EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4110826/2019

Held at Edinburgh on 9 January 2020

Employment Judge: W A Meiklejohn

Mr Glenn Telfer	**Claimant** **In person**
The City of Edinburgh Council	**Respondent** **Represented by Ms S Thomson, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims of unfair dismissal and less favourable treatment as a part-time worker were lodged out of time and the Tribunal did not have jurisdiction to deal with them, and accordingly they are dismissed.

REASONS

1. This case came before me for an open preliminary hearing on time bar. The claimant appeared in person and Ms Thomson appeared for the respondent.

Preliminary matters

2. Ms Thomson disclosed that she remembered me as her tutor in company law when she was undertaking the Diploma in Legal Practice at the University of Dundee in 2004/05. I responded that I was unable to recall Ms Thomson. The claimant confirmed that he had no objection to my continuing to hear the case and I did not consider that it was necessary or appropriate to recuse myself.

3. I identified the claims being pursued by the claimant as (a) unfair dismissal in terms of section 94 of the Employment Rights Act 1996 ("ERA") and (b) less favourable treatment under regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the "Regulations"). Ms Thomson had not understood that the claimant was pursuing a claim under the Regulations and questioned whether fair notice of that claim had been given.

4. I noted that in his ET1 claim form the claimant had stated "*As a part-time worker, I have been treated less favourably than a full-time or permanent employee".* I also noted that in the grounds of resistance attached to their ET3 response form the respondent had stated "*It is denied that the Claimant has been treated less favourably than a full time or permanent employee as alleged or at all".*

5. I was satisfied that fair notice of the claim under the Regulations had been given. To allow Ms Thomson to be better prepared to deal with this I decided that the lunch break during the hearing should be a little longer than usual. The overriding objective set out in regulation 2 contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is "*to enable Employment Tribunals to deal with cases fairly and justly.* This includes "*avoiding delay"* and I considered that it was consistent with the overriding objective to proceed in this way.

Applicable law

6. The time limit for presenting a claim of unfair dismissal is found in section 111(2) ERA which provides –

> "*….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. The time limit for presenting a complaint under the Regulations is found in regulation 7(2) which provides –

> "*….an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months….beginning with the date of the less favourable treatment or detriment to which the complaint relates…."*

8. The operation of these time limits is subject to section 207B ERA which extends the time within which the complaint must be presented by the period of time between the date upon which the claimant complies with section 18A(1) of the Employment Tribunals Act 1996 by providing the prescribed information to ACAS and the date upon which the claimant receives the ACAS early conciliation certificate (and regulation 8A of the Regulations contains similar provisions). However, in the present case this had no impact as both dates were the same – 10 September 2019.

Evidence and findings in fact

9. I heard evidence from the claimant. I had bundles of documents from both parties to which I refer by page number prefixed by "C" in the case of the claimant's bundle and by "R" in the case of the respondent's bundle.

10. The claimant received a letter from Ms L Paterson, Senior Education Manager, Communities and Families with the respondent, dated 21 January 2019 (R34-35) containing allegations of misconduct and advising that he had been temporarily removed from the respondent's Teaching Supply List with immediate effect. Thereafter there was an investigation (of which the claimant was highly critical but that was not relevant to the matters I had to decide) following which the claimant received a further letter from Ms Paterson (R37-38 – this was undated but was attached to an email dated 22 March 2019 – R36). This advised the claimant of the decision "*to remove you from the City of Edinburgh supply list for primary schools and nurseries with immediate effect".*

11. The claimant said that he was unclear as to how this affected his employment status with the respondent as much of his supply teaching work came through direct contact with primary school head teachers or business managers. He sent an email to Ms Paterson on 29 March 2019 (C10) which she acknowledged on 1 April 2019 (C12). He sent a further email to Ms Paterson on 3 April 2019 (C11). Ms Paterson wrote to the claimant on 12 April 2019 (R40) confirming her decision to remove him from the City of Edinburgh supply list.

