



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Carter

Respondent: The Abbeyfield Society

HELD AT: Liverpool

ON: 4 December 2017

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: In person

Respondent: Not in attendance

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of unfair dismissal is out of time, it was not reasonably practicable for the claimant to have presented her claim in time, she had presented it within a further reasonable period and the Tribunal has the jurisdiction to consider the complaint.
2. The respondent has failed to present a response and judgment for unfair dismissal is entered in favour of the claimant in accordance with rule 21 of the Tribunal Rules 2013.
3. The hearing is reserved to remedy listed for **one hour on 3 April 2018** commencing at **10.00am** at **Liverpool Employment Tribunal, 3rd Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L2 2BX.**

REASONS

1. This is a preliminary hearing to decide two issues. The first relates to the claimant's complaint of unfair dismissal being out of time; the second relates to issuing a rule 21 judgment, the respondent failing to lodge a defence to the claimant's claim by 19 October 2017.

2. It is not disputed the claimant issued her ET1 on 15 September 2017 having notified ACAS on 2 August 2017 of the prospective complaint, with the early conciliation certificate being issued on 25 August 2017. However, the claimant's continuity of employment was 6 April 2004 to 28 February 2017. There is a question mark over the effective date of termination given the 3 March 2017 letter from the respondent to the claimant confirming she was on a zero hours' contract and the email to the claimant from ACAS sent 1 September 2017 indicating the respondent had been in contact with ACAS confirming the claimant was not to be offered more hours within the houses where the claimant's sister was manager, but was "encouraged to look at other houses...you did not wish to consider any hours in these houses...the opportunity for hours was kept open and remains that way...The respondent states that you were not dismissed".

3. In direct contrast, the claimant received a P45 following a TUPE transfer which took place on 1 March 2017 from Abbeyfield Southport Society Limited to the Abbeyfield Society. A letter dated 14 March 2017 from the later stated confirmed the claimant's leaving date was 28 February 2017. The claimant confirmed 28 February 2017 was the last date when she physically worked for the respondent.

4. The Tribunal has been provided with a letter dated 17 October 2016 from the Abbeyfield Society which confirmed the TUPE transfer and the fact that the proposed transfer was to result in one-to-one meetings being offered to all employees. The claimant indicated that she was not offered a one-to-one meeting, and such a meeting did not take place with her.

5. It appears that by the time the claimant received the P45 on 14 March 2017 and the 3 March 2017 letter (which confusingly referred to the Abbeyfield Southport Society Limited "will be" merging into the Abbeyfield Society when a TUPE transfer had taken place on 1 March 2017) that the decision had been made not to offer the claimant further hours within the Southport houses, whilst her sister was senior house manager due to the policy of the Abbeyfield Society. The claimant believes her employment was dismissed at that stage following her attempt to make contact with Human Resources.

6. After the claimant's dismissal she suffered from a severe depression exacerbated by her marriage of 21 years coming to an end when her husband left in April 2017, and her mother suffering from a stroke in May 2017. The claimant attended at her GP's practice in or around April 2017, antidepressants were prescribed and counselling arranged. The claimant was put on 50mg per day of medication, which has since been increased due to her deteriorated mental condition. She also attended counselling in approximately May 2017, possibly before this date, which she continues to attend one session per week.

7. The claimant explained how in June 2017 with her medical condition deteriorating, she was unable on occasion to leave the house, felt anxious and dizzy, getting worked up thinking about things. With the support of friends she attended the Citizens Advice Bureau in late June 2017, when time limits were discussed and the claimant was advised that as she had not been well, it is possible the time limit could be extended.

8. The Tribunal explored with the claimant what steps she took after being advised by the CAB, and before notifying ACAS on 2 August 2017. The claimant indicated that she was unable to take any steps in relation to her Employment Tribunal claim. She could not “think straight” and had too much going on in her mind, suffering from depression. The claimant was still taking the medication, and at some stage was assessed by the ESA as not being able to work due to her medical condition of depression.

9. Unfortunately, the claimant did not produce any medical evidence to support her complaint. The Tribunal on balance accepted the claimant's explanation that she was too unwell suffering with severe depression to take any steps prior to making contact with ACAS on 2 August 2017. Thereafter, the Tribunal was satisfied that the claimant, in issuing proceedings on 15 September 2017, less than three weeks after the issue by ACAS of the early conciliation certificate, presented the complaint within such further period as the Tribunal considered reasonable given the claimant's mental health condition.

