



EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Y

HELD AT: Manchester

ON: 27 November 2017

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Written representations only

Respondent: Mr T Perry, Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that the claimant's claims were presented out of time. It was reasonably practicable to present the claims in time. Accordingly the claimant's claims are outside the jurisdiction of the Tribunal and are dismissed.

REASONS

1. The claimant brings claims of breach of contract in respect of notice pay, unlawful deduction of wages in respect of suspension pay and the failure to pay holiday pay. The claimant was employed by the respondent for less than two years although over one year and so is not entitled to bring an unfair dismissal claim in respect of his dismissal by the respondent in March 2017.

2. There is a dispute about the date of the claimant's dismissal. The claimant states it was 10 March 2017 and the respondent states that it was 7 March 2017. This hearing was listed because the respondent states that the claimant's claim is out of time. This was also the position recorded by the Tribunal administration. The respondent says it was reasonably practicable for the claimant to present his claim in

time. The claimant submits it was not reasonably practicable in the main because of his illness.

Bundle and Witnesses

3. The respondent had produced a bundle with all the relevant documentation available in it.

4. In respect of witnesses, the claimant did not attend and so there was no live evidence taken. The claimant submitted written representations in the form of a witness statement.

5. In addition to the witness statement the claimant had also submitted another statement on 21 November 2017 which was a mixture of submissions and evidence. The claimant in his claim form stated that he had some underlying conditions/learning difficulties including ADHD, dyslexia, Tourette's, anxiety and depression.

Tribunal's Findings

6. The claimant was dismissed by the respondent for failing to follow their safeguarding policy. He has not been dis-barred from practising as a social worker by the DBS since the relevant incident; however he states he has not been able to find any work but this may be because of his illnesses.

7. The claimant was dismissed either on 7 or 10 March. I have not had to determine this as it has not been necessary. The claimant contacted ACAS on 29 March and his conciliation certificate was discharged on 13 April 2017. He presented his claim to the Tribunal on 22 July 2017.

8. The claimant's first statement states that the reason he could not present his claim in time was because:

- (1) He had a major depressive episode and experienced adverse side effects from medication impeding his ability to function;
- (2) He also had a mental health crisis although he does not state the date on which he had a mental health crisis. He says that he certainly got worse towards the end of March 2017.

9. The claimant feels that the respondent contributed to his mental health by not informing him of the reason for his suspension, failing to involve him in the investigation, not providing information regarding the allegation and denying him the right to appeal against the outcome.

10. The claimant says he made attempts to find appropriate legal advice and representation in the initial phases of his claim but this proved difficult. The CAB, for example, informed him that they had no-one who specialised in employment law locally and suggested the claimant contacted the local University of Law clinic at UCLAN but that had closed for the summer holidays, not to re-open until the next academic year. The claimant tried to contact firms online but the availability of these

firms meant that it was not possible to access legal advice. The claimant states that in the end he was advised by ACAS of the need to submit the claim as soon as possible, which the claimant did as soon as it was practical to do so.

11. The claimant elaborates on his illness in his statement sent today (27 November). The claimant said that he entered early conciliation with ACAS between 29 March and 13 April 2017 but did not fully use the conciliation process because he had had a breakdown and was in the midst of a depressive episode, nothing mattered and prioritising anything became impossible. He said he became withdrawn to the point where he stopped eating, could not sleep and could not leave the house towards the end of March 2017. He had suicidal thoughts. He went to see his GP who placed him on medication and referred him to the Crisis Team. He waited for a reply to his letter of appeal of his dismissal but this never materialised. He felt that the side effects of the medication actually made him worse. He had further periods of crisis where he needed the support of the Mental Health Team and managing the effects of the medication. He became further isolated from friends and family and was under considerable financial pressure.

12. The claimant does not give any details of the dates of these events; neither did he provide any specific medical evidence regarding his GP consultations or any information from the Mental Health Team.

13. The claimant applied for benefits in May 2017 and struggled but had some assistance and did manage to make some progress with this. He states he was in no frame of mind to concentrate or think about anything logically. He submitted his claim late and states it was not through ignorance or naivety but genuine illness.

14. The claimant had sick notes from his doctor dated 8 May 2017 backdated to 31 March 2017 and then from 6 June 2017 which covered the period up to 4 July 2017 which said that he was suffering from anxiety and depression and was not fit to work.

15. The claimant applied for Employment Support Allowance on 3 August 2017. He was not required to take part in any work related activity. He was given a personal independence payment on 13 October 2017 backdated to 13 July 2017. As far as I am aware the claimant continues to receive this.

16. The claimant was clearly aware that he had insufficient service for unfair dismissal as his claim form submitted on 22 July 2017 claimed breach of contract, i.e. wrongful dismissal (remedy: one week's notice pay) and a claim for holiday pay and for a week's suspension pay.

17. The claimant's complaint in respect of his dismissal was that he was not told of the full reasons for his suspension, he was not involved in the investigation and he was not told of the details of the allegations against him and the reason for his dismissal. Further, the claimant sought to appeal but his letter of appeal was ignored.

