THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**

BETWEEN:

Mr O Jones **Claimant**

AND

Lewisham and Greenwich NHS Trust **Respondent**

ON: **15 June 2018**

Appearances:

For the Claimant: **Mr D Flagg (Representative)**

For the Respondent: **Ms H Patterson (Counsel)**

JUDGMENT

1. The Claimant's claim of unfair dismissal under s94 Employment Rights Act 1996 ("ERA") was not brought within the statutory three month time limit set out in s111 ERA when it would have been reasonably practicable for him to bring his claim in time. The Tribunal therefore has no jurisdiction to hear that claim which is hereby dismissed.
2. The Claimant's claim of race discrimination, was not presented within the statutory three month time limit set out in s 123 Equality Act 2010 ("Equality Act"). It is not just and equitable to extend the time limit in respect of that claim. The Tribunal therefore has no jurisdiction to hear the claim which is hereby dismissed.

Reasons

1. The case was listed for a preliminary hearing to deal with the Respondent's application that the Claimant's claims should not proceed because they had been brought out of time and the Tribunal did not therefore have jurisdiction to hear them. The Claimant, Mr Jones, gave evidence at the hearing and there was a small bundle of documents. Any references to page numbers in this judgment are references to page numbers in that bundle.

The law

2. The law on time limits in unfair dismissal cases is set out in s111 ERA as follows:

111 Complaints to employment tribunal.

(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) Subject to the following provisions of this section, 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. The law on time limits in discrimination cases is set out in s123 Equality Act as follows:

123Time limits

(1) Subject to sections 140A and 140B 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……

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

4. There are also various cases on time limits that I have taken into account in reaching my judgment and to which I refer as necessary.

5. This has been a difficult case to decide. The Claimant plainly feels that he has been the victim of a hurtful injustice which has caused him significant distress and difficulty at a time when he was beset by other challenges in his home life. He feels that the Respondent made the situation worse by depriving him of information about allegations against him and taking a very long time to come to the view that his services should be dispensed with. His dyslexia, he maintains, put him at a disadvantage in articulating his case subsequently and the manner in which events unfolded caused him such a degree of distress that his ability to act decisively was impaired. He lacked the financial resources to pay for legal advice. Bringing legal proceedings against a hospital trust involved him in an ethical dilemma – was it the right thing to do?

6. A brief chronology of events in the case is as follows:

   (1) The claimant's services were dispensed with on 14 February 2017. I find that time for starting the process of bringing a tribunal claim ran from that date for the purposes of both the unfair dismissal claim and the discrimination claim.

   (2) The Claimant was deeply upset and confused by the Respondent's actions and took no action in response to them until he produced the letter of complaint 26 April 2017. This happened after Mr Flagg began to assist him.

   (3) He had to wait until 31 July 2017 to receive an outcome – an unacceptably long time on any analysis.

   (4) Sometime in August 2017, after receiving the July 31 letter, the Claimant and/or Mr Flagg begin to consider whether the Claimant might bring an employment tribunal claim. Mr Flagg did some internet research and ascertained that individuals who may not have the status of employees might still have claims that can be decided by employment tribunals. The two men discussed whether it was right to start proceedings and decided to resume discussions after Mr Flagg had taken holiday in August and the early part of September. At that point the Claimant decided to go ahead. The application to ACAS was submitted on 28 Sept and the ACAS certificate was issued on 28 Oct.

   (5) The claim form was presented one month later on 26 Nov.

7. I will deal first with the time limit under s 111 ERA and the test of reasonable practicability set out in that section. There are two limbs to the test – the first asks the Tribunal to determine whether it was reasonably practicable for the

claim to be submitted in time and if the Tribunal decides that it was not the second limb asks the Tribunal to consider whether it was submitted within such further period as was reasonable.

8. This is a particularly strict test. It involves an enquiry not just into what the Claimant actually knew, but what he could reasonably be expected to know. The Claimant in this case claims ignorance of his rights and of the associated time limits.

9. The Claimant's case is that:

    a. he was repeatedly told by the Respondent that he was not an employee and that in effect misled him;
    b. no mention of his rights or of employment tribunals was made by Right Core Care, the Employee Assistance programme;
    c. the CAB merely told him to take legal advice;
    d. legal advice was beyond his means at the time;
    e. once he obtained the assistance of Mr Flagg, he thought the right thing to do was to try to resolve the matter internally;
    f. the Respondent was responsible for some very significant delays in dealing with his attempt to do so – the outcome letter was received three months after the complaint was raised.

