Case Number 1400089/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss M Handley	**AND**	The Red Cross & St John Defence Medical Welfare Service

HELD AT Birmingham **ON** 18 August 2017

EMPLOYMENT JUDGE Hughes

Representation
For the Claimant: Mr D Alloway, Lay Representative
For the Respondents: Ms J Bann, Solicitor

JUDGMENT having been sent to the parties on 22 August 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and issues

1 The claimant presented a Claim Form to the Employment Tribunal on 13 January 2017 claiming unfair dismissal. In summary, her complaint was that she was made redundant by the respondent and later saw a job advertisement for a post with the respondent which was the same role as she had been undertaking before being made redundant. At that point the claimant concluded that the redundancy process was a sham.

2 There appeared to be some confusion over the effective date of termination of employment but this has now been resolved because the claimant accepts that the dismissal letter contained in the bundle prepared by the respondent for the

hearing before me [R1], made it clear that the claimant's employment was terminated with effect from 7 July 2016.

3 The case was listed for a preliminary hearing to consider whether there was jurisdiction to hear it having regard to the limitation period and the impact, if any, of Early Conciliation on the primary time limit of three months less one day.

4 The claimant gave oral evidence about the point at which she discovered the job advertisement and the steps she took after that.

Primary findings of fact

5 From the evidence I saw and heard I made the following primary findings of fact relevant to the issue which I had to determine.

5.1 The effective date of termination of employment was 7 July 2016. The primary time limit expired on 6 October 2016.

5.2 It was common ground that on 24 October 2016 the respondent posted a job advertisement on its own website and with an employment agency, for a position which was the same job as the claimant had undertaken prior to being made redundant.

5.3 There was a dispute as to whether this was intended to be a temporary or permanent post which it was unnecessary for me to resolve. I did not need to resolve that point because it was not material to the issues before me.

5.4 On 29 October 2017, which was already outside the primary time limit, the claimant became aware of the job advertisement because of a text sent to her by a former colleague. She then checked the website and saw the advert herself. The claimant said that this was a Saturday and that she contacted ACAS on Monday 31 October 2017. Her evidence, which I accepted, was that she was advised to contact the respondent and ask for her job back.

5.5 The claimant did contact the respondent, that day or the following day, and spoke to a lady called Julia and explained she had seen the advertisement and would like her job back. The claimant was told that the respondent would not be prepared to do that because she had already been made redundant, but that she could apply for the vacancy and go through an open recruitment process. The claimant told Julia that she intended to take it further.

5.6 The claimant did not put in an application. It was common ground that shortly afterwards, on 7 November 2016, the post was withdrawn from the website.

5.7 The claimant's evidence was that as the situation was not resolved to her satisfaction she contacted the Citizens' Advice Bureau and an appointment was arranged with Bradical, which is a local provider of free advice, assistance and representation. There is one paid worker and the rest are volunteers, the majority of whom have other employment.

5.8 The claimant was unaware of the exact date of the appointment but said that it was within one or two weeks of her conversation with Julia and before the advert was withdrawn. I concluded that it was likely that the appointment took place at some point during the first week in November. The claimant's evidence, which I accepted, was that the volunteer she saw took details and advised her to contact the respondent again and ask for her job back.

5.9 The claimant said that before she had the opportunity to do so, she was informed that the advertisement had been taken down from the website, and that when she checked she found that to be the case.

5.10 The claimant's evidence was that at that point she thought there may not be any prospect of taking the matter further because she had no proof that the advertisement had been posted on the website – she had not printed it off or taken a screenshot. The claimant said she contacted ACAS again but was told the respondent could withdraw job advertisements because it had the right to choose when to hire and which posts to recruit to. The claimant told me that she concluded that there was nothing further to be done. I accepted that.

5.11 However, the claimant was then contacted by Bradical towards the end of November. It was likely that this occurred on or around 24 November because this was when the Early Conciliation process was instituted.

