



EMPLOYMENT TRIBUNALS

Claimant: Ms K Anderson

Respondent: Wirral Borough Council

HELD AT: Liverpool

ON: 27 November 2017

BEFORE: Employment Judge Holbrook

REPRESENTATION:

Claimant: In person

Respondent: Mr P Jewell, Solicitor

JUDGMENT having been sent to the parties on 29 November 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

INTRODUCTION

1. By an ET1 claim form presented to the Tribunal on 2 May 2017, Ms Karen Anderson makes claims for unfair constructive dismissal and disability discrimination against her former employer, Wirral Borough Council. As originally presented, the discrimination claim was based upon Ms Anderson's association with her mother, for whom she had caring responsibilities, and who is alleged to be a disabled person for the purposes of the Equality Act 2010.

2. Following a case management hearing conducted by Employment Judge Horne (at which Ms Anderson had been legally represented), a further preliminary hearing was listed to determine whether the above claims had been presented in time and, if so, whether Ms Anderson's mother's health condition satisfied the statutory definition of disability. That hearing took place on 27 November 2017 and, on this occasion, Ms Anderson represented herself.

3. In addition to the preliminary issues identified by Employment Judge Horne, the hearing considered Ms Anderson's application to amend her ET1 to introduce new claims of disability discrimination and victimisation based upon her own alleged

disability. The Tribunal heard oral evidence from Ms Anderson and from Ms Maria Saleemi for the respondent. The Tribunal also heard submissions from both parties and an oral judgment with reasons was given at the conclusion of the hearing.

FACTS

4. The following is a brief summary of the key facts which are relevant to the issues to be determined on preliminary hearing. For ease of presentation, however, additional facts are mentioned in the Conclusions section of these reasons.

5. Ms Anderson resigned from her employment as a social worker with the respondent local authority by giving written notice in September 2016. The effective date of termination of her employment was on either 7 or 8 November 2016. In the periods both before and after the termination of her employment, Ms Anderson sought advice from her trade union. However, it was not until 18 April 2017 that she contacted ACAS for the purposes of the early conciliation process which is a mandatory prerequisite of presenting a claim to the Tribunal. ACAS issued an early conciliation certificate two days later and, as already stated, Ms Anderson presented her claim to the Tribunal on 2 May 2017.

6. The possibility that Ms Anderson's claims had been presented out of time was readily apparent when the case came before Employment Judge Horne for a case management hearing. In addition to listing the case for a preliminary hearing on the "out of time" issue, Employment Judge Horne ordered Ms Anderson to file further and better particulars of her claims. In doing so, Ms Anderson now seeks to add new claims under the Equality Act 2010, based on her own alleged status as a disabled person. Essentially, Ms Anderson claims that the respondent discriminated against her, and victimised her, by deliberately failing to deal with her grievances within a reasonable timescale. She says that this failure continued beyond the effective date of termination of her employment.

LAW

7. A claim for unfair dismissal must be presented to the Tribunal before the end of the period of three months beginning with the effective date of termination of the claimant's employment, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the claim to be presented before the end of that period of three months (see section 111 of the Employment Rights Act 1996).

8. A claim for unlawful discrimination must be presented to the Tribunal before the end of the period of three months starting with the date of the act to which the claim relates, or within such other period as the Tribunal thinks just and equitable (see section 123 of the Equality Act 2010).

9. The above time limits for presenting a claim may (in effect) be extended in a case where the mandatory early conciliation process applies (see section 207B of the 1996 Act and section 140B of the 2010 Act). However, this is only possible if the claimant has started the early conciliation process (by providing ACAS with the prescribed information in relation to her claim) before the primary time limit for presenting a claim to the Tribunal has expired.

CONCLUSIONS

10. Ms Anderson accepts that she did not present her ET1 to the Tribunal within three months of the effective date of termination of her employment. Nor did she initiate the early conciliation process by contacting ACAS within that period. It follows that the Tribunal has no jurisdiction to determine her claim for unfair dismissal unless it is satisfied: i) that it was not reasonably practicable for Ms Anderson to present her claim within the primary limitation period; and ii) that she did in fact present it within such further period as was reasonable.

11. At the case management hearing conducted by Employment Judge Horne, Ms Anderson's legal representative had confirmed that none of the acts of alleged discrimination which were the subject of Ms Anderson's claim (as originally presented) had occurred later than the effective date of termination of her employment. On that basis, it follows that Ms Anderson's claim for disability discrimination was also presented outside of the normal three-month time limit. Consequently, the Tribunal only has jurisdiction to determine that claim if it was nevertheless presented within such period as the Tribunal thinks just and equitable.

