



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Ainsbury
Respondent: CATERed Ltd
Heard at: Plymouth **On: Friday 16 February 2018**
Before: Employment Judge Matthews

Representation:
Claimant: Miss C Davies of Counsel
Respondent: Ms D Grennan of Counsel

RESERVED JUDGMENT

Mrs Ainsbury's complaint of unfair dismissal was not presented to an employment tribunal before the end of the period specified in section 111 of the Employment Rights Act 1996. The Tribunal has no jurisdiction to hear that complaint which is, therefore, dismissed.

REASONS

INTRODUCTION

1. This is a Preliminary Hearing listed by Order of Employment Judge Goraj sent to the parties on 6 December 2017 following a Preliminary Hearing on 29 November 2017 (the "Order"). The Order can be seen at the front of the bundle.
2. By a claim form presented on 16 September 2017 Mrs Jeanette Ainsbury brought a complaint of unfair dismissal against the Respondent Company.
3. The Company denies the claim. The Company also raises jurisdictional and preliminary issues, which are now to be decided.

4. The Order sets out the preliminary issues for determination as follows:
 1. The effective date of termination of the Claimant's employment with the Respondent (namely whether it was 9 March 2017, 1 June 2017 or some other date).
 2. Whether in light of the findings in respect of 1 above, the Claimant's unfair dismissal claim was presented to the tribunals within the relevant statutory time limit.
 3. If not, whether it was reasonably practicable for the Claimant to have presented her complaint of unfair dismissal within such statutory time limit.
 4. If not, whether such complaint was presented within a reasonable period of time thereafter.
 5. If the tribunal has jurisdiction to entertain the claimant's complaint of unfair dismissal to give directions for the further conduct of the claim.
5. The parties have an agreed position on the issues. If Mrs Ainsbury was dismissed with effect from 9 March 2017 (and that was the "effective date of termination" or "EDT") her claim should have been lodged on or before 8 June 2017. There is no extension for conciliation because this was not begun in time. However, if the EDT is 1 June 2017, the claim should have been lodged on or before 15 September 2017 (allowing for a fifteen days extension for the conciliation period). The claim, as already noted, was lodged on 16 September 2017.
6. I heard from Mrs Ainsbury who produced a written statement. On behalf of the Company I heard evidence from Ms Anne-Marie Sowden (Commercial Operations Manager) and Ms Rachel Ryles (Employee Relations Specialist). Both produced written statements. There was a bundle of documentation. All references in this Judgment are to pages in the bundle unless otherwise specified. Miss Davies and Ms Grennan both produced comprehensive and helpful skeleton arguments.
7. The Hearing had been set down for three hours. There was no difficulty in hearing the evidence and argument in that time allowance but a further hearing later on the same day meant that I had to reserve judgment in this case.

FACTS

8. I confine myself to the fact finding necessary to address the jurisdictional and preliminary issues which I must decide.
9. Mrs Ainsbury started her employment with the Company as a Community Meals Driver on 12 May 2004.
10. On 26 August 2016 Mrs Ainsbury was diagnosed with a back condition, being sciatica and a compressed nerve in her spine. Mrs Ainsbury was certified as unfit to drive, was signed off sick and did not thereafter return to work.
11. On 3 March 2017 Mrs Ainsbury received a letter dated the previous day. The letter required Mrs Ainsbury to attend a capability meeting on 9 March 2017.
12. Mrs Ainsbury duly attended the meeting. There are minutes at 31b-31f. Unfortunately, that morning Mrs Ainsbury's daughter was rushed into Derriford Hospital in Plymouth with suspected appendicitis. Mrs Ainsbury was also scheduled to have spinal surgery on the following day, 10 March 2017. Understandably, as Mrs Ainsbury says (WS8), she was "extremely anxious and in a distressed state, and with the benefit of hindsight, I was really not thinking straight throughout all of this."
13. The upshot of the meeting was that Mrs Ainsbury was to be dismissed on ill health capability grounds. There is a dispute about some of what happened at the meeting. In essence the dispute is about whether Mrs Ainsbury agreed that the dismissal would be with immediate effect and she would receive (non-taxable) pay in lieu of notice (as reflected in the minutes) or that Mrs Ainsbury's last date of employment would be 1 June 2017. In my view, I do not need to decide this conflict of evidence for present purposes.
14. A letter from Ms Sowden dated 9 March 2017 confirming the outcome was e-mailed to Mrs Ainsbury (29-30). The letter included this:

"You are entitled to 12 weeks' notice and therefore your last day of employment with CATERed Limited will be Thursday 1st June 2017. For your notice period you will revert to full pay and will receive your annual leave entitlement up to 1st June 2017, this will include any leave you have accrued while being absent.

I do want to ensure that you receive support and regular contact from Julie Robertson during your notice period, and so regular meetings will take place to facilitate this."
15. The letter is at odds with what the Company says was agreed at the meeting on 9 March 2017. It is also at odds with what happened in

practice. Mrs Ainsbury was paid a lump sum in lieu of notice in the March 2017 pay run. There are some arguments (revolving around the refund of pension contributions) that Mrs Ainsbury would have known that the Company's letter included a mistake about the last day of her employment. Certainly, having heard from Mrs Ainsbury, I am by no means persuaded that she did not understand that the Company had simply made a mistake in its letter of 9 March. Notwithstanding all this, in my view Mrs Ainsbury was entitled to rely on the content of the letter and treat her last day of employment as being 1 June 2017.

