



EMPLOYMENT TRIBUNALS

Claimant

Mr S Olaniyi

v

Respondent

Wilko Retail Limited

OPEN PRELIMINARY HEARING

Heard at: London Central Tribunal (by video)

On: 31 January 2022

Before: Employment Judge C H O'Rourke

Appearances

For the Claimant: In person

For the Respondent: Ms R Kight – Counsel

JUDGMENT

The Claimant's claims of unfair dismissal and race discrimination are dismissed for want of jurisdiction, as they were presented out of time.

REASONS

Issues

1. Following a case management hearing on 26 October 2021, this matter was listed for hearing today, by way of Open Preliminary Hearing, to determine whether, as both claims had been brought out of time, the Tribunal should exercise its discretion, subject to s.111(2) Employment Rights Act 1996 (ERA) (in respect of the unfair dismissal claim) and s.123(1)(b) of the Equality Act 2010 (EqA) (in respect of the discrimination claim), to extend time. Other purposes of the Hearing were also to consider an application by the Respondent for strike out/a deposit order in respect of the discrimination claim and an application by the Claimant to amend his claim, but which applications were not dealt with, as both claims were dismissed, for want of jurisdiction.
2. **Background.** The Claimant initially brought claims of unfair dismissal and race discrimination against the Respondent, on 7 August 2020 [10], following his summary dismissal by the Respondent, for alleged gross misconduct, on 6 May

2020 [60]. However, as he had not included the ACAS Early Conciliation number in that initial ET1, the claim was rejected on 15 August 2020. Following re-presentation of the claim, by the Claimant, on 17 August, it was accepted by the Tribunal as presented on that date [35].

3. The Claimant entered ACAS Early Conciliation on 22 June 2020 and the Respondent being unwilling to engage in such a process, the Certificate was issued on the same date [1].
4. It was not in dispute that even taking into account the earlier attempted presentation date, of 7 August, the claims were out of time, as they should have been presented on 5 August. Taking the actual date of presentation, therefore, of 17 August, the claims were twelve days out of time.
5. Documents and Evidence. The Claimant gave evidence. He had not provided a witness statement and therefore his witness evidence on the limitation issue was taken as those comments he had made at the case management hearing [82] and as recorded by Employment Judge Goodman in her case management summary. The Respondent provided a bundle of documents for the Hearing, but it became apparent early on into the Claimant's evidence that he had provided a written submission on the limitation issue, on 9 August 2020, which was not included. After a short adjournment, the Claimant provided the Tribunal and Ms Kight with further copies of this document and the hearing continued, with that additional submission being incorporated into his witness evidence.

The Law

6. In respect of the unfair dismissal claim, I referred myself to s.111(2) ERA, which states:

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
(2) 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.
7. I also referred myself to the following cases:
 - 7.1. **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53 EWCA**, in which Lord Denning MR set out the principles to be considered in such a case, to include the reasons for the failure to meet the deadline, whether there was acceptable ignorance of the fact and other factors, such as awaiting information from the employer, or physical impediments etc.

- 7.2. The burden of satisfying the Tribunal that it was not reasonably practicable to present the claim on time rests firmly on the claimant (**Porter v Bandidge Ltd [1978] IRLR 271 EWCA**).
8. In respect of the discrimination claim, s.123(1) EqA states that:
- (1) ... proceedings on a complaint within section 120 may not be brought after the end of—
- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.
9. The case of **British Coal Corporation v Keeble [1997] IRLR 336 UKEAT** indicated that the factors set out in s.33(3) of the Limitation Act 1980 may be useful when considering time limitation points. These are (as relevant to this claim):
- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed ...
- (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- (d) ...;
- (e) the extent;
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.
10. However, the very recent case of **Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23** cautioned, at paragraph 37 that:
- '...rigid adherence to a checklist (with reference to s.33 Limitation Act) can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) “the length of, and the reasons for, the delay”. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.'*
11. The case of **Robertson v Bexley Community Centre [2003] IRLR 434 EWCA** stated, in the context of the exercise of discretion as to a time limit in

discrimination cases that *'there is no presumption that they (tribunals) should do so, unless they can justify failure to justify the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.'*

12. **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278, UKEAT** indicated that the potential merits of a claim were relevant factors to be taken into account, in considering the balance of prejudice to the parties.

The Facts

13. As stated, I heard evidence from the Claimant.

14. He said the following:

- 14.1. That he was suffering from anxiety and work-related stress, as shown in his GP's fit notes for the period 22 May to 19 December 2020 [99-102] (all dates hereafter 2020, unless otherwise stated) and that from 22 May, to date, he has been prescribed anti-depressant medication, the side effects of which are sickness, drowsiness and trouble sleeping. While he said that he had provided corroborative evidence of this medication and its effects, none was before the Tribunal.

