



EMPLOYMENT TRIBUNALS

Claimant: Mr Wayne Alcock
Respondent: Department of Work and Pensions

AT A HEARING BY TELEPHONE CONFERENCE CALL

Heard at: Leeds **On:** 13th May 2020
Before: Employment Judge Lancaster

Representation

Claimant: In person
Respondent: Mr Sadiq, counsel

JUDGMENT

1. The complaint of unfair dismissal was not presented in time although it would have been reasonably practicable to have done so, and is struck out.
2. All complaints of disability discrimination apart from any which relate to the act of dismissal are struck out because they were not presented in time and it is not just and equitable to extend the time limit.
3. The time limit for presenting any complaint of disability discrimination in respect of the act of dismissal is extended to 11th November 2019, and the claim will proceed only in so far as it relates to the termination of employment.

REASONS

1. Having heard oral representations over the telephone, the decision was reserved to be given in writing.
2. No actual evidence was taken at this hearing because the Claimant had not complied with the directions of the Tribunal to serve a witness statement, or to provide any medical evidence on which he sought to rely.
3. This preliminary hearing had already been postponed, in February at the request of the Claimant. It would not have been proportionate to delay matters further in circumstances where it was possible to hear submissions on the issue.
4. The Claimant has brought complaints of unfair dismissal and of disability discrimination. The precise legal basis of the discrimination complaints is still not clear, and would clearly require further particulars if it were to proceed.
5. All complaints are outside the primary time limit of 3 months, as extended by a 13 day period of ACAS early conciliation.

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6. This preliminary hearing was therefore directed to take place on the instructions of Employment Judge Jones, given on 16th December 2019, to determine whether time should be extended.
7. The relevant statutory tests are to be found in section 111 (2) of the Employment Rights Act 1996 (unfair dismissal) and section 123 (1) of the Equality Act 2010 (discrimination).

UNFAIR DISMISSAL

8. On the complaint of unfair dismissal time may only be extended if I decide that it was not reasonably practicable to have presented the claim in time and that, if not, it was presented within a reasonable time thereafter.
9. The Claimant, it is agreed, was dismissed with immediate effect by a hand-delivered letter on 23rd July 2019.
10. The 3 month time limit therefore would have expired on 22nd October 2019.
11. The Claimant commenced ACAS early conciliation on 29th August 2019 – the date he was notified of his unsuccessful appeal against dismissal – and the certificate was issued dated 11th September 2019. That serves to extend the time limit by 13 days to 4th November 2019.
12. The Claimant attempted to present his claim form (ET1) to the Tribunal on 3rd November 2019.
13. It was properly rejected (under rule 10 (1) (c) of the Employment Tribunal Rules 2013) because the Claimant had not provided the number of his early conciliation certificate. Although he had ticked the boxes on the form to suggest that he did not have a certificate, and that none was required because his employer had already contacted ACAS, neither of those statements was strictly accurate.
14. As set out elsewhere in the ET1 form the position was that the Claimant had mislaid the notification from ACAS. Although the Claimant had contacted the ACAS office in Nottingham, closest to where he lives, and the claim was presented in Leeds because he worked in Sheffield, in the North East Region, that is not in any way material.
15. Although the rubric on the ET1 makes clear that a certificate number is required in nearly every case, and gives both telephone and email contact details for ACAS, the Claimant did not, prior to submitting his claim, take any steps to obtain a duplicate certificate or to confirm the number that he had been given on 11th September 2019. He now says that he did not think this was necessary because the Tribunal could have telephoned the Respondent to get the certificate number.
16. The Claimant accepts, as is clear from the exchange of communications that he had with the Tribunal staff following the rejection of his claim, that it was only between 6th and 11th November 2019 that he made further contact with ACAS and did then receive a duplicate certificate. That was provided to the Tribunal and upon reconsideration by an Employment Judge, the claim was then accepted because the original defect had now been rectified. The claim is, however, treated as having been validly received only on 11th November 2019. That was 7 days out of time.
17. The Claimant accepts that the attempted submission of the claim on 3rd November, which would have been within time by just one day, was, in fact, purely coincidental. He did not know when the time limit would have expired, and he had taken no steps to inform himself.
18. He says either that he believed the time limit was 6 months, either from the date of the alleged discrimination or from the final “outcome” of the discrimination if later, or that time began to run only from the date of an internal appeal or from the date of issue of the ACAS certificate. None of those propositions is correct, and the Claimant does not allege that they arise from anything other than his own misapprehensions.

