



EMPLOYMENT TRIBUNALS

Claimant

Miss P Blackman

v

Respondent

Co-Operative Group Limited

PRELIMINARY HEARING

Heard at: Watford

On: 21 July 2017

Before: Employment Judge Bedeau

Appearances:

For the Claimant: In person

For the Respondents: Mr T O'Donohoe, Counsel

JUDGMENT

1. It was reasonably practicable for the claimant to have presented her unfair dismissal, unauthorised deductions from wages, wrongful dismissal and accrued unpaid holiday claims in time and as they were presented out of time, they are struck out because the tribunal does not have jurisdiction to hear and determine them.
2. It is just and equitable to extend time in respect of the claimant's direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments claims.

REASONS

1. In her claim form presented to the tribunal on 14 November 2016, the claimant, Ms Paula Blackman, made claims of unfair dismissal, disability discrimination, wrongful dismissal and accrued but unpaid holiday. To these claims, the respondent, in its response presented to the tribunal on 29 December 2016, raised the issue of jurisdiction asserting that the claims were presented out of time. Further, the claimant was dismissed on grounds of capability, in that she had been absent from work for nearly a year and failed to attend a capability hearing. All other claims being denied.

2. At the preliminary hearing held on 23 February 2017, Employment Judge Smail set the case down for a hearing today, in public, for me to hear and determine whether or not the claims were presented out of time and, if not, whether time should be extended either on the grounds that it was not reasonably practicable for them to have been presented in time and/or it is just and equitable to extend time? Further, whether at all material times, the claimant was a disabled person and should the claims be struck out or deposits ordered?

The Evidence

3. I heard evidence from the claimant who called Mr David McKitty, a friend. No oral evidence was called by the respondent.
4. In addition, the parties adduced a joint bundle of documents comprising of 59 pages.

Findings of fact

5. Having considered the evidence, I made the following material findings of fact.
 - 5.1 The claimant commenced employment, according to the respondent on 13 March 2006 and for the purposes of this hearing, I am prepared to accept that date although the claimant stated in her claim form that her employment began on 6 March 2007. Her job title, she agreed, was not as she had stated, a store assistant but, officially, it was as a customer team member. At any rate, she had been working for the respondent for 10 or 11 years, part-time at its store in Aylesbury.
 - 5.2 Her husband died some ten years ago, since then she been the sole carer of her three sons all of whom have particular mental problems. She was absent from work from 7 July 2015 to 27 June 2016 due to depression and anxiety brought about by having to care for their particular mental needs.
 - 5.3 The respondent say that the claimant was invited to attend a capability meeting on 27 June 2016. The claimant's case is that she was unaware of that invitation and did not attend. There had been earlier attempts at arranging a meeting to discuss her absence and she told me that she had spoken to an assistant manager by the name of Kenny, who told her that when she fully recovered from her illness a meeting would be arranged. The meeting went ahead in her absence on 27 June 2016. Notes were taken but the outcome was not favourable to the claimant. A letter was sent by Mr Jamie Haughton, store manager, to the her on the same day in which he wrote that having earlier informed her that should she fail to attend the hearing it would proceed in her absence, it was conducted in her absence. He decided that her employment should be terminated effective on 27 June 2016, on the grounds of incapacity as a result of her ill health.
 - 5.4 The claimant would have either received that letter the following day, 28 June or the day after, 29 June 2016. I do not accept the evidence given by Mr McKitty that he read a letter referring to the claimant's termination

and that it was dated 28 May 2016. Such a document was not in the joint bundle and was not produced either by him or the claimant during the hearing.

- 5.5 The claimant told me in evidence that following her termination she spoke to someone at the USDAW head office about representation. As the representative, she had in mind was on leave, she spoke to someone who informed her that the reason why she was dismissed was that she was absent due to sickness and that if she was better within the next seven days she should inform the respondent. If that was said that advice was unhelpful. As a result, she did not have much confidence in her union. She said she did not appeal as she was not in a fit state to do so at the time and was shocked at having been informed that her employment after such a long period, had been terminated. I should add at this point that the respondent did pay the claimant in lieu of notice.
- 5.6 A social worker who was helping her with her particular problems in caring for her children, advised that she could contact ACAS. A document was downloaded from ACAS' website and handed to the claimant by the social worker. The claimant said that she was not told, at that stage, about any time limits. According to her, the ACAS document gave guidance on what would happen once they have been contacted. It also referred to what happens at an employment tribunal.
- 5.7 She first contacted ACAS on 5 September 2016. Conciliation lasted a month with a certificate being issued on 5 October 2016. She said she spoke to an ACAS conciliator, Ms Jane Coward, who advised her that she should think about putting a claim to the tribunal as conciliation had been unsuccessful.
- 5.8 The claimant decided to discuss matters with her friends and a week later told Ms Coward that she was going to go ahead with her tribunal claim. She said that Ms Coward said that she had a month to do so and that she should put her claim in "now".
- 5.9 The claimant told me that she spoke to her friend, Mr McKitty, who previously had an employment tribunal case and had some limited employment knowledge and experience.
- 5.10 She had earlier contacted the tribunal in respect of its procedure and was instructed to access its website. She told me that she is not particularly well versed in IT matters and does not possess an email account.
- 5.11 She could not have been under any illusions when she spoke to Ms Coward a week later that she had to put in her claim form more or less straightaway.
- 5.12 At some point she approached a friend who is a schoolteacher who had basic employment knowledge but was competent and proficient in IT

matters. It was that friend who filled out the claim form and assisted the her in presenting it on line on 14 November 2016.

