



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Pybis

Respondent: Adecco UK Limited

HELD AT: Liverpool

ON: 31 January 2018

BEFORE: Employment Judge Holbrook
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr C Crow, Counsel

JUDGMENT having been sent to the parties on [] February 2018 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 5 October 2017, Mrs Joanne Pybis made various claims under the Employment Rights Act 1996 and under the Equality Act 2010 against the respondent, her former employer. In particular, Mrs Pybis claims unfair dismissal and notice pay, and unlawful discrimination on the grounds of pregnancy or maternity. She also claims a redundancy payment.

2. An unusual feature of this case is that Mrs Pybis' claims relate to a period of employment which ended in 2013. It is clear that her claims have been presented well outside the usual limitation periods. A preliminary hearing was therefore held to determine which (if any) of these claims have been presented in time (bearing in mind the Tribunal's powers to 'extend' time in this regard in certain circumstances). That was the only issue dealt with at the preliminary hearing: to the extent that any of Mrs Pybis' claims are in time (and so are permitted to proceed beyond this hearing) their merits will need to be considered separately by the Tribunal.

3. The Tribunal was provided with a bundle of documentary evidence for the preliminary hearing. I also heard oral evidence from Mrs Pybis and from Ms V Aspinall, an employee of the respondent.

FACTS

4. The primary facts giving rise to these proceedings are summarised below. However, for ease of presentation, additional facts are referred to in the 'Conclusions' section of these reasons.

5. Mrs Pybis was employed by the respondent from 2006. Her employment ended on or about 1 October 2013. During the following days and weeks, Mrs Pybis took advice about her legal rights from a number of sources; including a local firm of solicitors, a citizens' advice bureau and ACAS. She was aware of her right to present a claim to the Tribunal and of the time limits for doing so. She was also aware that a claim for unfair dismissal and/or discrimination then attracted a £250 application fee, with a hearing fee of £950 potentially becoming payable thereafter. However, Mrs Pybis says that she was then unaware of the possibility of applying for fee remission.

6. On 26 July 2017, the Supreme Court ruled in R (on the application of Unison) v Lord Chancellor [2017] UKSC 51 that the statutory regime of Employment Tribunal fees which had been in force since 2013 was unlawful. The Court quashed the fees regime with immediate effect and its decision received extensive media coverage at the time.

7. On 10 September 2017, Mrs Pybis emailed the administration at the Manchester Employment Tribunal asking whether it would be possible for her then to present a claim relating to events which occurred in 2013. She received a reply to this enquiry from the Tribunal on 25 September, when she was informed that an Employment Judge had advised that a claim could indeed be presented, but that issues arising from its late presentation would be considered judicially thereafter.

8. Mrs Pybis contacted ACAS to initiate the 'early conciliation' process on 2 October, and ACAS issued her with an early conciliation certificate on 4 October 2017. Mrs Pybis presented her claim to the Tribunal the following day.

LAW

9. Under section 111 of the Employment Rights Act, the Tribunal cannot consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination of the claimant's employment or, alternatively, within such other 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.

10. The expression "reasonably practicable" means reasonably feasible or 'doable'. The burden of proving that presenting the claim was not reasonably feasible rests on the claimant and the question is one of fact for the Tribunal to decide taking all the circumstances into account. It will consider the substantial cause of the failure to comply with the time limit.

11. There is a different test for extending time in Equality Act claims, which is whether it is “just and equitable” to hear a claim presented more than three months after the act of alleged discrimination on which the claim is founded. The question whether it is just and equitable to extend time requires a consideration of the prejudice each party would suffer as a result of the decision and regard to all the circumstances of the case including (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the respondent had cooperated with any requests for information; (d) the promptness with which the claimant acted once she knew of the facts giving rise to the claim; and (e) the steps taken to obtain professional advice once she knew of the possibility of taking action.

CONCLUSIONS

12. As far as Mrs Pybis’ claim for a redundancy payment is concerned, the respondent concedes that, because Mrs Pybis had made a claim to it in writing for such a payment within six months of the end of her employment, that claim is actually in time. I agree. Although it accepts that this claim is in time, the respondent nevertheless disputes that Mrs Pybis is actually entitled to receive a redundancy payment. I have made a separate case management order requiring the respondent to file a response to the redundancy payment claim. Additional case management orders will be made by the Tribunal once that response has been received.