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19. The Claimant is, however, an HR professional, and as he himself states he has experience in handling complex tribunal cases.
20. In those circumstances I do not consider that the Claimant's apparent ignorance of the appropriate Tribunal time limits is in any way reasonable. He would have been well capable, and ought to have taken reasonable steps to apprise himself of the true position.
21. Nor, similarly, in the circumstances do I consider his failure to complete the ET1 correctly, by taking appropriate steps to have ascertained the necessary certificate number, to have been reasonable. The potential significance of his omission should have been obvious to him.
22. Whilst it may well be that the Claimant has "good and bad days" so that he would only wish to address his mind to submission of his claim on a good day when he felt calm, that does not sufficiently explain why he left it until what, coincidentally, transpired to be the eleventh hour to seek to present the ET1.
23. There is no medical evidence that the Claimant was actually incapacitated at any point so that he could not, in fact, have presented his claim. For the first part of the relevant period he was actively pursuing an internal appeal. As soon as that failed he took the appropriate steps to contact ACAS. He might have presented his claim at any time after 11th September 2019 and for a six week period from September he was, in fact in work: the only reason he had to give up that job was because of the physical demands, nothing to do with his mental impairment. He was also at around this time also clearly able to seek further alternative employment, which he then secured from 16th December 2019.
24. The mistake which led to the Claimant erroneously believing that he had already submitted a claim before the point when the time limit in fact expired was not a reasonable one. Therefore, balancing all the relevant factors, I find that it was reasonably practicable for him to have submitted the claim in time but that he did not do so. The complaint of unfair dismissal must therefore be struck out because the Tribunal has no jurisdiction to hear it.

DISABILITY DISCRIMINATION (2014 -2017)

25. The principal focus of the discrimination complaints in the ET1 is the period from 2014 to 2017.
26. The Claimant asserts that under the Respondent's internal policies he should have been placed on an "Equality Act list" for transfer to another position. This he says was not done until June 2017, and in his case management agenda this is given as the cut off point for this series of allegedly discriminatory acts. The Claimant was transferred to a different post in November 2017.
27. It is not at all clear what the type of alleged discrimination in fact is. The Claimant has said today that it is direct discrimination. It may be that this is in reality a claim of a failure to make reasonable adjustments (moving the Claimant to another post), though the material and disadvantaging provision, criterion or practice that would have given rise to a duty to make that particular adjustment at any given time is not clearly identified. However it might potentially be categorised so as to fall properly within the definitions of the Equality Act, the Claimant accepts that the Respondent had done what he says it should have done earlier by no later than November 2017.
28. The claim was therefore not presented until 2 years after the last act of alleged discrimination in this regard. The move to a new post, which the Claimant accepts was a "good move" necessarily removed any continuing disadvantage which the Claimant may have suffered by being in his previous position. His complaint is rather that he believes that there were continuing effects upon his health as a result of having been

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in that previous job and that the transfer did not simply “flick a switch”. That is not, however, at all the same as saying that there was any continuing act of discrimination.

29. This delay in the context of a 3 month time limit is clearly substantial and the reasons for it are not satisfactorily explained. The Claimant evidently considered the possibility of bringing a claim much nearer the time but elected not to do so.
30. Nor did the Claimant therefore act at all promptly in pursuing this claim from the point where it became apparent that the dismissing officer did not share his view that these historic events were relevant to the capability hearing in 2019.
31. Even if there are some documentary records the difficulties in the Respondent defending a claim that extends back now some 6 years are self-evident. This is also not a case where the Claimant ever raised a formal grievance so that there is a contemporaneous record of investigation where potential witnesses addressed their mind to the issues when recollections were still fresh. The cogency of the evidence, must as Mr Sadiq submits be adversely affected.
32. I do not therefore find that the Claimant has shown any good reason why it would be just and equitable to allow this part of the claim to proceed out of time.

DISABILITY DISCRIMINATION (Dismissal)

33. Although I agree with the statement in the Response that it is not clear from the ET1 whether or not the Claimant is alleging that the dismissal itself was discriminatory, that is now clarified to be the position.
34. It is however still not clear what type of discrimination is being alleged.
35. Nonetheless, because, it is acknowledged in the Response (ET3) that the totality of the Claimant’s absence in the previous 12 months was taken into account, and not just the most recent non-disability-related absences which followed the issue of the final warning, there is a possible claim.
36. Although, for the reasons already set out in respect of unfair dismissal, this claim is also out of time, I have a much wider discretion to allow it to proceed if I consider that it was nonetheless presented within such period as I consider just and equitable.
37. Although I do not consider the Claimant’s mistakes to have been objectively reasonable I have no reason to doubt that they were genuine.
38. The delay of 7 days is very short and there is no discernible prejudice to the Respondent in its ability to defend the claim.
39. Once alerted to the deficiencies in his original ET1 the Claimant did act promptly to rectify the error.
40. In the circumstances I consider that it would be just and equitable to allow this claim to proceed, subject to further clarification. I am not thereby expressing any comment upon the potential merits or otherwise of any such claim as may now be formulated.

EMPLOYMENT JUDGE LANCASTER
DATE 13th May 2020

JUDGMENT SENT TO THE PARTIES ON

..... 14 May 2020.....

AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS

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