

THE EMPLOYMENT TRIBUNALS



BETWEEN

Claimant

Respondent

Mrs MJ Nicholson

AND

Boots Management Services Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PUBLIC PRELIMINARY HEARING

HELD AT: North Shields

ON: 6 March 2017

EMPLOYMENT JUDGE HUNTER

Appearances

For the Claimant: Mr T Wilkinson of Counsel

For the Respondent: Miss C Coram-James of Counsel

RESERVED JUDGMENT

1 The constructive unfair dismissal claim is dismissed because although it was not reasonably practicable for the claimant to have presented her claim to the tribunal before the end of the period of three months beginning with the effective date of termination, the claim was not presented within a further reasonable period.

2 The disability discrimination claim is dismissed because the claim was not presented to the tribunal within the period of three months beginning with the act to which the complaint relates or such further period as was just and equitable.

REASONS

1 The Facts

1.1 The claimant's husband was diagnosed with lung cancer in July 2015. He underwent a course of radiotherapy and chemotherapy in August and September 2015. This shrunk the tumour.

1.2 The claimant resigned her employment on 12 October 2015 giving 4 weeks' notice. The effective date of termination of employment was 6 November 2016. The claimant resigned because the respondent had two weeks earlier announced that they were to move her to another store at a time when the claimant believed that she needed the support of her colleagues in order to cope with the stress caused by her husband's illness and that of her nephew who was terminally ill.

1.3 When the claimant resigned, she knew that she could bring proceedings in an Employment Tribunal. She did not know there was a time limit.

1.4 The claimant was not a member of a Trade Union.

1.5 The claimant's husband underwent surgery in respect of the lung cancer in January 2016 and was discharged from the surgical outpatient clinic on 23 February 2016. He was given the all clear by the oncologist in July 2016 and was able to return to work as a tower crane driver by the end of September 2016.

1.6 At the date of her resignation and thereafter, the claimant was worried about her husband's health and also that of her nephew. She describes herself as not being in a good place. She was seen by her GP on 8 August 2016 with symptoms of low mood and anxiety. He gave her some antidepressant medication.

1.7 In May 2016 the claimant suspected that the respondent had not appreciated her true reason for resignation. She submitted a grievance with the object of obtaining some compensation. The grievance was concluded on 20 July 2016, but not to the claimant's satisfaction. Shortly afterwards she sought legal advice.

1.8 On 27 September 2016 the claimant's solicitor submitted the required particulars to ACAS for early conciliation. ACAS issued an Early Conciliation Certificate on 27 October 2016 by email.

1.9 On 25 November 2016 the claimant presented a complaint to the tribunal alleging constructive unfair dismissal and direct disability discrimination by association.

1.10 No explanation has been offered as to the delay between seeking legal advice shortly after 20 July 2016 and the presentation of the claim on 25 November 2016.

2 The Law

Unfair Dismissal

2.1 Section 111 Employment Rights Act 1996 provides:

- (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.
- (2A) . . . Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2) (a)

2.2 Section 207B Section 111 Employment Rights Act 1996 provides:

207B Extension of time limits to facilitate conciliation before institution of proceedings

- (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).
But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.
- (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.
- (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

2.3 The following test of reasonable practicability propounded by Lord Denning in *Wall's Meat Co Ltd v Khan* [1978] IRLR 499 remains good law, notwithstanding the myriad of subsequent appellate decisions.

"It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights—or ignorance of the time limit—is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."

Disability Discrimination

2.4 Section 123 Equality Act 2010 provides

- (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.

2.5 Section 140B Equality Act 2010 provides:

- (1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).
but it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 140A.
- (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 the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.
- (4) If the time limit set by section 123(1)(a) or 129(3) or (4) 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.
- (5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

2.6 There is no presumption that a tribunal should exercise its discretion to extend a time limit. *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable. *Parthan v South London Islamic Centre* EAT 0312/13.

2.7 In considering whether a claim has been brought in a period which is just and equitable it was suggested in *British Coal v Keeble* [1997] IRLR 336 by the EAT that tribunals would be assisted by the factors mentioned in section 33 of the Limitation Act 1980, which deals with the exercise of discretion by the courts in personal injury cases. This requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:

- (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;
- (c) the extent to which the party sued had cooperated with any requests for information;
- (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and
- (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

3 Analysis

Unfair dismissal claim

3.1 The period of three months beginning with the effective date of termination expired on 5 February 2016. On the assumption that the claimant sought legal advice on 1 August 2016, the claim was by then 178 days out of time. The claim was 235 days out of time when the claimant's solicitor referred the claim to ACAS for Early Conciliation. Section 207B Employment Rights Act 1996 does not extend the time limit in such a case. The claim was, therefore, 294 days out of time when it was presented on 25 September 2016.

3.2 I am satisfied that the claimant was in a very low mood as a result of her husband's terrible illness and the treatment he had to endure in connection with it. I can quite understand why she would want to put his interests before her own. I am prepared to accept that in the period up to the successful outcome of the claimant's husband's operation in late February 2016 and perhaps for a short period afterwards while he was convalescing, it was not reasonably practicable for the claimant to have pursued her claim.

3.3 However, I cannot accept that this claim was presented within a further period that was reasonable. In the first place the claimant sought to resolve the matter by way of a grievance with the respondent. If she could do that she could also have presented a claim to the tribunal. The reason she did not so is that she did not know of the time limit. She did, however, know of the right to bring a claim to the tribunal and an enquiry would have revealed the time limit. Her ignorance of the time limit was not reasonable.

3.4 Secondly there was no explanation of the delay once she had taken legal advice. That delay was significant in three respects. First there was the delay in referring the matter to ACAS. Secondly, the claimant chose to allow ACAS to attempt conciliation before presenting the claim instead of asking ACAS to issue a Certificate immediately. Thirdly, the claimant chose to wait a further month after presentation of the certificate before presenting the claim in circumstances where section 207B Employment Rights Act 1996 did not apply.

3.5 Since the claimant has not shown that the claim was presented to the tribunal within a reasonable period, the tribunal is prevented by section 111(2) Employment Rights Act 2016 from considering the claim.

Disability Discrimination claim

3.6 The claim is that the respondent was motivated to move the claimant from one store to another close by because the claimant's husband had cancer. I take into account that, if proved, this is an exceptionally serious statutory tort.

3.7 On the assumption that the decision to move the claimant had happened on 1 October 2015, the limitation period for bringing a claim would have expired on 31 January 2016. The claim was, therefore, presented 299 days out of time. I take into account the same factors for the late presentation as I did when considering the unfair dismissal claim, namely the claimant's low mood while her husband was undergoing treatment and for a period thereafter and her devotion to him at the expense of enforcing her own rights. I also take into account the unnecessary delay while she pursued a grievance against the respondent and the inexplicable delay once she had taken legal advice.

3.8 It was clear at the preliminary hearing that neither the claimant nor her witness could be sure of dates, and details. Time takes its toll on memory. I am satisfied that the respondent will suffer similar difficulties in respect of its witnesses. The cogency of the evidence will be adversely affected by the significant delay caused by the late presentation of the claim.

3.9 My task is to balance the prejudice the claimant will suffer if I refuse her application against the prejudice the respondent will suffer if I allow it. In this case I am satisfied that the respondent will suffer the greater prejudice.

JOHN HUNTER EMPLOYMENT JUDGE
RESERVED JUDGMENT SIGNED BY THE
EMPLOYMENT JUDGE ON
7 March 2017
JUDGMENT SENT TO THE PARTIES ON

13 March 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL