



# EMPLOYMENT TRIBUNALS

## Claimant

Mr J L Sargent

**Heard at:** Watford

**Before:** Employment Judge Tuck

## Appearances

**For the Claimant:** Mr R Jenkins, Union representative.

**For the Respondent:** Mr D Piddington, counsel.

## Respondent

B & Q Limited

**On:** 15 January 2020

## JUDGMENT

1. The Claimant's claim was presented out of time.
  - 1.1 In relation to his claim for unfair dismissal; it was reasonably practicable to have presented the form on time, he did not present it within such further period as was reasonable.
  - 1.2 In relation to his claim for disability discrimination; it is not just and equitable to extend the time limit.

## REASONS

1. By an ET1 presented on 10 March 2019 the claimant presented complaints of unfair dismissal and disability discrimination. He worked for, working in a role in kitchen, bathroom and bedrooms in the B&Q Enfield store for over 12 years. He resigned describing in his ET1 "the final straw was when I was meant to take over the Design Consultants role" and was given a new title of "Showroom Advisor" which would not attract commission.
2. The claimant's employment ended on his resignation; he confirmed today his effective date of termination was 30 August 2018. The claimant contacted ACAS on 29 November 2018 (Date A), and an early conciliation certificate was issued on 12 January 2019 (Date B).

3. Today's hearing was listed in June 2019 - to consider whether the claim was presented out of time.

## FACTS

4. The claimant gave evidence to me on oath, and I find that he was a very truthful witness. I accept his evidence entirely.
5. The claimant wrote a letter of resignation on 20 July 2018, stating that he "cannot continue in my role after repeated changes to my contract and pay. My position is now untenable". He gave notice, saying his last day would be 30 August 2018.
6. The claimant very frankly stated that he knew of all the facts giving rise to his claims of constructive unfair dismissal and disability discrimination by 30 August 2018. He did not need to see any documents from the employer in order to describe what had led him to resign, or what he considered to have been discriminatory treatment of him during his employment.
7. The Claimant, at all material times has been a member of the Communication Workers Union; he has been friends with Mr Jenkins, a union representative who has been assisting him, since summer 2018.
8. After his employment ended the claimant tried to obtain advice from a Citizens Advice Bureau, telephoning to no avail on 3 or 4 occasions. At some point between 30 August, and going on holiday on 8 September 2018 he took advice from Mr Jenkins. The claimant believed there was a time limit to go to Acas of "30 days minus one day" – he may have been thinking of the way in which the three-month time limits to apply to tribunals have traditionally been expressed as operating of requiring presentation of claims within three months minus one day.
9. The claimant in fact commenced ACAS Early conciliation on 29 November 2018. He says that Mr Jenkins carried out some communication with ACAS on his behalf and that he spoke to them himself on some occasions. The claimant said that B&Q sought to obtain extensions. I infer that this was likely to be an extension to the standard ACAS EC period of one month, which would have ended on 29 December 2018, for an additional two weeks, such that the certificate was issued on 12 January 2019.
10. The claimant said that he thought B&Q might put proposals to ACAS – I explained that they are not obliged to do so, and that I am in any event not permitted to know the content of any such discussions.
11. The claimant received the ACAS EC Certificate on 12 January 2019.
12. On 8 February 2019 Mr Jenkins telephoned the Respondent's solicitor to discuss the claimant's case. He followed that up with an email on 14 February 2019. In that email he wrote:

“John Sargent has now completed the draft Employment Tribunal Form and I will be going over it at the weekend before letting CWU’s legal people go through it and then sending it off.”

13. Mr Jenkins also pursued a subject access request seeking documents from B&Q. He has significant complaints about documents provided, and documents not provided; he said this is a matter he had taken up with the information commissioner.
14. The ET1, as set out above, was presented to the ET on 10 March 2019. The claimant confirmed to me that his health in the period between receiving the ACAS certificate in January and presenting the claim in March was “no worse than it normally is”.
15. The delay between this hearing being listed in June 2019 and today is of course no fault of the claimant or his advisors, but due to the pressure on tribunal lists.

## LAW

16. Section 111 of the Employment Rights Act 1996 provides that complaints to the employment tribunal of unfair dismissal must be made within three months of the effective date of termination, or if that was not reasonably practicable, within such further period as is considered to be reasonable. This very long standing time limit was altered in 2013 by the introduction of the requirement to complete ACAS early conciliation before presenting a claim. Section 207B ERA provides:
  - (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 (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 provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
  - (4) If a time limit set by a relevant provision would (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.
17. The older authorities – most notably *Dedman v British Building and Engineering Appliances Ltd* [1973] IRLR 379 and *Wall's Meat Co Ltd v Khan* [1978] IRLR 499 stated that if a person engaged an advisor who mistook time limits – the complaint is out of time and any complaint is against them. More recent

authorities, and in particular since the judgment of the Court of Appeal in *Marks & Spencer plc v Williams-Ryan* [2005] IRLR 562, have suggested that the position is more nuanced and requires an examination of who the advice is from and in what circumstances it is given. (Applied, for example in *Paczkowski v Sieradzka* [2017] ICR 62, EAT).

