Case No: 1402447/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr Bryan Goodes

Respondent: Numatic International Limited

Heard at: Exeter **On:** 5 March 2020

Before: Employment Judge Fowell

Representation:

Claimant: In person

Respondent: Mr S Ellerby, Solicitor, for Make UK

JUDGMENT ON PRELIMINARY ISSUES

1. The claim was submitted in time.

2. The claimant has a disability for the purposes of the Equality Act 2010 and had that disability at all material times.

REASONS

1. The decision on the above two preliminary issues was recorded in the Case Management Summary issued on 5 March 2020, since when written reasons have been requested by the respondent.

Time Limits

2. The relevant test for complaints of unfair dismissal is set out in section 111(2) Employment Rights Act 1996:

> "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."

3. That three month period has since been extended by section 207B of the Act, to allow for the period spent in early conciliation.

4. It is not disputed that claim form was presented outside the normal time limit. Mr Goodes was dismissed on 14 December 2018 and began early conciliation on 2 March 2019. That was within the normal three month period from dismissal, which expired on 13 March. Early conciliation finished on 29 March 2018, 27 days later, and so the normal rules would allow a further period of one month from the issue of that ACAS certificate. Hence the primary time limit expired on 29 April 2019. So much is common ground. But the claim form was not in fact submitted until 3 June 2019, 35 days late. He relies on incorrect advice from ACAS and also on medical grounds.

5. The incorrect advice was in the form of an email from ACAS which is at page 1 of the bundle. It states:

> "You will have a *minimum* one calendar month to submit your claim from the day on which you received the certificate." [Emphasis added]

6. Clearly the author intended to say that he would have a *maximum* of one calendar month to do so. But it is important for me to attempt to put myself in Mr Goodes shoes and see what he would make of the document in the circumstances. There is nothing obvious on the face of the email to indicate that that advice was wrong. It is an odd statement in that it leaves the precise length of time unclear, and begs the question how long in fact did he have if there was a minimum of one month. Mr Goodes accepted that he ought to have asked them at some stage how much the maximum was and regretted not doing so. But ACAS is a reputable source of advice on such matters. In every case, including this one, they provide the certificate and a letter to the tribunal advising of the start and end of early conciliation, so that the Tribunal can work out whether a claim is late. It is to be expected that in the overwhelming majority of cases it will get this information correct. It is very unfortunate that in this one case the correct position was misstated, but that is the case and there is no reason why Mr Goodes would have had any occasion to doubt it.

7. The general principle is that if a claimant engages solicitors to act for him in presenting a claim, it will normally be presumed that it *was* reasonably practicable to present the claim in time and no extension will be granted. As Lord Denning MR put it in **Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA: 'If a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out. His remedy is against them.' Similar cases have held that trade union representatives are also skilled advisers for these purposes, even advisers at the CAB, although that is not so clear cut. But there is a distinction where the advice comes either from tribunal staff or from ACAS, who are neutral between the parties.

8. In **DHL Supply Chain Ltd v Fazackerley** EAT 0019/18 (unreported, but referred to in the IDS Employment Law Handbook on Practice and Procedure, paragraph 5.81) the position was similar to this. The claimant was advised by ACAS to wait until his appeal had been heard before submitting the claim. He did not seek any further advice and the Employment Judge found that it was reasonable for him to approach the matter on the basis of this advice from ACAS. The Employment Appeal Tribunal upheld the decision.

9. Here the position is more clear cut. It is not a case of having taken general advice at an early stage; specific written advice was given that he had a minimum of one month, not a maximum. Following that advice inevitably meant that the normal time limit would be missed. Even if Mr Goode had submitted the claim form one month and one day after the end of early conciliation it would equally have been late. I find in those circumstances that it not reasonably practicable for Mr Goodes to submit his claim form on time.

10. The next question is whether it was submitted within such further period as may be considered reasonable, under section 111(2)(b) above. What is reasonable depends on all the circumstances, including Mr Goodes' health.

11. His position is set out in the impact statement at page 59 of the bundle. He started new employment on 28 January 2019, which involved him being on his feet or on the go all day, aggravating his neuropathy and pain, and meaning that he had to take extra medication. He expanded on this in his oral evidence, explaining that his main medication was gabapentin and that when this wore off he would have a sharp pain in his head, for which he needed tramadol, a sedative. After a full day's work, he needed three doses of this combined medication, rather than the usual two, leaving him physically drained and unable to concentrate

12. Another factor was that his wife was taken ill at the end of February 2019. That meant not only that he had some caring responsibilities for the next few weeks, but he was trying to make up the loss of her earnings by working overtime and also some Saturday mornings. The net effect meant that he only had Sundays to recuperate and had little or no energy even then.