10. I have two concerns. Even if the Claimant was initially confused and misled by the Respondent's assertion that he was not an employee, I was puzzled that this point was not revisited once Mr Flagg came on board. He represented the Claimant very ably at the hearing and plainly did have access to some resources – he turned to those later in the process, he says. He is not a lawyer or a legal adviser but it concerned me that no enquiry was made as to how the Claimant might enforce his legal rights at the time the letter at page 38 was drafted – it was a highly articulate letter that made some express references to the Claimant's legal rights – there is a reference to case law on zero hours workers on page 40 and reference to race discrimination at page 41. For the purposes of the test under s111 therefore, I find that the Claimant was no longer ignorant of his legal rights in April, once he had Mr Flagg's assistance – on the contrary he began to assert them. It seems to me on those facts that it was not reasonable of him to remain ignorant of the time limits for enforcing those rights. If he was able, with assistance to write a detailed and articulate letter referring to the rights he thought he had, then it cannot be said that he could not have taken steps to protect his position by checking how those rights might be enforced at the time. In my judgment it would have been reasonably practicable for the Claimant, with the assistance he had at the time, to do some basic research into enforcing employment rights (there are ample free resources available), approach ACAS within the 3 months statutory time limit and make the other basic enquiries needed to bring an unfair dismissal claim in time.

11. Even if I am wrong about that, I accept the Respondent's submission that there is no question that the claim was not submitted within such further period as was reasonable. Leaving aside all other points, there was an

unexplained one month gap between the ACAS certificate being issued in October and the claim form being submitted in November. In the absence of any explanation as to that delay I am unable to conclude that the further delay was reasonable under s111 (2)(b). It follow that the Tribunal has no jurisdiction to hear the unfair dismissal claim under s 94 ERA.

12. A more lenient test applies to the discrimination claim. Would it be just and equitable to extend time? In reaching this part of my decision I reflected on the particular nature of the Claimant's role, the fact that he is a principled man and not, as Mr Flagg put it, a troublemaker and hence more hesitant than some individuals might be to bring proceedings against his employer. I have been cautious about the weight I gave to this consideration as it emerged from Mr Flagg's submissions rather than from the Claimant's own evidence, but I have also weighed in the balance the difficulties the Claimant has in articulating his concerns, which have been exacerbated by the difficult emotions that accompany an experience of the kind that he had with his employer. On the other hand, as the Respondent pointed out, the Claimant did have help preparing his witness statement for today and he did not make any reference to this consideration there. In the end therefore I have given that point little weight in reaching my conclusions.

13. I have considered whether there are other reasons for that that make it just and equitable to extend time. The letter of 26 April was written within the primary time limit. The response took an unacceptably long time to emerge. Applying the just and equitable test, it seems to me that the Claimant acted reasonably in waiting for the outcome of his complaint before deciding to take the significant step of bringing proceedings for race discrimination, particularly as he had been so comprehensively deprived of information at the time of his suspension from the employment bank and his ultimate dismissal from it. He suspected, but did not know, what lay behind the Respondent's actions – and he hoped that he would find out when the Respondent replied to him. If matters had ended there I would have been prepared to extend time on the basis that it was just and equitable to allow the Claimant to take the step of waiting for some further information before deciding how to proceed. The Respondent undoubtedly exacerbated the delay and its contribution to the lateness of the Claimant's claim must also be taken into account.

14. However I am again left with the problem that the Claimant has not explained the delay between receiving the ACAS certificate and presenting his claim. Even though I am dealing with a more flexible test, the authorities are clear: Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA, provides that the starting point in a case of this kind is that a time limit should be adhered to and if there is no explanation for a delay or part of a delay, the Tribunal has no basis from which to exercise its discretion. I therefore conclude that it would not be just and equitable to extend time as far as is required in this case. A prompt approach to ACAS after the letter in July 2017 and a speedy approach to the Tribunal after the ACASE Certificate was received, might have resulted in a different outcome.

15. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in s.33 of the Limitation Act 1980 (as modified by the EAT in British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular:

    a. the length of, and reasons for, the delay;
    b. the extent to which the cogency of the evidence is likely to be affected by the delay; I have heard submissions form the Respondent as to the difficulty that would be caused by allowing the claim to proceed. There is an inherent difficulty the Respondent says, in recalling matters that took place as long ago as 2013.
    c. the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action .
    d. the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action.

16. Taking into account the guidance from the authorities, the Claimant's evidence and the relevant factors under s33 Limitation Act I conclude overall that it is not just and equitable to extend the time limit to allow the Claimant's claim of race discrimination to proceed to a full merits hearing. I therefore conclude that the Tribunal does not have jurisdiction to determine the claim of race discrimination. Both the unfair dismissal and discrimination claims are therefore hereby dismissed.

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Employment Judge Morton
Date: 12 July 2018