13. As far as Mrs Pybis’ other claims are concerned, however, the respondent argues that all of these are out of time and that the Tribunal should not extend time for presenting them in the circumstances of this case.

14. Mrs Pybis says that the substantial reason why she did not present her claims initially is that she had been unable to pay the Tribunal application and hearing fees which were then applicable, and that she had been unaware of the possibility of applying for fee remission. She therefore asks the Tribunal to extend time for presentation of her remaining claims in order that they may now proceed.

15. On the basis of the evidence presented to me, however, I am satisfied that, during the three months following the end of her employment, Mrs Pybis did have the financial means to pay the relevant Tribunal application and hearing fees. Those fees were, of course, of a significant amount and it is not at all surprising that potential claimants might have chosen not to incur them. There are numerous other household expenses which a family might – quite reasonably – choose to prioritise at the cost of foregoing a potential Employment Tribunal claim. However, the fact that a potential claimant has made this choice does not necessarily lead to the conclusion that it would not have been reasonably feasible for her to present a claim and to pay the associated fees.

16. I heard that, between them, Mr and Mrs Pybis had a net monthly income of about £2,300 during the relevant period, even after the end of Mrs Pybis’ employment with the respondent. They had a mortgage and other regular loan repayments, which together amounted to about £700 per month, as well as other usual household expenses. It is unclear whether Mr and Mrs Pybis then had any equity in their home, but they did have cash savings of at least £1,000 (and possibly

as much as £3,000). Mr and Mrs Pybis do not appear to have been over-indebted in terms of their credit cards, and indeed they had available credit on those cards in the region of £4,000 - £5,000 at the time in question. During October 2013, Mrs Pybis bought jewellery to the value of £450 (which she says she bought as Christmas presents). Mr and Mrs Pybis also had a Sky TV subscription of £100 per month and they were able to spend modest sums on Internet gambling sites.

17. The choice of how Mr and Mrs Pybis spent their money was one which was entirely for them, and I make no criticism at all of the choices they made. However, even though I accept that choosing to pay Tribunal fees would have required Mrs Pybis to make economies elsewhere, I do not accept that it was not, in fact, reasonably feasible for her to pay those fees. The application fee could have been paid out of savings, or by credit card, and Mrs Pybis could have started to make provision for the anticipated hearing fee, which would not have become payable for several months after the claim was made.

18. Mrs Pybis maintains that none of the professionals whom she consulted for advice in 2013 told her of the possibility of applying to extinguish, or at least reduce, the applicable Tribunal fees by means of the government's fee remission scheme. Even so, it is disappointing that Mrs Pybis did not investigate and discover that possibility for herself. I consider that it would have been reasonable for her to do so. From the evidence available at the preliminary hearing, it is not possible to know whether a fee remission application would have been successful in this case. Certainly, it appears that Mrs Pybis would not have been entitled to full fee remission. However, she may well have been granted partial remission of the fees and, in my view, it is not possible for Mrs Pybis now to argue that she could not have afforded the fees when she did not ascertain whether, and to what extent, those fees could have been reduced.

19. For these reasons, I conclude that it was reasonable practicable for Mrs Pybis to present her claims under the Employment Rights Act to the Tribunal within the period of three months beginning with the effective date of termination of her employment. It follows that those claims (other than the claim for a redundancy payment) are out of time and should be dismissed.

20. Turning to the claims made under the Equality Act, it is clear that the respondent would be significantly prejudiced if Mrs Pybis' discrimination claims were permitted to proceed more than four years out of time. Whilst I accept that Mrs Pybis still has possession of various relevant email evidence, the fact remains that several individuals who would have been called as key witnesses for the respondent have now left its employment. It is not clear that any of those individuals would now be available to give evidence in the proceedings or, of course, that they would now be able to recall relevant events in sufficient detail to do so anyway. Obviously, Mrs Pybis will herself suffer prejudice if she is unable to pursue her claims but, in my view, this is a natural consequence of her decision not to pay Tribunal fees in 2013. It is also a consequence of her omission to investigate the possibility of fee remission at that time. I therefore conclude that it would not be just and equitable to permit the claims under the Equality Act to be presented as at 5 October 2017.

Employment Judge Holbrook

Date 9 February 2018

REASONS SENT TO THE PARTIES ON

13 February 2018

FOR THE TRIBUNAL OFFICE