18. The claimant said that the staff member who provided the information to the respondent he believed had an ulterior motive for providing false information. He had raised concerns about working with her on previous occasions. He said he had also

raised concerns a week earlier about staff and young people's safety when he had been stabbed with a fork three or four times and pool ball in a sock swung at his head. He stated he believed he was dismissed for "other reasons" and that this incident was used as a reason to sack him, although he did not elaborate on "other reasons".

Submissions

19. The claimant's submissions were included in his two statements and as previously stated they relied on him being too ill to issue Tribunal proceedings.

20. The respondent made the following submissions at the hearing:

- (1) That the test was whether it was reasonably practicable for the claimant to present his claims within the primary time limit and if not did he present them within a reasonable time thereafter? They pointed out the claimant had not addressed this test in any detail, in particular the second limb of the test. Of course the claimant was not legally represented and had not been able to access any specific legal advice.
- (2) The claimant had been awaiting the outcome of the appeal but given that he says he put a letter of appeal in on 12 March this did not explain the long delay.
- (3) The claimant had not produced any detailed medical evidence to explain what had happened between the end of March and 22 July.
- (4) The claimant had obtained assistance on 8 May and been able to claim benefits.
- (5) The claimant had been able to contact ACAS on 29 March. He had detailed that he had tried to get advice, however this appeared to be an earlier period. He did not provide any detail of when he had attempted to get advice and what the specific results were. It appeared that the CAB who generally can help claimants in this situation were unable to assist him.
- (6) The claimant has stated that ACAS told him he needed to submit his claim as soon as possible and this was likely to be when his certificate was discharged in April.
- (7) The claim was out of time. It was submitted that the breach of contract claim should have been submitted by 20 June and the unlawful deductions which, if it is assumed the claimant was due to be paid on 31 March, was still out of time on the basis of the 14 July which would have been the adjusted time limit.

The Law

21. In a breach of contract claim time runs from the end of employment. In a Wages Act claim time runs from the date when payment was due. In both cases the

initial time limit is three months. However, the early conciliation rules have changed the way in which the three months is calculated. Section 207B states that:

- “(2) In this section –
- (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (the requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought; and
 - (b) Day B is the day on which the complainant or applicant concerned receives, or if earlier is treated as receiving, by virtue of regulations made under subsection (11) (of that section) the certificate issued under subsection (4) of that section.
- (3) In working out when a time limit set by a relevant section expires the period beginning with the day after Day A and ending with the Day B is not to be counted.
- (4) The time limit set by the relevant provision (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B – the time limit expires instead at the end of that period.
- (5) Where an Employment Tribunal has the power under this section to extend a time limit set by a relevant provision the power is exercisable in relation to the time limit as extended by this section.”

22. In effect the time spent in the conciliation period will not count for the calculation of the time limit period: these are, in effect, “stop the clock” provisions.

23. The method of calculation is that the starting point is to ascertain:

- (1) The date when the claimant complied with the duty to contact ACAS under Employment Tribunals Act 1996 section 18A(1) (known as Day A).
- (2) The date on which the claimant received or is deemed to have received the early conciliation certificate (known as Day B) (see Employment Rights Act 1996 section 207B(2)(a) and(b)).

24. For the purpose of working out the expiry date the relevant limitation period beginning with the day after Day A and ending with Day B is not to be counted, thus for example the three month limitation period would ordinarily be expired on 31 March and Day A was 16 January and Day B was 6 February. The period that would not be counted so it would be 21 days i.e. 17 January to 6 February inclusive, so that the revised expiry date would be 21 April.

25. If, however, Day A of the conciliation period occurs before and Day B occurs after the start of the limitation period, it is only the conciliation days that take place after the start of the limitation period and ending with Day B that are not to be counted when calculating the expiry date (see **Ferguson v Combat Stress** case number 4105592/2016; and **Muller v Hounslow London Borough Council**, case number 2302599/2015, both Employment Tribunal cases and not Appeal Court cases).

26. Where a claimant leaves it late into the ordinary limitation period before complying with the early conciliation requirement there is an automatic extension of time in accordance with the provisions of the Employment Rights Act 1996. This is where the time limit expires during the period beginning with Day A and ending one month after Day B; so going back to 31 March, if Day A was 20 March and Day B was 27 March the extended time limit would expire one month after Day B i.e. on 27 April.

27. In this case the correct approach is to adopt the corresponding date rule which provides that when the relevant period is a month and the start date, i.e. Day B in this case, is, say 6 June, the period expires on the same date in the following month, 6 July. Where the start date is 31 day of a 31 day month and the following month is a 30 day month the expiry date will be the 30th of that month, and where the start date is 31 January the expiry date is 28 or 29 February as the case may be.

28. Where Day B was 30 June as in **Tanveer v East London Bus & Coach Company EAT 2016** the extended expiry date was 30 July and the claimant was out of time when he presented his claim on 31 July.