13. It was put to him that the medical evidence in the bundle showed that his medication did not have any side effects on him, given that he had been taking them for a period of years, but that report was before his new employment and the increased dosage it required. I accept his evidence on that issue.

14. Mr Goodes also explained in his evidence that he was piecing his claim form together over successive weekends during this period. As already noted, the time-limit expired on 27 April and the claim submitted on 3 June 2018. That period also has to be seen against the advice from ACAS about a minimum period. As time went on, the question of what if any maximum period applied may well have become more pressing, but I accept that Mr Goodes was making reasonable efforts over those weeks to complete the claim form and set out the details of his claim, and the extra time needed does not seem to me so extraordinary as to put him on notice of the need to make further enquiries. A "minimum" of one month indicates that two months or even three might be usual. In those circumstances I find that the claim was presented within a reasonable further period and so was in time.

15. The next question is whether or not the complaint of disability discrimination was in time and that the test is less prescriptive. It is simply whether or not it is just and equitable to extend time. In circumstances where I have already found that it was not reasonably practicable for him to submit the claim form on time, and where it was submitted within a further reasonable period afterwards, the inevitable conclusion has to be that it would be just and equitable to extend time for that complaint also.

Disability

16. With regard to the disability, the only issues in dispute were (a) whether the condition had an adverse effect on day-to-day activities and (b) whether that effect was substantial. It is accepted that Mr Goodes has a long-standing problem with his left knee. On this issue there was a good deal of medical evidence, including letters from treating specialists, GP records and Occupational Health reports.

17. In approaching that evidence I remind myself that by section 212(1) of the Equality Act 2010 "substantial" means "more than minor or trivial." The Act also provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The key point however is that it is necessary to disregard the effect of his medication.

18. That is of course very difficult to do in practice, since all of the examinations have been conducted on the basis of Mr Goodes regime of medication. High doses have been prescribed to Mr Goodes for many years. Summarising the documentary and oral evidence, the pain began in about 2012 or even earlier, and

led to a number of scans and examinations. No physical or mechanical cause has been found, so it has proved very difficult to treat. Over time it has had more impact on his life, so that until about 2015 he could still play golf. He also used to enjoy cycling and long walks. Now, he may go to the beach with his wife and may be able to walk a mile or even two, going slowly, but sometimes that is not manageable and half a mile is a more realistic limit. All this of course is dependent on regular medication.

19. It has resulted at various times to adjustments at work, including a move to a 'continental' shift pattern of four hour stretches or a phased return to work. By the end of his employment he could tolerate a 9 hour shift, but that was the upper limit.

20. There was a marked disparity in the evidence between the reports of his Occupational Health physician, Dr Groom, and his own GP. There were two reports from Dr Groom, a year apart, but Mr Goodes said that his examination was limited to moving the leg up and down to assess the knee joint. (That contrasted with perhaps half a day spent with his specialist and regular appointments with his GP.) The first report noted that there was no mechanical fault identified by the MRI scan, and expected it to resolve itself within a matter of weeks. It clearly did not do so, but the second report, on 23 July 2018, did not address or explain why this view had proved inaccurate, and again concluded that it would resolve itself over time. It said that Mr Goodes was in good shape, no adjustments were recommended, and it questioned the amount of medication prescribed.

21. In response, Mr Goodes obtained a letter from his own GP, Dr Moody, giving the opinion that he met the test of disability. It did say that the knee pain had improved by 90%, although Mr Goodes' view was that that reflected the position on the day he saw the doctor, but that it still fluctuated considerably.

22. I prefer the view of Mr Goodes' GP on this issue. Mr Groom's opinion was that there is no underlying medical condition, but the respondent accepts that there is an impairment. Dr Groom's reports therefore neither identifies the cause or explains why it has failed to resolve itself over this long period. But even if his view is correct, he stresses the extent of medication taken by Mr Goodes. I take the view that it would not have been prescribed inappropriately for so long, and is therefore necessary to control his pain and so to enable him to carry out normal day to day activities.

23. In my view, even without taking into account the effect of his medication, a fair reading of the medical evidence shows a consistent history of recurrent pain which, despite exercising, has had a debilitating effect throughout the material period, up to and including dismissal, affecting his ability to attend work, drive, and take part in recreational activities and socialising. In those circumstances the test of disability is met.

Employment Judge Fowell

Date 5 March 2020

Amended on 28 March 2020