18. In relation to the claims for discrimination brought by the Claimant, the relevant time limit is set out in s.123 of the Equality Act (EqA) 2010. The tribunal has jurisdiction to consider a complaint if the claim is presented within three months of the act of which complaint is made. Section 140B EqA is in identical terms to s207B ERA set out above.
19. If the claim is presented outside the primary limitation period, that is after the relevant three-month period – or period as extended after the ACAS EC procedure has been undertaken, the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balancing of prejudice between the parties using the following principles:

The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended. I have been referred to the case of Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327, in which this principal was again set out by the Court of Appeal, at paragraph 26.

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“The burden of persuading the tribunal to exercise its discretion to extend time is on the complainant”.

He, after all, is seeking the exercise of the discretion in his favour. Lord Justice Sedley summarised it thus:

“There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal in the EAT is a well known example) policy has led to a consistently sparing use of the power. This has not happened and ought not to happen in relation to the power to enlarge the time for bringing ET proceedings.”

20. The tribunal takes into account anything which it judges to be relevant and may form and consider a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late weak claim and less prejudicial for a claimant to be deprived of such a claim.
21. This is the exercise of a wide general discretion and may include the date from which the claimant first became aware of the right to present a complaint. Consideration should also include whether it is possible to have a fair trial of the issues.

22. There is no requirement to go through all the matters listed in s.33 of the Limitation Act 1980 providing no significant fact has been left out of account. Those factors – which were read to the parties in the course of this hearing – are:
- 22.1 The length of and reasons for the delay;
  - 22.2 The extent which the evidence is likely to be less cogent;
  - 22.3 Whether the respondent’s conduct contributed to the delay;
  - 22.4 The duration of any relevant disability, that is something which deprived the claimant of the mental capacity required in law;
  - 22.5 The extent to which the claimant acted promptly once she knew that act or omission might be capable of giving rise to a claim; and
  - 22.6 Steps taken to receive relevant expert advice.

### **Submissions**

23. Mr Piddington produced a very helpful skeleton argument, which he spoke to. He said that the time limit had in fact expired on 29 November 2018, and that the extension to the time limit afforded by s207B(3) was from the day after date A, i.e. 30 November – by which time the claim was already out of time, such that the claim was 102 days late. Alternatively, if time expired on 12 February 2019, the claim was still 27 days out of time.
24. Mr Jenkins spoke mainly about his frustrations in getting documents from B&Q and the heavy redactions of those he had received.

### **Conclusions on the Issues**

25. The EDT – and last possible act of discrimination – was 30 August 2018. The time limit provided for in s111 ERA and s123 EqA would have expired on 29 November 2018. However, on that date ACAS EC commenced (Date A). I am satisfied that this case is within s207B(4) / s140B(4)-i.e. that the time limit would have expired in the period “beginning with Date A”, such that time expired one month after Date B, on 12 February.
26. The claim form in fact had been completed by the claimant by that date, and provided to his advisors. Mr Jenkins has not given evidence as to his failure to submit the ET1 by or on 12 February 2019, or of his steps to be clear as to time limits. He had however, as his email of 12 February 2019 sets out, the availability of further advice from union lawyers
27. Given that the claimant had completed the ET1 by the required date, it was reasonably practicable for it to have been presented on that date. In any event, waiting another month was such that it was not presented within such further period as was reasonable.

28. The claimant has not been able to put forward any factors as to why it would be just and equitable to extend the discrimination time limit. He was frank that his health was in a stable state; no doubt he simply left matters in the hands of Mr Jenkins having completed his draft form.
29. Considering the matters set out in the Limitation Act; whilst it is clear that he will lose his cause of action leading to prejudice, the claimant knew the relevant facts by 30 August 2018, and whilst he may have been frustrated by B&Q's lack of engagement, he did not need further information from them in order to present this claim. His (admitted) disability due to osteoarthritis is not relevant to the delay, and whilst the delay was only one month, this is a significant period in the context of a primary limitation period of just three months.
30. In these circumstances, the claims are dismissed.

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**Employment Judge Tuck**

Date: .....15 January 2020

03 February 2020

Sent to the parties on: .....

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For the Tribunal Office