10. In arriving at this decision, the Tribunal took into account the strict time limits in unfair dismissal complaints. Section 111(2)(a) of the Employment Rights Act 1996 (“ERA”) provides that employees who have the right to claim unfair dismissal will generally lose that right if they fail to present their claim to a Tribunal before the end of three months beginning with the effective date of termination. Time can be extended as a result of the ACAS Early conciliation period. Tribunals have a discretion to extend the time limit if the claimant can show that it was not reasonably practicable to put the claim in on time, and that the claim had been submitted within a reasonable time of it becoming practicable to present the complaint – section 111(2)(b) ERA.

11. The Tribunal is aware of in accordance with the Court of Appeal decision in **Palmer & another v Southend-on-Sea Borough Council [1984] ICR 372** when a general review of the authorities was conducted, the Court of Appeal concluded that “reasonably practicable” does not mean “reasonable”, which would be too favourable to employees, and does not mean “physically possible” which would be too favourable to employers, but means something like “reasonably feasible”. Lady Smith in **Asda Stores Limited v Kausar EAT 0165/07** clarified the test as “not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done”.

12. In relation to the legal tests, the Tribunal was satisfied on balance, despite the claimant not producing supporting medical evidence that she had and continues to experience a debilitating mental health illness which prevented her from submitting her claim in time. The Tribunal was satisfied on balance that the claimant had been unable to take the necessary steps directly as a result of her depression. The Tribunal's view is further supported by the fact the claimant was assessed on ESA as being unable to work with depression. In short, the claimant's serious mental health problems made it not reasonably practicable for her to have put in a timeous complaint and she was unable to cope with putting in an Employment Tribunal claim, which she had submitted as soon as she was sufficiently to do so and only with the support of friends.

13. Turning to the claimant's claims, it was confirmed that her claim was one of unfair dismissal and included automatic unfair dismissal under regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 which provides that a dismissal is automatically unfair if the sole or principal reason for the dismissal is the transfer – regulation 7(1).

14. The correspondence provided to the Tribunal from the respondent shows it to be a registered charity at the North Divisional Office, Beech House, Willow Court, Main Street, Garforth, LS25 1HB, the address on which the claim was served. No response has been received by the Tribunal, the deadline date being 19 October 2017.

15. Rule 21 of the Tribunal Rules 2013 provides that where a respondent has failed to present a response a rule 21 judgment can be entered. Presidential guidance was issued on 4 December 2013 entitled “Rule 21 Judgment” which sets out the procedure that will “normally” apply. In accordance with this rule the Tribunal took into account the fact that no response had been submitted and the content of the ACAS email to the claimant sent 1 September 2017 in which the respondent informed ACAS the claimant was not dismissed despite the suggestion to the contrary in the P45 that confirmed the leaving date was 28 February 2017.

16. On the information provided by the claimant, it was possible to determine the claim without a liability hearing, and the Tribunal was satisfied on balance the claimant had been unfairly dismissed. The Tribunal was unable to quantify remedy; the claimant did not have details of her salary slips, gross and net pay. It is clear to the Tribunal that the claimant's loss of earnings may be affected by the ESA payments she has received (benefits of £125 per week) and the fact that she is unable to seek alternative employment due to her medical condition of depression. It was suggested the claimant seek advice from the Citizens Advice Bureau concerning her Schedule of Loss, taking into account the gross and net pay and the fact that she is unable to seek alternative work due to ill-health. The recoupment regulations will apply to the loss of earnings claim given the fact the claimant is in receipt of benefits.

17. It was agreed the claimant would prepare a breakdown of her gross and net losses, referred to as a Schedule of Loss, and shall send this to the Tribunal together with supporting documentation, such as three months of payslips, in order that a one hour remedy hearing can take place at a date agreed with the claimant on 3 April 2018 at 10.00am.

18. The Tribunal's judgment is in respect of liability only. Rule 21(3) of the Employment Tribunal Rules prevents the respondent from taking part in the remedy hearing except to the extent permitted by the Employment Judge. The respondent will indicate to the Tribunal within 14 days of receiving this judgment whether or not it intends to take part in the remedy hearing, and if so the respondent will provide a counter Schedule of Loss in response to the claimant's Schedule of Loss which will be sent to the respondent and copied to the Tribunal no later than 8 January 2018. The respondent will send to the claimant and copy to the Tribunal a counter Schedule of Loss no later than 16 January 2018.

19. The claimant will also produce evidence relating to her benefits and medical evidence relating to her inability to work.

Employment Judge Shotter

Date 6 December 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
12 December 2017

FOR THE TRIBUNAL OFFICE