12. The claimant thereafter submitted a number of Freedom of Information ("FOI")/Data Subject Access Requests to the respondent (it was not material for the purposes of the matters I had to decide how these were categorised and I refer to them hereafter as "*FOI requests"*). The claimant was not satisfied with the response he received on 30 May 2019 and requested a review on 3 June 2019 (R16-17). He received the review outcome in a letter from Ms S Brown of the respondent's Information Governance Unit ("IGU") on 10 July 2019 (R19-20).

13. The claimant wrote to Ms Brown on 6 August 2019 (R54-56) regarding a "*further investigation"* and received a reply from Ms F Smyth of the IGU on 4 September 2019 (R58-60). The claimant then took steps to submit a claim online to the Employment Tribunal. When doing so he became aware of the requirement to obtain an early conciliation certificate from ACAS and did so, as noted above, on 10

September 2019 (R32). The claimant then submitted his ET1 on 16 September 2019.

14. By the time the claimant submitted his ET1 he was aware of the three month time limit. He thought this might have been through something he read on the Employment Tribunals website. The opening paragraph of the paper apart attached to his ET1 was in these terms –

> "*TIME LIMIT: I was dismissed on 12/4/19. The reasons stated were incorrect and unfair. I wrote to the case managing officer twice (29/3/19 and 3/4/19) a request for some clarity, and the relevant case and procedural documents. This request was ignored, which obliged me to go down the FOI route for these documents. This process has added some extra months, which accounts for the late application. The final FOI letter dated 4/9/19. I crave indulgence for this situation occasioned by the obduracy of my employer."*

15. The claimant advanced four reasons for his ET1 being late. The first was that he had mistakenly believed that the time limit was six months. He said that he might have confused the time limit for an Employment Tribunal claim with the time limit for some other process – he mentioned "*grievance"* and "*Ombudsman".* If he had been aware of the three month time limit he would have acted sooner.

16. The claimant's second reason was that he had been diligently seeking information about the nature of the allegations and evidence against him. He regarded the report on the basis of which he was removed from the supply list as being "*full of errors*" and wanted to understand why he had been treated as he had. When there was no response he believed he had no option but to pursue FOI requests. If the respondent had replied earlier he would have been able to pursue his claim sooner.

17. The claimant's third reason was that he had been unclear about his employment status. When he received Ms Paterson's letter of 12 April 2019, he was unsure what it meant to be removed from the supply list. He thought it might mean that he would no longer receive the list of supply teacher vacancies. He did however accept in

evidence that he had regarded 12 April 2019 as the date upon which he was dismissed. He had used this date in his ET1.

18. The claimant referred to his June 2019 payslip (C13). He accepted that this was in respect of back pay but said that he wondered why he had received this if he was no longer an employee of the respondent. This, he said, had added to his confusion about his employment status.

19. The claimant's fourth reason was what he described as "*context".* He was involved in a four year long dispute with the respondent which had led to an Employment Tribunal claim of victimisation in 2014. He had attended two hearings at the Edinburgh Employment Tribunal, representing himself. One of these, on 24 September 2014, had resulted in a Judgment (R31) extending time in respect of his victimisation claim. The claimant accepted that he had lodged the victimisation claim late.

20. The claimant had also pursued another Employment Tribunal against the respondent. He thought this had been after the victimisation claim. When Ms Thomson suggested to the claimant that this claim had been submitted in 2012, the claimant was uncertain as to whether it had been before or after the victimisation claim.

21. The claimant had previously had employment advice, including legal advice, from his trade union (EIS), about which he was not complimentary, regarding an earlier claim against the respondent. He had also at one stage consulted solicitors (Morton Fraser) but found them too expensive. He had not taken advice about the present claim. He was able to undertake research online. He commented that there was a lot of information on the internet about Employment Tribunal procedure, but he had not seen anything to flag up that there was a three month time limit.

Submissions for respondent

22. Ms Thomson referred to the statutory provisions dealing with the time limits for unfair dismissal and part-time worker claims. These provided certainty and should be complied with. She argued that the claimant knew he had been dismissed when he received the letter of 22 March 2019 and so the deadline for initiating ACAS early conciliation had been 21 June 2019. The claim was some eleven weeks late.