5.12 The Early Conciliation process lasted from 24 November to 16 December 2016. The claimant was then issued with an Early Conciliation certificate and was then able to issue proceedings. When Early Conciliation came to an end the claimant arranged a further appointment with Bradical and could not be sure when this was. It was clearly at some stage between 16 December and 13 January 2017 which was when the Claim Form was presented.

Submissions

6 Having heard the above evidence I started to hear submissions. The claimant's representative started to make some points about the claimant's health and state of mind during the material timeframe. I make no criticise him for doing so, but the fact was that I had not heard any evidence from the claimant on this point, nor was there any medical evidence in the bundle.

7 The claimant's representative rightly pointed out that in the case of Norbert Dentressangle Logistics Ltd – v – Hutton EAT/0011/13 it was held that although medical evidence is desirable, it is not essential for the purposes of taking into account someone's state of health if they present a claim outside the primary time limit. Whilst I accepted that, I pointed out that the fact was that I had heard no evidence on the medical question at all. Mr Alloway asked if he could recall the claimant to give evidence about that. I was very grateful to the respondent's representative, Ms Bann, who did not object to that course of action, because she accepted that it was important for me to hear all relevant evidence in order to be able to make a fair and just decision. I commend her for her very diligent observation of her professional duties to the court.

Evidence about health

8 The evidence which the claimant gave when she was recalled was that she had a serious mental health issue in 2015. She had depression and Post Traumatic Stress Disorder ("PTSD"). The respondent did not dispute that and, in fact, volunteered the information that the claimant had been referred to an Occupational Therapist in connection with this at some point between January and May of 2015. The Occupational Therapist recommended an urgent appointment with a Psychiatrist. The claimant also told me that she had taken medication for depression and PTSD but it had caused a seizure. The claimant was prescribed different medication which, in her words, caused her to "flat-line". I understood this to mean that a side effect of the medication was that the claimant did not feel any emotions at all whether positive or negative. The claimant said that she had taken steps to reduce the medication and to come off it and was no longer taking it when she was made redundant.

9 The claimant told me that when she found out that she was redundant she was "floored" by it and that it "had pulled the rug from under my feet". I accepted that. The claimant also told me she had felt much the same since with ups and downs. She did not go to see her G.P. The claimant secured new employment, on 24 October 2016 (although the Claim Form gives a date in November). The claimant told me that going out to work helps her to feel more positive mentally.

Submissions (continued) plus case law

10 In summary, the law relied on by the parties was firstly the Norbert Dentressangle case in the context of medical evidence and limitation periods. This case is authority for the proposition that absent medical evidence from a G.P. I could take into account the claimant's own account of her state of health and state of mind during the relevant period of time. Secondly I was taken to some of the many cases around advice and whether, if inaccurate advice is provided, this can but does not always assist a claimant with the limitation

question. I did not think that it could be said that this claimant was badly advised so I did not consider that case law on advice given assisted in this case.

11 I was also taken to the Cambridge and Peterborough Foundation NHS Trust –v- Crouchman EAT/0108/09 which was the most on point because it considers ignorance of fact. Paragraph 11 states that ignorance of a fact which is crucial or fundamental to a claim will in principle be a circumstance rendering it impracticable for a claimant to present a claim. It states that such a fact would be crucial or fundamental in the relevant sense if it is such that, when a claimant learns of it, his state of mind genuinely and reasonably changes from one where he does not believe he has grounds to claim to one where he believes that he has. The case also states that ignorance of a crucial fact would not mean it was not reasonably practicable to claim in time unless the ignorance of the fact was reasonable. Finally, the case provides that the question of whether the crucial fact is true is not relevant as such because the real point is whether it has genuinely produced a change in belief. In my judgement Crouchman was very relevant to the period between the effective date of termination of employment and the claimant finding out about the job advertisement.