12. As far as the claim for unfair dismissal is concerned, Ms Anderson argues that it was not reasonably practicable for her to present that claim within the usual period of three months. Although there was no physical impediment to Ms Anderson presenting her claim in time, she maintains that, as at the effective date of termination of her employment, she had been unaware, not only of the relevant time limits for presenting a claim, but also of the very possibility of presenting a claim to an Employment Tribunal. I do not find this assertion to be credible. When she resigned, Ms Anderson complained to the respondent that she had been harassed and discriminated against. She thus appears to have had at least some familiarity with concepts for which a means of redress is provided by the Equality Act. This is perhaps unsurprising given Ms Anderson's professional status and, for the same reason, I am not persuaded that she was entirely unaware of the right to make a claim for unfair dismissal. I do not accept that Ms Anderson genuinely believed there to be no means of redress available to her other than the submission of a grievance to her employer. In any event, the possibility of making a Tribunal claim would have easily been revealed by some simple research which Ms Anderson was quite capable of undertaking.

13. Nor do I accept that the continuation of the respondent's consideration of Ms Anderson's grievances beyond the date of termination of her employment impeded her ability to present a claim to the Tribunal in time. Ms Anderson appears to believe that the respondent deliberately stalled the grievance process in order to delay the making of any claim by her until the statutory time limit had expired. There appears to be no credible evidence that this was the case. Ms Saleemi explained the reasons for any delays in her evidence to the Tribunal. Ms Saleemi's evidence was credible and was not challenged by Ms Anderson in cross-examination.

14. Even if it was not practicable to present the unfair dismissal claim within the primary limitation period (and, for the reasons explained above, I do not consider this to be so), I do not consider that the claim was presented within such further period as was reasonable. Ms Anderson has confirmed that, by no later than mid-February 2017, she knew that a claim could be presented to a Tribunal and that there is a

three-month time limit for doing so. Nevertheless, Ms Anderson did not contact ACAS until 18 April 2017. Moreover, once ACAS had issued her with an early conciliation certificate, she still did not present her claim to the Tribunal for almost a fortnight. Ms Anderson now says that these delays are explained by the fact that she did not think that an unrepresented claimant could present a Tribunal claim, and that she had difficulty in finding a representative to assist her in presenting a claim. Again, I do not find this explanation credible; particularly in view of the fact that Ms Anderson was being advised by her trade union. If it is actually the case that Ms Anderson found out about the Tribunal process for the first time in mid-February, then she should have endeavoured to present her claim within a matter of days thereafter. Instead, she allowed a period of a further six weeks or so to elapse. In my view, that was unreasonable.

15. I have considered whether it would be just and equitable to permit Ms Anderson's disability discrimination claim to proceed notwithstanding the fact that it was not presented within the primary limitation period. Having considered the prejudice which each party would suffer as a result of the Tribunal's decision on this issue, I have concluded that it would not be just and equitable to permit the claim to proceed. In coming to this view, I have taken account of the fact that responding to the claim would be particularly burdensome for the respondent: some of the alleged acts of discrimination occurred a number of years ago and some potential witnesses are no longer employed by the respondent and their evidence might therefore be difficult to obtain. I have also taken account of the fact that Ms Anderson did not act promptly in presenting her claim, even after the date on which she says that she became aware of the possibility of presenting it.

16. Finally, I have considered whether Ms Anderson should be permitted to amend her ET1 in order to make the claims described in paragraph 6 above. In determining whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

17. The proposed amendment in this case is a substantive one: Ms Anderson seeks to introduce a new cause of action and to complain, for the first time, about the respondent's conduct following the end of her employment. The Tribunal must therefore consider, among other things, whether the proposed new claim is in time, and, if it is out of time, whether time should be extended on a just and equitable basis.

18. To the extent that the proposed new claim relates to acts which are alleged to have occurred before the end of Ms Anderson's employment, it is clearly out of time and is subject to the considerations mentioned in paragraph 15 above, which indicate that the amendment should be refused. To the extent that the proposed new claim relates to acts which are alleged to have occurred since Ms Anderson's employment ended, it is possible that the claim (or parts of it, at least) would be in time. Nevertheless, I am concerned that the suggestion of post-termination discrimination may have been introduced at this stage simply to ensure that at least part of Ms Anderson's claim is within time. My concern in this regard arises, in particular, from the fact that Ms Anderson was inconsistent in what she said at the

preliminary hearing about the period or periods to which her complaints relate. In addition, however, I am also concerned that the merits of the proposed claim appear to be weak: the proposed claim is again based upon an assertion that the respondent has deliberately delayed dealing with Ms Anderson's grievances. As I have already noted, there seems to be no credible evidence to support this contention, and so it appears to me that such a claim would have no reasonable prospect of success. For all these reasons, I therefore consider that Ms Anderson should be refused permission to amend her ET1.

Employment Judge Holbrook

Date 8 December 2017

REASONS SENT TO THE PARTIES ON

15 December 2017

FOR THE TRIBUNAL OFFICE