clear but given only a whistle-blowing case has been brought I find on the balance of probabilities she was referring to the former.

44. I have no evidence as to why an appointment with the solicitor could not be arranged for earlier than 14 July. I have not heard why the claimant was not advised to go to ACAS on 6 July or 14 July, although by that time he was out of time. As can be seen from later, the claimant was able to go to ACAS and put a claim in within two days.

45. Therefore, although I accept that up to 6 July the claimant was initially too ill and then overall ignorant of his right to actually bring a Tribunal claim in respect of whistle-blowing, it was clear on 6 July he was given advice, but he was also put off from taking any action by it being recommended that he speak to a union solicitor first.

46. Accordingly, my finding is that it was reasonably practicable for the claimant to bring a claim between 6 and 11 July as he would have been able to go immediately to ACAS [as I have referred to he did later on] and then issue some sort of proceedings the next day or avail himself of any extension under the early conciliation rules.

47. I have not heard any evidence that if the claimant had issued proceedings himself the Police Federation would have refused to offer any legal advice or assistance, as is sometimes the case with trade unions.

48. If I am wrong on that I have then considered the second limb of the test, which is if it was not reasonably practicable to present by 11 July, was the claim presented within reasonable time thereafter? I would have been open to considering the reasons why an appointment with a solicitor could not be made until 14 July, and I at least did have some evidence from the claimant that at that stage Slater and Gordon were not formally retained by the Police Federation and therefore the solicitor could not have been said to be acting for the claimant. However, by the time the solicitor meets with the claimant on 17 July and there is a real anticipation of funding being granted, and all the relevant information and documentation is provided on 17 July, at that stage there was then a further week's delay whilst, one might surmise, that some of that time was taken with the solicitor considering the information and some of it with applying for funding and receiving a reply, I have received no evidence regarding that: I am simply asked to assume that that is what happened.

49. It is not at all clear from the claimant's evidence, even, what happened, as at paragraphs 18 and 19 he says:

> "Jennifer provided a letter of advice to the Police Federation. I was advised to contact ACAS to begin the process of early conciliation.
>
> As a result of this advice on 24 July 2017 I instructed Jennifer to contact ACAS on my behalf…"

50. The claimant later says he instructed Jennifer Hanley to submit his claim on 25 July. It is not at all clear what happened about the Police Federation advice and no documents were submitted to show at what point assistance was agreed. No documents or information was given regarding the process for obtaining Police Federation funding either.

51. In the absence of that information I find that the claim was not put in within a reasonable time thereafter. It was 14 days late and the guidance from the Appeal Courts is that the whole of the period should be scrutinised and it appears to me that from 17 July all the information was available to bring a claim, and that ACAS could have been applied to and a claim could have been brought between 17 and 18 July.

52. Anyone familiar with the claimant's "story" would at least have realised that it was unlikely that any further detriment would have arisen after he went off sick on 8 April, and therefore would have used that date at least as the date on which time began to run; although in fact it appears to be earlier than that, (i.e. when the claimant was told about the comments at the party) save for the fact that 12 April is now relied on (of course that would depend on Inspector Khan's actions being found to be a detriment, but that would be a matter for a full hearing).

53. Unfortunately for the claimant the test under section 48(3) which replicates the unfair dismissal time limits test in the 1996 Act is a harsh test, much harsher than the just and equitable extension in a discrimination claim, and although the amount of time at issue here is short, the absence of any evidence to explain these delays I find it was not reasonable to delay until 25 July.

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Employment Judge Feeney

Date: 25th January 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

26 January 2018

FOR THE TRIBUNAL OFFICE