- 5.13 She is of limited means and could not afford the services of a solicitor.
- 5.14 She said that two weeks prior to 14 November 2016, one of her sons, who is autistic, had health problems. He is 15 years of age. On 22 November 2016, he had a biopsy. She believed, based on the information provided, that he could either be suffering from a chronic liver disease or from Crohn's disease. He had two hospital appointments. For her caring for him has been "a roller coaster experience". Her youngest son is borderline autistic and ADHD and he had been excluded from school on two occasions for smoking. Her eldest son is 17 years of age and suffers from ADHD and was arrested in connection with a dispute with another person.
- 5.15 I have read the occupational health reports on the claimant. The second of the two reports signed by Dr Peter Steinberg and 1 June 2016, states:

"Ms Blackman told my colleague she has three sons who all have complex needs and she is a single parent since her partner died nine years ago. Ms Blackman has a 16 year old who has ADHD and who has had problems with school, a 14 year old with autism and a 13 year old with severe behavioural problems. All three boys are statemented but Ms Blackman said it was only two years ago that she managed to get help for the boys, and that her life has been a real struggle over the years. Her boys are all at different schools and there have been a lot of problems with school refusal, and so every morning is a battle to get them to go to school before she then has to go to work. She also has problems getting them to go to bed and a lot of fights would ensue."

- 5.16 The doctor then made reference to what happened last summer. He wrote in respected of the claimant's autistic son, the following:

"...started having medical problems and losing weight and Ms Blackman feels that he is very unwell and mentioned that she is not getting the support that she should be getting from the medical community. At one point, Ms Blackman thought he was going to die. Her social worker left and she said she really did not have any help with her son until September. By this time she was absolutely desperate as she felt no-one was listening and that she was not going to get help that her boys deserved and she says she became absolutely at rock bottom and just wanted to run away but she did not know where to run. She had still been going to work and trying to sort out her boys and she feels that she just got to breaking point."

- 5.17 It goes on:

"In July 2015 Ms Blackman began to feel suicidal and so her GP put her on medication and signed her off work and she has been unable to return to work since, as she still has all these problems at home. She still feels extremely anxious and angry at the doctors and hospitals, etc and she has actually put in a complaint as she feels that she has not had the support and services that she was entitled to. In January, her GP increased her medication and she is no longer suicidal and feels that she is just about coping now at home, but she cannot possibly go to work while she still has all these problems with her autistic son. She sees her GP once a month still

and has a certificate up until the end of May but she feels that this will have to be extended and she cannot go back whilst her son is still physically unwell and she has no idea when she will be able to return.”

- 5.18 Dr Steinberg was of the opinion that the claimant was unlikely to be able to return to work in the near future.
- 5.19 I referred to those passages as they seemed to mirror the experience the claimant went through following the termination of her employment.
- 5.20 The claimant's claims as clarified by Employment Judge Smail, at the preliminary hearing, are: unfair dismissal; notice pay; unauthorised deductions from wages; accrued unpaid holiday; discrimination arising from a disability; direct disability discrimination, and failure to make reasonable adjustments.

Submissions

6. I heard submissions from Mr O'Donohoe, counsel on behalf of the respondent who invited me to read and to consider his written detailed skeleton arguments as well as the earlier skeleton arguments prepared by his colleague, Mr Joseph England, counsel. The claimant also made submissions and I have taken them into account. I have also considered the authorities I have been made referred to.
7. I do not repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) regulations 2013, as amended.

The law

8. In relation to a complaint of unfair dismissal, unauthorised deductions from wages, wrongful dismissal and accrued unpaid holiday, the time limit is three months unless it was not reasonable practicable to have presented the claim within that time, sections 111(2) and 28(2) Employment Rights Act 1996; article 7, Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, and regulation 30, Working Time Regulations 1998, respectively.
9. A claimant must show that it was not reasonably practicable to present his or her claim in time. The burden of proving this rests firmly on the claimant, Porter-v-Bandridge Ltd [1978] IRLR 271, CA.
10. The question of what is or is not reasonably practicable is essentially one of fact for the employment tribunal to decide. The test of what is reasonably practicable is reasonable feasibility, Palmer and Saunders-v- Southend-on-Sea Borough Council [1984] IRLR 119 CA. May LJ said that factors which the tribunal can take into account include, amongst others, a substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; and whether the claimant had been advised by anyone, and the nature of any advice given.

