Case No: 3300282/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Hardie (deceased)	**v**	**Centreplate UK**

Acting through his personal representative
Mrs A Hardie

Heard at: Watford **On:** 15 May 2017

Before: Employment Judge Manley

Appearances:

For the Claimant: Mrs A Hardie

For the Respondent: Mr D Potter, solicitor

JUDGMENT having been sent to the parties on 13 June 2017 and reasons having been requested out of time and therefore not in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided at the discretion of Employment Judge Manley under Rule 5 Rules of Procedure 2013:

REASONS

Introduction and issues

1. This was an open preliminary hearing. There were initially some questions about whether Mrs Hardie could proceed with this matter, it not being entirely clear whether she was a personal representative of Mr Hardie who is now deceased, but that seems to be no longer an issue. The matter proceeds with Mrs Hardie as the representative.

2. The question for this open preliminary hearing is whether the claim form containing complaints of unfair dismissal, breaches of working time regulations and disability discrimination was presented out of time. If it was out of time, I have to consider whether it was reasonably practicable for the unfair dismissal and working time regulations to have been presented within time. For the disability discrimination complaint I have to consider whether it is just and equitable to extend time to allow that complaint to proceed. I outlined the difference in the tests to Mrs Hardie at the start of the case and she seemed relatively knowledgeable about the matters which I was going

to address.

3. Mrs A Hardie was the spokesperson for this matter and she gave evidence. Mr Potter represented the respondent. I also heard from friends of Mrs Hardie; Mr Walsh and Mrs Walsh and from Ms Fisher who is HR director of the respondent.

The facts

4. This then is an outline of the relevant facts. Mr Gordon Hardie worked for the respondent as duty manager at their venue at Warner Bros Studio Tour London from April 2013 until dismissal on 6 October 2016.

5. In September 2016 Mr Hardie made an application by email for some leave of absence with respect to needing to care for his stepson. He indicated in that email that he needed something which he called extended leave and said that it might be for some weeks. He went on to say that his stepson would be "back at school tomorrow" and he could see how it would develop. There is no documentary evidence with respect to what happened about that. Mrs Hardie when she gave her evidence believed that the request had been ignored but, in a later document that Mr Hardie completed for the appeal after his dismissal, he said something about a response being two days after that. It does seem as if that matter ended in early September and I have no evidence that anything was pursued after that point. I understand that the difficulties continued with Mr Hardie's stepson, who has Asperger's syndrome, and was facing some serious difficulties over this period of time.

6. Later in September an issue came to the attention of the respondent and Mr Hardie was called to a disciplinary hearing on 5 October before Ms Fisher. She is based in Stoke on Trent in the head office and took the decision to dismiss Mr Hardie for various aspects of misconduct. Mr Hardie appealed that decision by letter of the next day, 7 October, and set out a number of reasons for why he felt his appeal should succeed. He talked about the way in which the process was followed. He did make reference to the difficulties at home, specifically with his stepson, but he also said that he had sought guidance from ACAS and the Citizens' Advice Bureau with respect to this matter.

7. That appeal was heard on 14 October. Mrs Hardie gave evidence and said that she had discussed matters with Mr Hardie. She and Mr Walsh were under the impression that Mr Hardie had also spoken at some point and we are not clear when this was, to a "no win no fee" solicitor. In any event, the appeal was unsuccessful and Mr Hardie was sent an outcome letter on 21 October, which he probably got on 22 October, which indicated why his appeal was not successful.

8. There is very little documentary evidence from that time, although I have seen some text messages which I will refer to. The respondent heard nothing directly from Mr Hardie after the appeal. Unfortunately, Mr Hardie died suddenly at the end of January 2017. I therefore have had to rely on the evidence of Mrs Hardie with respect to her belief about what Mr Hardie did in this period of time. The importance of this is that this is when the time

limit for bringing any proceedings to the employment tribunal was running. These complaints fall into the complaints that now are subject to mandatory reference to ACAS for early conciliation. In this case, the latest that reference to ACAS should have been made was 5 January 2017.

9. Mrs Hardie told me that she discussed matters regularly with Mr Hardie. She said that she discussed matters with him every week. She was particularly clear that she and, by implication, Mr Hardie knew about the time limit. She explained it very clearly as being three months less one day and said that she understood that early conciliation was mandatory and that it would "stop the clock", which is the phrase that she used. She believed that Mr Hardie had in fact gone to ACAS about this matter. In her submissions, she said that when she later spoke to ACAS they suggested that he might have rung the advice line but when she was giving evidence before me, it seemed to be related to the issue of the early conciliation process.

10. What she did produce as evidence was a series of text messages which she exchanged with Mr Hardie about this. The first one is dated 31 October 2016 and the text from Mr Hardie to Mrs Hardie reads:

    "I've spoken to ACAS and the first step is for them to set up mediation. They have logged my case and given me a case number. They will now contact Centreplate to arrange a mediation meeting. They might get them running scared as they will know I'm not bluffing."