12 The other case law which I considered material in this instance was the case of Lezo and OCS Group Ltd EAT/0104/10. In this case the EAT considered the provisions of section 111 Employment Rights Act 1996 (as amended) ("the ERA") which contains the time limitation provision for an unfair dismissal claim. Paragraph 14 rightly draws the distinction between the reasonable practicability question i.e. was it reasonable to present the claim in time (s111(2)(a) ERA) and the second question, which falls to be answered if it was not reasonably practicable to do so. That question is whether the claim submitted within such further period as the tribunal considers to be reasonable (s111(2)(b) ERA). The latter is, of course, wider than the "reasonable practicability" test, which has been likened to a test of reasonable feasibility. Both are, of course, fact specific, which is why oral evidence and any such documentary evidence as is available, are important in preliminary hearings on time points.

Conclusions

13 There are a number of relevant time periods in this case. The first is the period up to the primary time limit which expired on 6 October 2016. Closely associated with it is the period up to 29 October 2017, when the claimant became aware of the job advertisement. The reason they are closely associated is because this is the period to which Crouchman applies.

14 Prior to setting out my findings on that, I should point out that although the Early Conciliation process is a necessary precursor to an Employment Tribunal claim, it will be plain from the above facts that in this case it did not operate to extend the primary time limit because it took place after the primary limitation

period had expired. Time is not extended by Early Conciliation if the claim is already out of time, which it clearly was in this case.

15 This was, in my judgement, clearly and obviously a case where a crucial fact was not known to the claimant at the point when the primary time limit expired. It was not a fact that she could reasonably have been expected to know. Consequently it was not reasonably practicable to present the claim in time. During the period between 6 and 29 October 2016 the claimant remained unaware of that crucial fact, and it was reasonable for her to not know of it. It was not until 29 October 2017 that the claimant came to believe that the redundancy process, which she had not challenged up to that point, was a sham. The first point at which the claimant knew of the potential factual basis of her claim was 29 October 2017 and consequently it was necessary to look at her actions from that point onwards when considering whether the claim was presented within such further period as was reasonable.

16 The next relevant period is 29 October to 24 November 2017, the latter being the start date for Early Conciliation purposes and the likely date when the claimant was contacted by Bradical. During that time the claimant took advice from ACAS, contacted the respondent and tried to resolve the situation, contacted the CAB, had an appointment with Bradical, and as a result resolved to contact the respondent again. Before she did so the job advertisement was withdrawn and, having no evidence of its existence and taken further advice from ACAS, the claimant concluded that there was nothing else she could do. In my judgement, the claimant reasonably came to that conclusion. The claimant had not brought an Employment Tribunal claim before. She is not a lawyer. Being made redundant clearly had an adverse impact on her health fortunately ameliorated to some extent by the fact that she was able to find other employment quite quickly. The claimant had taken advice and she acted on it. I am in no doubt that the second conversation with ACAS about the withdrawal of the post caused the claimant to think there was nothing more to be done. That situation did not change until she was contacted by Bradical. Bradical is to be commended for having done so, given that it is heavily dependent on volunteers and has few resources.

17 As to the Early Conciliation period which ran from 24 November to 16 December 2016, clearly the claimant was unable to issue proceedings during that time, so it cannot be said that there was any delay in presenting the claim during this time.

18 The final period which fell to be considered was 16 December 2016 to 13 January 2017. In respect of that period, two points were made by the claimant's representative. The first was that he did not appreciate that this period was relevant because he thought that Early Conciliation automatically extends the period to present a claim by four weeks and the claim was presented within four weeks of 16 December. That is not the case for the reasons set out at paragraph

14 and this needs to be relayed to Bradical because it is a fundamental misunderstanding of the position.

19 However, when I pointed this out, Mr Alloway put forward an explanation for the delay between 16 December and 13 January. He said Bradical was a small organisation, reliant on volunteers; that it was the Christmas period; and that they do the best they can in difficult circumstances. I accepted that was a reasonable explanation.

20 In the circumstances, I concluded that it was not reasonably practicable for the claim to be presented in time, and that it was presented within such further period as was reasonable. I therefore concluded that the Employment Tribunal has jurisdiction to hear this claim. Oral reasons were given on the day, and the case was listed for a hearing. Written reasons were later requested.

Employment Judge Hughes
14 November 2017