11. In the case of Walls Meat-v-Khan the Court of Appeal held that ignorance or mistaken belief before that is to be accepted, it would not be reasonable if it arises from the fault of the complainant in not making such enquiries as should reasonably, in all the circumstances, be made. In Dedman-v-British Building and Engineering Appliances Ltd [1973] IRLR 379, the Court of Appeal held that if, upon inquiry by the tribunal, the claimant was at fault in allowing the period to pass then it could not be said to have been impracticable for the complaint to have been presented in time.
12. In the Supreme Court case of Gisda CYF-v-Ms Lauren Barratt [2010] IRLR 1073, it was held that where an employee is dismissed by letter time starts to run from the date the employee read the letter or has a reasonable opportunity of reading it, rather than the date when the letter was posted or delivered or the date when the employer decided to dismiss.
13. Under section 123 Equality Act 2010, a complaint must be presented within three months,

“starting with the date of the act to which the complaint relates” (a), “or such other period as the employment tribunal thinks just and equitable,” (b) and “conduct extending over a period is to be treated as done at the end of the period,” (3)(a).
14. Time limits are to be applied strictly. The Court of Appeal held that the exercise of discretion on just and equitable grounds is the exception rather than the rule, Robertson v Bexley Community Centre [2003] IRLR 434. The factors the Tribunal may consider in exercising its discretions are: the reason for and the extent of the delay; whether the Claimant was professionally advised; whether there were any genuine mistakes based on erroneous information; what prejudice, if any, would be caused by allowing or refusing to allow the claim to proceed; and the merits of the claim. There is no general rule and the matter remains one of fact.
15. The time limits are extended by the ACAS conciliation provisions.

Conclusion

16. I deal firstly with the non-discrimination claims. The time limit is three months but it is to be extended because of ACAS conciliation, by one month. There is no dispute that applying ACAS conciliation, the time expired on 5 November 2016. The claimant could only succeed in extending time if it was not reasonably practicable to present the claims in time. I am satisfied that she did have a discussion with Ms Coward and that was after conciliation had been unsuccessful. The next step for the claimant was to issue employment tribunal proceedings. She took time, about a week, taking her up to the middle of October, to consider her position. She spoke to Ms Coward again who told her that she must act “now”, in other words, straightaway, but did not present her claim form until 14 November 2016. The test is what was reasonably feasible in the circumstances for the claimant to have done?
17. She was assisted by Mr McKitty and the school teacher. She had also the union upon which she could refer for advice and assistance though I accept she had lost confidence in them. I accept her evidence that Ms Coward expressed to her

the need for her to act quickly and that she had a month in which to do so. It was, therefore, reasonably practicable for her to have presented her non-discrimination claims in time by 5 November 2016. It follows from my judgment that it cannot be argued in her case that it was not reasonably practicable for her not to have done so within the time limit. Her non-discrimination claims are out of time and are struck out as the tribunal has no jurisdiction to hear them.

16. In relation to the disability discrimination claims, I do take into account the factors I am required to consider: the length and reason for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had co-operated with any request for information; the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action and the steps taken by her to obtain appropriate professional advice once he or she knew of the possibility of taking legal action.
17. In terms of the length of the delay, it was nine days and I do not consider that period to be unduly excessive. I do, however, consider the claimant's reasons for the delay and accept that she has three comparatively young teenage boys who have their own mental issues and behavioural problems which she has had difficulty coping with for some time. According to the medical evidence, the problems she experienced, particularly in caring for her autistic child, affected her health causing her to take time out from work, nearly a year, before she was dismissed. I accept that at the time she presented her claim form she had ongoing problems with her boys which occupied most of her time, taking one to hospital his appointments; dealing with the exclusion from school as well as their behavioural issues. These ever-pressing matters caused her, temporarily, to her to take her eye off the time limit and to focus her attention on her children.
18. I do not accept, nor has it been urged upon me, that the cogency of the evidence has been affected by the length of the delay.
19. As regards the extent to which the party sued had co-operated with any requests for information, again this has not been a matter that has been argued before me.
20. In relation to the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action, she contacted the tribunal once she was made aware by Ms Coward that conciliation had failed and that she had a month to present her claim. She is not proficient in IT matters and enlisted the services of her school teacher who is. Thereafter the claim form was presented nine days outside of the extended time limit.
21. The claimant, in her submissions, told me that she did see a solicitor and had paid £60 but could not continue with their services as she is a person of limited means.
22. Taking these factors into account, I do come down on the side of the claimant and allow her to proceed with her disability discrimination claims as it is just and equitable to extend time but this is subject to a judge at a further preliminary hearing concluding that she was, at all material times, a disabled person suffering from anxiety and depression. I did not have time to consider this issue.

Employment Judge Bedeau

Dated: 26 September 2017

Sent to the parties on:

.....26 September 2017

For the Tribunal:

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