29. If the claim is found to be out of time then a Tribunal can allow a claim to proceed out of time, in the case of the jurisdictions involved in this case, if it was not reasonably practicable for the claimant to present his claim in time, and if he then presented it within a reasonable time thereafter.

30. In **Palmer and Saunders v Southend-on-Sea Borough Council [2084]** Court of Appeal it was stated that:

“We think that one can say that to construe the words ‘reasonably practicable’ as the equivalent of ‘reasonable’ is to take a view that is too favourable to the employee. On the other hand ‘reasonably practicable’ means more than merely what is reasonably capable physically of being done, different, for instance, from its construction in the context of the legislation relating to factories. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word ‘practicable’ as the equivalent of ‘feasible’ as Sir John Brightman did in **Singh v The Post Office [1973] NIRC** and to ask colloquially and unencumbered by too much legal logic was it reasonably feasible to present the claim to the Tribunal within the relevant three months?”

31. In considering the second limb of the test the Tribunal should consider all the relevant circumstances: the period of the delay and the actual knowledge the claimant had as to his rights.

Conclusions

32. In my view in respect of the claimant's breach of contract claim he should have presented that claim by 23 June or 20 June. The 23 June is arrived at by taking the claimant's alleged date of termination as 10 March, and therefore his original deadline would have been 9 June. This is extended by the "stop the clock" provisions which are 14 days (30 March to 13 April inclusive), and 20 June is arrived at by taking 7 March as the dismissal date and applying the same rules.

33. In respect of the claimant's unlawful deductions claim, the claim should have been presented on 14 July on the basis that payment was due on 31 March. The clock is stopped by 14 days which gives a time limit of 14 July. Clearly he is out of time in respect of both the claims, slightly less so in respect of the unlawful deductions claim. Accordingly I have to consider whether it was reasonably practicable for the claimant to present his claim in time.

34. I find that it was reasonably practicable for the claimant to present his claim in time. I acknowledge fully that the claimant was suffering from considerable difficulties arising out of his mental illness and that a dismissal from a job would in most circumstances cause a depressive or anxious reaction in most employees. Further, the claimant had underlying conditions which no doubt contributed to a more extreme reaction in his case.

35. I have accepted the claimant's evidence regarding his state of mind throughout this period. However, I have found it difficult to assess the issues with any accuracy as the claimant has failed to provide an accurate timeline as to how he was affected at different times within the period from the end of March to the middle of July, to explain why he was fit by the middle of July to issue proceedings and not before. Further, he failed to provide supporting medical evidence for the whole of the relevant period. He has not set out in any detail his efforts to obtain legal advice and why he felt legal advice was necessary and why, by the middle of July, he obviously had made a decision it was not necessary, or possibly earlier. The claimant was able to make a claim for benefits in May. He was able to contact ACAS at the end of March. He does recount that ACAS advised him to file his claim as soon as possible.

36. In respect of the second limb, if I am wrong on the above the claimant has provided no details as to why, if was not reasonably practicable for him to issue his claims by the due dates, that he then presented then within a reasonable time thereafter.

37. In all those circumstances the claimant has clearly not provided me with sufficient evidence to find that it was not reasonably practicable for him to present his claim before the relevant dates. Or that if it was not that he presented it within a reasonable time thereafter.

38. Accordingly I must dismiss the claimant's claims as out of time.

39. I make some further comments on the claimant's claim.

40. The claimant is concerned that he cannot obtain a job because the respondent has dismissed him for gross misconduct. The respondent's letter dismissing the claimant does not say this: it says that he has been dismissed for failing to comply with safeguarding procedures and therefore it is to be hoped that a letter of this nature would not prevent the claimant from obtaining further employment in this field if he still wishes to do so. He has not been debarred from working by the DBS.

41. Secondly, although I have not heard much detail the claimant's main complaint (which he cannot pursue as an unfair dismissal claim as he does not have two years service) was that he was not involved in the investigation procedure. Clearly if this had been a normal unfair dismissal claim the respondent would have been required to follow a fair procedure, and if they had not the claimant may well have succeeded on this point (subject to **Polkey** and contributory conduct). However the alleged lack of process in this case may have arisen because the respondent was clearly aware that if the claimant did not have two years' service he could not bring an unfair dismissal claim. For the wrongful dismissal claim it must be established that the respondent was entitled to dismiss summarily for gross misconduct which would involve scrutiny of its evidence.

42. Further, the claimant had alluded to other reasons for his dismissal but has not provided any detail of that, and I have had to make a decision on time limits on the basis of the claims he has pleaded .

43. I further note that I asked the respondent's representative to look again at whether it is possible that they may owe the claimant any monies for the matters he is claiming. The claimant could have brought some of these claims in the County Court where the time limit is more favourable. However, it would be prudent of the respondent to consider these monetary claims further in the light of the fact that the claimant may be able to take further proceedings in the County Court.

Employment Judge Feeney

Date: 5th January 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
19 January 2018

FOR THE TRIBUNAL OFFICE