11. Mrs Hardie replied "*Ok cool. So they haven't heard from Centreplate regarding this? Did they say it was bad they hadn't replied?".*

12. Mr Hardie's text in reply reads "*Yes. They said that irrespective of the outcome their procedures had clearly been broken*".

13. There are no further text message exchanges until 14 December when Mr Hardie sent a text to Mrs Hardie which reads something about that he had to work and that he would be working "*normal shifts until we close*". Mrs Hardie wrote: "*If you don't hear from ACAS by Xmas can you call them as think there is time limit.*" He replied: "*Calling them after lunch as they left voicemail*". Mrs Hardie could not recall whether she heard anything about that voicemail.

14. There was a further text message exchange which is not in the bundle but Mrs Hardie sent through to my email. Mrs Hardie sent a text to Mr Hardie on 9 January which reads: "*Can you follow up with ACAS as we really could do with extra money now we are getting our bathroom done and be good to have this meeting before the 18th when you start work. They have had over three weeks so should have got back by now so think it's reasonable to give ACAS a nudge.*" It appears that Mr Hardie replied: "*Okay will call after I've had my lunch.*"

15. Those then are the text message exchanges. As indicated Mr Hardie had been dismissed by the respondent in early October. Mrs Hardie told me that he had had a small amount of work with Amazon for which he was not paid and that might have been what he was referring to when there was an

attempt to set up the appeal hearing. He then found work at Compass at Hatfield House from 1 December. He was working quite long shifts as they were busy with December work but he needed 9 to 5 work, particularly because of the difficulties that they were facing at home with the family. Mrs Hardie told me that he was not attending work in early January as Compass were trying to re-locate him but that he found alternative and preferable work with Imagination which he was to start on 18 January and I can see that was a reference to something which appeared in her text message to Mr Hardie.

16. As indicated, time was running with respect to these claims. With respect to the complaints of unfair dismissal and working time regulations breaches, the effective date of termination was 6 October making the time limit expire in early January unless there has been an extension because of an ACAS reference. The time limit which applies to discrimination complaints is still three months but from the last act of discrimination which may or may not be the same as the date of dismissal. In this case it seems relatively clear to me that the time limit ran from the date of the family leave request in early September and that would therefore have expired even earlier in early December.

17. In any event, now that there is a requirement for all these complaints for a potential claimant to notify ACAS that they wish to engage in early conciliation. That notification needed to have happened in this case at the very latest before or on 5 January 2017. Clearly Mrs Hardie believed and I can see why she would so believe, that Mr Hardie was doing something with respect to ACAS. It is even possible that he believed at the time that what he was doing was preparatory to an employment tribunal claim. Unfortunately, I cannot hear from Mr Hardie. The respondent heard nothing about this matter from ACAS or indeed Mr or Mrs Hardie, as I have indicated, until after his unfortunate death at the end of January.

18. On the evidence before me, I cannot find that Mr Hardie had contacted ACAS within the time limit and the complaints have therefore been presented out of time. There is no evidence, save that contained in what was said in texts between Mr and Mrs Hardie, of ACAS notification. I know, from experience, that ACAS records any notification and there is no such record.

19. Very unfortunately, Mr Hardie died suddenly on 28 January. I have heard considerable evidence from Mrs Hardie and indeed Mr Walsh and Mrs Walsh about Mr Hardie's mental health over this period of time. I have evidence before me that he was particularly stressed. Some of that might have been in connection with the difficulties with his stepson and of course there may have been difficulties arising from his dismissal from work which would not be unusual. I have evidence that he sought help with his mental health problems and he was referred for cognitive behavioural therapy and he may well have taken some low level medication to help him sleep. I have no firm medical evidence of how serious this mental health difficulty was. Mrs Hardie, who saw him regularly of course, believed that he was very unwell although as indicated he was able to attend work and indeed change his jobs over this period of time.

20. Very shortly after Mr Hardie's sudden death, which, as I understand it, was in connection with an undiagnosed heart condition, Mrs Hardie contacted ACAS. ACAS said it had no record of Mr Hardie contacting them. There was no referral number or any indication that he had done so. Mrs Hardie therefore decided to take matters forward herself. She notified ACAS and an email of 13 February was then sent to the respondent which I have seen. Ms Fisher told me that she then discussed matters with the ACAS officer. An ACAS certificate was therefore granted on 15 February. The claim form in this matter was presented on the same day.

21. Ms Fisher gave evidence that she had not been contacted by ACAS earlier than 13 February. She told me she tried to discover whether anybody else at the respondent had. Mrs Baker, who was one of the managers, told her that she also had not been contacted by ACAS.

22. I have not been able to find, on the balance of probabilities, that the early conciliation process was started when Mrs Hardie believed that it was underway. She may well have genuinely believed that Mr Hardie had been in touch with ACAS. As I have indicated, the claim form was presented out of time and the complaints are therefore out of time.