- 14.2. That he is dyslexic. The Respondent appears to accept that the Claimant has this condition, but there was no medical or related evidence before me as to its degree, or effect on the Claimant.

- 14.3. He agreed that he had, in this time period (on or about 9 June), submitted a very detailed, closely-typed, seven page appeal document [63], but said he had done so with the assistance of this then union representative. He also attended an appeal hearing on 10 June.

- 14.4. He agreed that he'd been able to contact ACAS on 22 June, to discuss his claim, at which point he continued to have union support and that his health had not prevented him from doing so.

- 14.5. When it was suggested to him that therefore, there was nothing to suggest that he was incapable of completing the claim form (as indeed, he subsequently did), he said that because of his dyslexia, he didn't understand dates, in particular the 'minus a day' requirements in assessing the final date for presentation of his claim. He did accept, however that he knew that generally he had three months from the date of dismissal in which to bring his claim.

- 14.6. When it was further suggested to him that when the claim was initially rejected, he was able to address that issue, correct his claim and have it re-presented, he said that he'd not really understood what the problem was and had to phone the Tribunal to establish what he needed to do. He said also that at the time, he was attempting to obtain legal advice, but was unable to do so.

14.7. He also said, for the first time that he'd been awaiting the outcome of his appeal, before presenting his claim. It was, however, pointed out to him that he had received the appeal outcome on 16 June [70], a week before entering early conciliation with ACAS and over seven weeks before his initial attempt to present his claim.

14.8. Finally, he also said, again for the first time that he had been awaiting further information from the Respondent, before he could submit the claim, which is why, in the end, it was not very detailed. He said that he'd also been in discussions with the Respondent's HR department as to holiday pay and related matters. When challenged, however, as to what further additional information he said he needed to submit his claim, he was unable to be specific and nor had he provided any corroborative evidence of such enquiries.

Submissions

15. I heard submissions from the Claimant and Ms Kight.

16. Claimant's Submissions. Having been informed as to the factors that the Tribunal would take into account in deciding whether or not to exercise discretion to extend time, in respect of both claims, the Claimant made the following submissions:

16.1. His health had been deteriorating throughout.

16.2. He was struggling to obtain advice, until, eventually, somebody told him to simply 'send the claim in', which is why it is not very detailed.

16.3. He continued to be in contact with HR and was awaiting further documents.

17. Respondent's Submissions. Ms Kight made the following submissions:

17.1. Unfair Dismissal

17.1.1. In respect of the unfair dismissal claim, it was reasonably practicable for the Claimant to have met the time limit. It was, in fact, entirely reasonable that he could do so, as he knew of the time limit.

17.1.2. Such medical evidence as he has provided does not provide a clear reason as to why his mental health/dyslexia would have prevented him doing so.

17.1.3. He was clearly capable of submitting other lengthy documents, albeit perhaps with some assistance.

17.2. Discrimination

17.2.1. While it is noted that the test in this respect is different to that for unfair dismissal, nonetheless there is no assumption that the Tribunal should exercise its discretion in the Claimant's favour, but that extension of time is the exception, not the rule.

- 17.2.2. There hasn't been significant delay in this case, a couple of weeks, but nonetheless there has been delay.
- 17.2.3. The Claimant has simply not been able to provide a valid reason, or reasons for this delay.
- 17.2.4. The cogency of the evidence in respect of the dismissal is not affected by that delay, but the other allegations brought relate to incidents in 2017.
- 17.2.5. There is prejudice to the Respondent in having to deal with a claim, in particular in respect of the 2017 allegations that otherwise they would not have to face, balanced against the Claimant's inability to bring such a claim.
- 17.2.6. Finally, the Tribunal can consider the potential merits of this claim, which is without merit.

Conclusions

18. **Unfair Dismissal**. I find that it was reasonably practicable for the Claimant to present his claim on time and I do so for the following reasons:
 - 18.1. The Claimant knew of the three-month time limit.
 - 18.2. He was unable to provide a satisfactory explanation as to why, having been informed by ACAS on 22 June that there would be no conciliation, he then delayed a further seven weeks plus in initially attempting to present his claim.
 - 18.3. The evidence to support his assertions that his mental health/dyslexia prevented him from meeting the deadline was minimal. The fit notes simply refer to 'anxiety and work-related stress', stating he was not fit for work, but providing no indication as to why he would not be able to submit a claim form within time, particularly as, when he did so, it contained just three relatively brief paragraphs, taking, perhaps, at most, a matter of a couple of hours to complete. There was no corroborative evidence as to the severity of his dyslexia and I note, in this respect that he had previously held an assistant manager's job with the Respondent, for which he had to complete training and tests. I note that at the same time, he was submitting very lengthy and detailed grounds of appeal, which, even with assistance, will have required considerable input from him and he was able to attend a no-doubt relatively lengthy appeal hearing, without any stated problems.
 - 18.4. He continued to have advice from his union, at least until entering ACAS conciliation and perhaps to some degree thereafter. In any event, very many claimants present such claims, within time, without the benefit of advice, but perhaps through their own research on the internet, or elsewhere, which the Claimant was clearly capable of doing.
 - 18.5. His belated evidence as to awaiting the outcome of his appeal was clearly erroneous and did not reflect well on his credibility. He provided no corroborative evidence as to his enquiries as to further documentation or

evidence from the Respondent and in any event was well able to submit his claim, without any such documents, in due course.