23. Ms Thomson argued that there had been no physical or mental impairment preventing the claimant from lodging his claim timeously. He lived in Edinburgh and could have obtained a claim form from the Edinburgh Tribunal office, or online. Ms Thomson said she understood that the claimant's 2014 claim had included unfair dismissal but she did not know if that claim had been submitted in time. In any event, the claimant had attended a preliminary hearing on time bar in 2014 and so must have had an awareness of Employment Tribunal time limits.

24. Ms Thomson referred to ***Wall's Meat Co Ltd v Khan 1979 ICR 52***, quoting from the judgment of Lord Denning MR at page 60 –

> "*The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present as complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable"*

25. Ms Thomson argued that the claimant's alleged ignorance or mistaken belief was not reasonable. He could have checked what the time limit was but failed to do so. He

had lodged a previous Tribunal claim which was late and so had an awareness that there were time limits for Tribunal claims.

26. Referring to ***Palmer and Another v Southend-on-Sea Borough Council 1984 ICR 372***, Ms Thomson quoted from the judgment of May LJ at page 385 –

> "[The Tribunal] *will no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the industrial tribunal to investigate whether at the time when he was dismissed, and if not then when thereafter, he knew that he had the right to complain that he had been unfairly dismissed; in some cases the tribunal may have to consider whether there has been any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for it to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the advisers' knowledge of the facts of the employee's case; and of the nature of any advice which they may have given to him. In any event it will probably be relevant in most cases for the industrial tribunal to ask itself whether there has been any substantial fault on the part of the employee or his adviser which has led to the failure to comply with the statutory time limit. Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the industrial tribunal taking all the circumstances of the given case into account."*

27. Ms Thomson submitted that if I found it had not been reasonably practicable for the claimant to lodge his claim timeously, I should find that he had not done so within such further period as was reasonable. She highlighted the various points at which there had been delay on the claimant's part and argued that the delay was not reasonable in circumstances where the claimant already thought the reason for his dismissal was unreasonable. A delay of eleven weeks, nearly double the statutory time limit, was very significant.

28. Turning to the claimant's part-time worker claim, Ms Thomson referred to ***Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434***. Time limits, she argued, should be strictly applied and should not be extended unless the claimant had satisfied the Tribunal that it would be just and equitable to do so. She submitted that the claimant had led no evidence to justify an extension. The decision in ***Robertson*** had been approved by the Court of Appeal in ***Department of Constitutional Affairs v Jones 2008 IRLR 128***.

29. Ms Thomson referred to the list of factors in section 33(3) of the Limitation Act 1980 per ***British Coal Corporation v Keeble and others 1997 IRLR 336.*** She also referred to ***Southwark London Borough Council v Afolabi 2003 ICR 800*** where the section 33(3) list was described as a guide as opposed to a legal requirement. In that case the Court of Appeal had highlighted two factors which would almost always be relevant – the length of and reason for the delay, and whether the delay had prejudiced the respondent. She argued that the claimant had not provided a satisfactory explanation and that there would be prejudice to the respondent if the claims were allowed to proceed.

Submissions by claimant

30. The claimant accepted that he had made a mistake in believing that the time limit was six months. He attributed the time limit issue in 2014 to his trade union. He had not sought advice on this occasion because, having done so in the past, he had found it "*not terribly useful"* at a level he could afford.

31. The claimant said that there was encouragement to complete the ET1 form online. The form was designed to assist parties to proceed without professional advice and it had not seemed necessary to seek advice. In any event, he had no realistic opportunity to seek advice.

32. When he received the respondent's reply to his FOI requests on 10 July 2019, the claimant said he had to consider what to do. He had not sat on his hands. He had spoken with his brother whose opinion he valued. To the extent that there had been

delay he could provide an explanation. He had been diligent – he was either considering what to do or preparing for the next stage.

33. The claimant said that it had not been clear to him what his employment status was. It was not clear what it meant to be taken off the supply list. He believed that the respondent had deliberately not answered his questions because they did not want him to raise a Tribunal claim.