16. Mrs Ainsbury duly underwent seven hours of surgery on 10 March 2017. The surgery went very well and, happily, as Mrs Ainsbury comments (WS13) "Within three weeks, I was able to drive, and I have had no repercussions since."
17. Mrs Ainsbury says that she concentrated on her recuperation in the weeks following her surgery. Over time she says she became convinced that she had been dismissed unfairly. On 26 July 2017 Mrs Ainsbury says she called the ACAS helpline. Mrs Ainsbury was directed to the early conciliation online form, which she says she completed on 31 July 2017. This date of receipt by ACAS is confirmed by the Early Conciliation Certificate (1). Having received an automated e-mail response, Mrs Ainsbury says she spoke with ACAS's Mr Paul Staddon on 1 August. The Early Conciliation Certificate was issued on 15 August 2017.
18. Mrs Ainsbury obviously spoke to Mr Staddon again because she says that, the early conciliation certificate having been issued, Mr Staddon advised that she needed to issue a claim form. Mrs Ainsbury says that (WS 17) "I wasn't aware of any strict deadline for doing so."

APPLICABLE LAW

19. Section 97 of the Employment Rights Act 1996 (the "ERA"), so far as it is relevant provides:

"97 Effective date of termination

(1) Subject to the following provisions of this section, in this Part "the effective date of termination"-

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by the employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect,"....

20. Section 111 of the ERA, so far as it is relevant, provides:

“111 Complaints to employment tribunal”....

“(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal-

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A)”....“section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a)”

21. Section 207B of the ERA, so far as it is relevant, provides:

“207B Extension of time limits to facilitate conciliation before institution of proceedings

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).”....

“(2) In this section-

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period

beginning with Day A and ending one month after Day B, the time limit expires at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.”

22. I was referred to Westward Circuits Ltd v Read [1973] 2 AER 1013, Dedman v British Building & Engineering Appliances Ltd 1974 ICR 53, Wall's Meat Co Ltd v Khan [1978] ICR 52, Porter v Bandridge Ltd [1978] IRLR 271, Avon County Council v Haywood-Hicks [1978] IRLR 118, Riley v 1. Tesco Stores Ltd 2. Greater London Citizens Advice Bureaux Service Ltd [1980] IRLR 103, Adams v GKN Sankey Ltd [1980] IRLR 416, Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119, Marley (UK) Ltd v Anderson [1994] IRLR 152, Schultz v Esso Petroleum Co. Ltd [1999] ICR 1202, Northumberland County Council v Thompson UKEAT/209/07, Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10, John Lewis Partnership v Mr A P Charman UKEAT/0079/11 and Tanveer v East London Bus & Coach Co Ltd UKEAT/0022/16.

CONCLUSIONS

23. The parties agree that Mrs Ainsbury's complaint of unfair dismissal was not presented to the tribunal before the end of the period of three months specified in section 111(2)(a) of the ERA including any extension for conciliation. The only difference between them is whether the presentation was one day late or over three months late.
24. As I have explained in paragraph 19 above, in my view Mrs Ainsbury was entitled to rely on the Company's letter of 9 March and treat the last day of her employment as 1 June 2017. That was the EDT. We are, therefore, dealing with late presentation of a day.
25. I must, therefore, decide whether or not it was reasonably practicable to present the claim in time and, if it was not, whether it was presented within such further period as the Tribunal considers reasonable? The onus of proving that presentation was not reasonably practicable in time is on Mrs Ainsbury.
26. On the evidence, Mrs Ainsbury's case is that it was not reasonably practicable for her to present the unfair dismissal claim in time because she was unaware of the applicable time limits. In her skeleton argument Miss Davies argues that Mrs Ainsbury's recovery from surgery and other medical issues affecting Mrs Ainsbury and her daughter, together with the resultant stress should also be taken into account in this context. I cannot see any other factors in play.

27. It seems to me that Mrs Ainsbury had ample opportunity to enquire about her rights and any time limits applicable to exercising them. In her evidence Mrs Ainsbury did not make much of her medical history and that of her daughter. These were more or less behind her by the summer of 2017. In any event, she was able to contact ACAS on 31 July 2017 and follow the process through. By that stage, at the latest, Mrs Ainsbury knew she had a right not to be unfairly dismissed. Mrs Ainsbury's evidence that she "wasn't aware of any strict deadline" hints that she might have thought about the possibility of some deadline. Mrs Ainsbury seems not to have taken the opportunity of contact with ACAS to find out about time limits. No explanation is offered for this. Mrs Ainsbury was at fault in not making an enquiry on the subject as, reasonably, she should have done.
28. Mrs Ainsbury has failed to show that it was not reasonably practicable for her to present her unfair dismissal claim within the period allowed by the legislation. Accordingly, an employment tribunal cannot consider that complaint and it is dismissed.
29. It is not, therefore, necessary for me to decide whether or not the complaint was presented within such further period of time as was reasonable.

Employment Judge Matthews

Date: 26 February 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

8th March 2018
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FOR THE TRIBUNAL OFFICE