



EMPLOYMENT TRIBUNALS

Claimant: Miss S Linnett

Respondent: Curveball Solutions UK Limited

HELD AT: Liverpool

ON: 24 April 2017

BEFORE: Employment Judge Robinson
(sitting alone)

REPRESENTATION:

Claimant: Mr J Nolan, Solicitor

Respondent: Mr M Smith, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claim for unfair dismissal relating to the claimant's pregnancy has been made out of time, as has the claim for pregnancy discrimination and they are dismissed for the reasons set out below.
2. The claim for unlawful deduction of wages relating to commission is made in time and can proceed.
3. The claim for unpaid car allowance is made out of time and it was reasonably practicable to make the claims in time, and therefore that claim is dismissed also.

REASONS

1. The claimant has a number of claims. Her major claim, which was issued on 26 September 2016, is the pregnancy discrimination claim. Her claims for sex discrimination and holiday pay have been dismissed on withdrawal before this hearing. The claimant also has an unlawful deduction of wages claim based on three issues:

- 1.1 Unpaid commission for business generated in June 2016;

- 1.2 Commission of £5 for each mobile number that was reassigned by her, and I am told that the claimant generated 29 such commission based claims which have not been paid to her; and
- 1.3 A monthly car allowance of £250 per month. She alleges she is owed a June car allowance. I do not have any application for any July car allowance.

2. The claimant has also made an application in her further better particulars, contained in that document on 31 January 2017, that her dismissal was automatically unfair contrary to section 99 of the Employment Rights Act 1996 in that she was dismissed for a reason which related to pregnancy, childbirth and/or maternity.

3. I have gleaned from the documents provided to me, and from the claimant's oral evidence tested by Mr Smith in cross examination, the following facts.

Findings of Fact

4. The claimant submitted her ET1 claim form on 26 September 2016. However, she knew that she was dismissed on 22 June 2016 because she was told in a meeting that that was the case on that date. The effective date of termination is therefore 22 June 2016. If that is the case, the primary limitation period expired on 21 September 2016. The claimant issued proceedings some five days later. The limitation period has not been extended by the early conciliation process. The early conciliation certificate was issued on 12 August 2016 and the date of notification was that date too.

5. The claimant had taken legal advice before the limitation period expired. Mr Nolan, who represents the claimant today, and has done so over the period of time these proceedings have been pursued, accepts that the claim has been issued out of time.

6. I can of course extend time in relation to an out of time claim if, for unfair dismissal and unlawful deduction of wages' claims, it was not reasonably practicable to issue within time, and for the pregnancy discrimination claim if it is just and equitable in all the circumstances of the case to extend time. Consequently there are two different tests that I have to apply in relation to the application today.

7. I have to establish when time starts running in relation to each of the claims. For the unfair dismissal it is the date of dismissal or the date the claimant knows she is dismissed. I repeat that that is 22 June 2016. For the unlawful deduction of wages claim it is the date of payment of the wages from which the deduction is made. The claimant tells me her June wage and therefore commission would have been paid in the middle of July 2016, something like 15 July 2016. For discrimination cases it is the end of the three month period starting with the act complained of. The act complained of here is the dismissal on 22 June 2016. Finally, for the automatic unfair dismissal it is that same date, the date of dismissal.

8. I am reminded by Mr Smith of the **Robertson v Bexley Community Centre** case. The principles that flow from that decision are that time limits are there for a purpose and that an extension of time to let a claim in is the exception rather than

the rule, even where the test is a just and equitable test as opposed to a reasonably practicable test.

9. I have accepted, because Miss Linnett tells me so and I accept her evidence, that the claimant's pregnancy was difficult for her. However, despite her pregnancy being difficult she was able to take legal advice within the time limit and well before her baby was born on 2 November 2016. She knew that she was dismissed on 22 June 2016. She was personally told that she was dismissed. She spoke with Mr Nolan on 12 August 2016 before the expiry of the limitation period.

10. I accept that that was by telephone and sometimes it is difficult to communicate that way rather than face to face. It is imperative, whether there is funding in place or not (and I gather there was not at that stage any funding), for the adviser and the client to establish the effective date of termination or the date on which the act complained of occurred. That fixes when time starts running in relation to most potential claims. Everything thereafter, in terms of advice and the issue of proceedings, would fall into place.

11. In dealing with this claim I have to consider the length and reasons for the delay, the extent to which the parties sued have cooperated with any request for information, the promptness with which the claimant acted once she knew of the possibility of taking action, the extent to which the cogency of the evidence is likely to be affected by the delay, and the steps taken by the claimant to obtain professional advice once they knew the possibility of taking action. In relation to that last principle, the claimant had taken professional advice and knew that there was, at least, the possibility of taking action and issuing proceedings during the limitation period

12. Overall, I then have to decide where the balance of prejudice lies in relation to the application to extend time, and in relation to the counter application by Mr Smith that these matters should not proceed as they are all made out of time.

13. For the respondent it is now nearly a year since the claimant was dismissed. The claimant, of course, will remember much but memories fade for respondent witnesses. It is not their issue they have to remember. They have to remember things which have taken place a long time ago. Even if we set a date today we would not get a trial date until well into the summer and maybe the autumn That is a good year after the claimant was dismissed.

14. The claimant knew the date she was dismissed and sought advice well in advance of the expiry of the limitation period and the early conciliation certificate was obtained. All obstacles to the issuing of proceedings were, consequently, cleared away in mid August. Proceedings were not actually issued until over a month after that date.

15. Having regard to all the circumstances of this case it is not just and equitable to extend time and I dismiss the claimant's pregnancy discrimination claim.

16. The amendment application relating to the claimant's pregnancy claim with regard to her automatically unfair dismissal is also out of time and it was reasonably practicable to have issued within time. I disallow, therefore, that amendment. There is little, if anything, in the amendment relating to the facts of the case that was not known to the claimant and her advisors during July and August of 2016. The only

reason the amendment was applied for then (and now we are considering the issue of a fresh claim some four months after the end of the limitation period) was the late receipt at that point - the end of January – of legal aid funding.

17. In short, for both those claims, the balance of prejudice would be against the respondents if I allowed the claims in. Neither the respondents nor their advisors have placed any obstacles in the way of the claimant or her advisors. After the expiry of the limitation period it took five further days to issue the proceedings and four months to issue the amendment. That is not prompt action. I accept the claimant was pregnant and, as Mr Nolan says, within her protected period, but she was able to give instructions to her solicitor and she knew all along she had been dismissed on 22nd June 2016. To say that she was awaiting funding before issuing proceedings is no excuse. Legal aid funding was not received by the claimant until January 2017 so the claimant, in any event, issued without funding in place. A short holding ET1 could have been presented if time was pressing and the claimant and her advisor knew, or should have known, that they were perilously close to the end of the limitation period when the funding issues were being discussed.

18. I will, however, allow the claimant's unlawful deduction of wages claim to proceed with regard to the commission. Those claims were made in time. The claim for the monthly car allowance, however, is made out of time and it was reasonably practicable to make that claim in time in relation to the June car allowance claim for the reasons set out above. Therefore the claims that the claimant can proceed with are the two commission claims set out in paragraphs 1.1 and 1.2 above.

19. No further order, judgment or direction need be made at this point other than to fix a date for the unlawful deduction of wages claim, which has been fixed for **17 July 2017 for two hours**.

09-06-17

Employment Judge Robinson

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

14 June 2017

FOR THE TRIBUNAL OFFICE