34. The claimant had believed that he needed to wait for a response to his FOI requests. The grounds for his dismissal had not been made clear. He did not have enough detail to complete an ET1 form. He did not believe it would have been right to lodge an ET1 first then go to his FOI requests. It could take a couple of months to get a response to a FOI request. Crucial information could come too late. When he submitted his FOI requests he had not made up his mind whether to go to the Employment Tribunal. He was not seeking that. He hoped the FOI response would show that there was no case to answer. He said that an Employment Tribunal claim had been the last thing on his mind right up until he received the last FOI documents. He had hoped matters might be resolved until he received the letter of 10 July 2019.

35. The claimant did not accept that the respondent would be prejudiced if his claims were allowed to proceed. He believed that he had a valid case. The respondent could have avoided these proceedings if they had replied to him, but they had left him "*hanging".* If they had not been *"evasive and obstructive"* the claim would have been on time. The delay had been caused by the need to use the FOI process which had inevitably taken the claimant beyond the three month time limit. There had been a lack of clarity on the part of the respondent. There had been no lack of diligence on the claimant's part. Once the need to submit FOI requests arose it had not been reasonably practicable to present the ET1 timeously.

Discussion and disposal

36. I should say at the outset that I have not attempted to record above every part of the evidence given by the claimant. It is not the Tribunal's function to do so. I have

sought to focus on those parts of his evidence which related most closely to the "*claim in time"* issues I had to decide.

37. I reminded myself of the relevant statutory provisions as set out in paragraphs 6 and 7 above. These differ as between (a) the unfair dismissal claim where the test is one of reasonable practicability and (b) the part-time worker claim where the test is one of justice and equity.

38. Dealing firstly with the unfair dismissal claim, I reminded myself of the reasons advanced by the claimant for his ET1 being submitted outwith the statutory time limit as set out in paragraphs 15-19 above. The onus was on the claimant to show that it had not been reasonably practicable to present his unfair dismissal claim in time – per ***Porter v Bandridge 1978 ICR 943*** that onus "*imposes a duty on him to show precisely why it was that he did not present his complaint".*

39. I found the claimant's assertion that he had believed that the time limit was six months difficult to accept. His reference to confusion with the time limit for some other process was vague and unconvincing. The necessary implication was that he was aware that there was a time limit. Having been involved in a previous Employment Tribunal case where his claim had been lodged out of time, I considered that the claimant might reasonably be expected to be more aware of Tribunal time limits than someone without that experience. He had much less of an excuse for getting it wrong and I did not consider his mistaken belief to be reasonable.

40. The claimant's second reason was in effect blaming the respondent for their delay in answering the points he raised in his emails to Ms Paterson on 29 March and 3 April 2019, necessitating (in the claimant's view) the requirement for his FOI requests. I did not regard this as a reasonable excuse. The claimant knew that he had been dismissed as at 12 April 2019. He said so in his ET1. In his email to Ms Paterson of 29 March 2019 he referred to "*a proper dismissal document"* which inferred that he understood her undated letter emailed to him on 22 March 2019 to relate to the termination of his employment. This was confirmed in his email to Ms Paterson of 3

April 2019 where he referred to a decision *"finally reached to terminate a teacher's career"* and an event which "*led to me being sacked".*

41. The claimant's third reason was that he had been unclear about his employment status. If the claimant had been referring to his employment status as a supply teacher, in the sense of whether there was the required mutuality of obligation for him to be regarded as an employee of the respondent, as only an employee has the right to claim unfair dismissal, there might have been some substance to this. However, that was not what the claimant meant. He spoke about his uncertainty as to what it meant to be removed from the supply list and whether this meant that he would no longer receive the list of supply teacher vacancies. He also referred to the fact that much of his supply teaching work came through direct contact with primary school head teachers or business managers. However, this did not alter the fact that he knew he had been dismissed. Once again this was not a reasonable excuse for failing to lodge his unfair dismissal claim timeously.

42. The claimant's fourth and final reason was what he described as "*context".* This was also vague and unconvincing. I considered that as a person who had raised previous Employment Tribunal proceedings against the same respondent not once but twice, it was simply not credible for the claimant to plead ignorance of the statutory time limit. That was particularly so when one of those previous claims had involved a hearing on time bar.

43. Accordingly, my decision is that it was reasonably practicable for the claimant to present his unfair dismissal claim within the statutory time limit of three months. As he had not done so, the Tribunal did not have jurisdiction to deal with this claim.

44. Turning to the claimant's part-time worker claim, I considered whether it was just and equitable to extend time. This was a wider discretion than that of reasonable practicability. I reminded myself of the list of factors derived from section 33(3) of the Limitation Act 1980 -

- The prejudice which each party would suffer

- The length of and reasons for the delay

- The extent to which the cogency of the evidence is likely to be affected

- The extent to which the party sued has cooperated with any requests for information

- The promptness with which the claimant acted once aware of the facts giving rise to the cause of action

- The steps taken by the claimant to obtain appropriate advice once aware of the possibility of taking action

45. I also reminded myself of what the Court of Appeal had said in ***Southwark London Borough Council v Afolabi*** (see paragraph 29 above). I therefore started by considering the two factors identified as being almost always relevant.

46. The first of these was the length of and reason for the delay. Giving the claimant the benefit of the doubt that he had been uncertain as to his position after receiving Ms Paterson's letter on 22 March 2019, the length of the delay had been overstated by Ms Thomson. Counting from 12 April 2019 as the date of dismissal, the delay was from 11 July 2019 (rather than 21 June 2019) to 16 September 2019. However, this was still a significant delay, sufficient to count against the claimant in the assessment of whether it was just and equitable to extend time.

47. Turning to the reason for the delay, this engaged the same excuses as advanced by the claimant in relation to whether it had been reasonably practicable to present his unfair dismissal claim in time. Not having found any of these to be reasonable, I considered that this again counted against the claimant in the assessment of whether it was just and equitable to extend time.

48. The second factor was whether the delay had prejudiced the respondent. This required a balancing of the prejudice to the claimant in being unable to pursue his claim against the prejudice to the respondent in having to answer a claim lodged out of time. Ms Thomson made reference to the cost of defending the claim, and the need for witnesses to take time away from their duties. I was not persuaded that the balance of prejudice was clearly in favour of either party. In other words the prejudice to each party was broadly equal and opposite.

49. I next addressed the other factors listed at paragraph 44 above. The first of these was cogency of evidence. While any delay had the potential to impact this adversely, I did not consider that the delay in the present case was likely to have done so. It was apparent that the process leading to the claimant's dismissal had been documented by the respondent and that would assist the witnesses to recall what had happened. This factor did not count against the claimant.

50. The next factor was the extent to which the respondent had cooperated with any requests for information. I could understand that the claimant would perceive that there had been no cooperation, with information provided only in response to his FOI requests. However, the allegations against the claimant involved his behaviour towards primary school pupils and so, in my view, there were sensitivities about disclosure of information and potentially some data protection issues. I did not consider that I had enough information to form a clear view as to where the balance of justice and equity lay in relation to this factor.

51. The next factor was the promptness with which the claimant acted once aware of the facts giving rise to the cause of action. I was not persuaded that the claimant needed to wait for the response to his FOI requests before proceeding with a part-time worker claim. However I could understand his perception that he needed to do so and, perhaps erring towards being generous to the claimant, I regarded this as a neutral factor.

52. The last factor I considered was the steps taken by the claimant to obtain appropriate advice once aware of the possibility of taking action. The claimant had a

somewhat negative view based on his previous experience of employment law advice, particularly from his union (of which I understood he was no longer a member). He had taken no steps to obtain advice from anyone with knowledge of Employment Tribunal matters and in my view bore a degree of responsibility for his own mistaken understanding of the time limit for his part-time worker claim. That was particularly so when he had *"been there before"* in 2014. This factor counted against the claimant.

53. Drawing together my views on these factors, I decided that they counted against rather than in favour of it being just and equitable to extend time for presentation of the claimant's part-time worker claim. My conclusion was therefore that it would not be just and equitable to extend time and accordingly the Tribunal did not have jurisdiction to deal with the claimant's part-time worker claim.

Date of Judgment: 14 January 2020
Employment Judge: W A Meiklejohn
Entered Into the Register: 20 January 2020
And Copied to Parties