The law and submissions

23. Section 111 Employment Rights Act 1996 (ERA) provides that an unfair dismissal complaint may be presented to an employment tribunal. Such claims cannot be heard by the tribunal unless they are presented before the end of a period of three months beginning with the effective date of termination. If the tribunal is satisfied that it was not reasonably practicable for the claim to be presented within that period it may consider the case so long as the claim was submitted within such further period as the tribunal considers reasonable. That is the effect of Section 111(2) ERA. The provisions for Working Time Regulations complaints are identical.

24. In the case of **Palmer & Saunders v Southend-on-Sea Borough Council 1984 IRLR 119** it was said by the Court of Appeal that the words "reasonably practicable" mean that the tribunal must ask if it was reasonably feasible to present the complaint to the employment tribunal within the relevant three-month period.

25. A discrimination claim must also be made within three months of the act complained of (section 123 Equality Act 2010). Section 123 b) gives the tribunal a discretion to the hear claim if it is presented in "*such other period as the tribunal thinks just and equitable.*" In **British Coal Corporation v Keeble [1997] IRLR 336** it was said that the discretion is as wide as that given to the civil courts by section 33 of the Limitation Act 1980. The court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension and to have regard to all the other circumstances, in particular the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected by delay, the extent to which the party sued has cooperated with any requests for information, the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he or she knew of the

possibility of taking action. However, it is said that there is no legal requirement on a tribunal to go through such a list in every case provided of course that no significant factor has been left out of account by the tribunal in exercising its discretion.

26. The effect of s18A Employment Tribunals Act 1996 is that anyone seeking to bring an employment tribunal claim must first refer the matter to ACAS for early conciliation. They must do so before the primary time limit as set out above expires and, if they do, there will be an extension of time under s207B ERA.

27. Mrs Hardie asked me to consider the ill health of her husband at the relevant time and what she felt he had done about ACAS. I think she genuinely believed that he was following the proper procedure. She submitted that this claim should be allowed to proceed.

28. For the respondent, Mr Potter submitted that the claim was presented out of time and it was reasonably practicable for Mr Hardie to refer the matters to ACAS in time and it was not just and equitable to extend time. I was referred to the case of **Norbert Dentressangle Logistics Limited v Hutton** UKETA/2013/11 which makes it clear that considerations of whether it was reasonably practicable where there had been ill health was one for the tribunal. Similarly in **Marks and Spencer plc v Williams-Ryan** [2005] EWCA Civ 470 the Court of Appeal did not interfere with the tribunal's decision on reasonable practicability. Mr Potter also reminded me that the burden of proof rests on the claimant where the claim was presented out of time.

29. In summary, having decided that the claim was not presented in time, I must decide whether it was reasonably practicable for Mr Hardie to put in his claims of unfair dismissal and breach of Working Time Regulations within the time limit or within any extended time limit. If it was not reasonably practicable, I can extend time if I think the matter was put in during a further period of reasonable practicability. As far as the disability discrimination case is concerned, I should consider whether it is just and equitable to extend time and although that is an arguably more generous test, it is still only in exceptional circumstances, that time would be extended.

Conclusions

30. I consider first the reasonably practicability question. In my view, it was reasonably practicable for Mr Hardie to bring his claim in time. I completely appreciate what Mrs Hardie tells me; that Mr Hardie was unwell and under considerable stress. I have also heard from other witnesses whose evidence I accept that they found him to be in a difficult mental state. However, he was able to do other things. He applied for and was successful in getting work and indeed changing jobs to one which was much more suitable given the difficult family circumstances. I also bear in mind that Mr Hardie was being prompted by Mrs Hardie to take steps in these proceedings. The evidence is that he did not do so. In all the circumstances of this case it was reasonably practicable for Mr Hardie to begin this case if he wanted to. He did not do so and therefore those claims

cannot proceed.

31. Turning then to the question whether I can extend time for the disability discrimination claim. This is not a case where I think it would be just or equitable to extend time in these circumstances. Mr Hardie has very unfortunately now died. That makes it very hard to assess what would be in his best interests. This would be his case and the tribunal would be put in the difficult position of not hearing oral evidence from him. The length of the delay is not particularly serious but there would be significant prejudice to the respondent to have to defend a discrimination complaint, particularly in the absence of the claimant. It does not seem to me that a fair trial would be possible. I have every sympathy with Mrs Hardie. I realise she is in a very difficult situation having lost Mr Hardie so suddenly and so tragically young. That does not mean that a case should proceed which is out of time and which, on the evidence before me, Mr Hardie himself did not pursue. I do not think it is in the interests of justice for me to extend time in this case and therefore I am not going to do so. This means that the case can go no further. The claims is dismissed as the tribunal has no jurisdiction to hear these complaints.

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Employment Judge Manley

Date: …1 November 2017

Judgment sent to the parties on

....2 November 2017....................

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For the Tribunal office