19. Discrimination. I considered the following factors:

19.1. The length of the delay is not great.

19.2. As with my findings above, however, in respect of the reason for the delay, no satisfactory reason has been advanced as to why the Claimant missed the time limit.

19.3. The effect on the cogency of the evidence caused by the delay is minimal.

19.4. Applying **Rathakrishnan**, I am entitled to consider the potential merits of the claim and I consider this claim to be of little merit (such that I would have, if necessary, ordered a deposit order), for the following reasons:

19.4.1. I have doubts about the Claimant's credibility, as set out above.

19.4.2. The claims set in 2017 [16] (being called 'marmite', having to travel some distance to his place of work and being the last to pass the test for the assistant manager role) are aged and would be likely to be countered by the following evidence from the Respondent, which the Claimant would find difficult to rebut:

19.4.2.1. The reference to 'marmite' is without any precise date. It is said that it was made by a Mr Bhatia, a regional manager, who allegedly said '*Sam, you are like Marmite, some people like you, some don't, you should smile more*' [114]. Firstly, Mr Bhatia may simply deny such comment, or if he did make it, may genuinely have forgotten, five years later that he did so, or as to its detail. Secondly, even if he can recall it, there is no obvious link to the Claimant's race and even the Claimant himself, in his further and better particulars, simply refers to the remark as '*an unprofessional and bullying comment*'.

19.4.2.2. The Respondent accepts that in 2017 the Claimant did complain of his commuting time to the store he was then working in. He made no reference at the time to that being linked to his race, or raised any grievance. In any event, as is clear from paragraph 20 of the Grounds of Resistance [121], the issue was dealt with by the Respondent at the time and the Claimant was initially offered work at a store closer to his home, but declined that offer, but did, however, a month later, accept another offer of transfer to a closer store. It is very difficult to see how such a claim could pass even the initial burden of proof that rests on the Claimant.

19.4.2.3. In respect of being the last to pass the test for the assistant manager role, a company the size of the Respondent will no doubt have records which show the Claimant's scoring in training, justifying the delay in passing the Claimant fit for the role. However, the crucial point is that he did pass fit for it and

was placed in an assistant manager role. An employer seeking to discriminate against him is unlikely to have done so, instead perhaps failing him on tests, or not even considering him for the role. Potential evidence of passing him, despite perhaps some concerns about his abilities, indicates the opposite to discrimination.

19.4.3. Finally, there is the claim that his dismissal was discriminatory. In balance to that allegation is the fact that by the point of dismissal, the Claimant had been in his managerial role for approximately two years, without any apparent discriminatory actions against him. Further, he admitted his wrongdoing in withdrawing money from a till without following the Respondent's cash handling procedures, resulting in financial loss for the Respondent and which they considered a serious breach of trust and integrity by him and therefore gross misconduct. The Respondent also considered that the Claimant had further breached trust and confidence by, in their view, changing his account throughout the disciplinary hearing. The process was detailed and the Claimant brought, as stated, a very detailed appeal, in which, at no point, did he refer to his race, or the possibility of discrimination, indicating that his belief in this respect is belated and perhaps opportunistic. He claims that he had been less favourably treated than white employees in similar circumstances, who had either not been disciplined or been dismissed, but I consider it likely, having read the detailed appeal decision that even if the Claimant can satisfy that initial burden of proof on this point, the Respondent is likely to be able to provide a non-discriminatory reason for his dismissal.

19.5. In balancing the prejudice between the parties, I consider that that balance falls in the Respondents' favour, as while the Claimant will be prevented from bringing his discrimination claim, the Respondent should not, in the circumstances of the Claimant's failure to meet the time limit, without good reason, be obliged to have to defend against a weak claim, involving allegations that by the time this case would come to hearing, be at least two and a half years old and in the case of the rest, more than five years old.

Judgment

20. For these reasons therefore the Claimant's claims of unfair dismissal and discrimination are dismissed, for want of jurisdiction.

Employment Judge O'Rourke

Dated 31 January 2022

Sent to the parties on:

31/01/2022.

For the Tribunal: