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THE EMPLOYMENT TRIBUNALS

Claimant: Ms H Roberts

Respondent: East London NHS Foundation Trust

Heard at: East London Hearing Centre

On: 30 May 2018

Before: Employment Judge Speker, OBE DL

Representation

Claimant: In person

Respondent: Ms N Motraghi (Counsel)

JUDGMENT ON PRELIMINARY HEARING

1 This claim was presented out of time. It was reasonably practicable for it to have been presented in time. The claim is dismissed.

REASONS

1 This Preliminary Hearing is to determine whether the claims by Ms Helen Roberts are within the statutory time limit in order that the Tribunal has jurisdiction. This hearing was listed as a result of a Preliminary Hearing held on 4 April 2018 before Employment Judge Goodrich. At that hearing the Employment Judge stated that it appeared that the date by which the Claimant should have presented her claim was 2 February, 2018 subject to the Tribunal's ability to extend the time.

2 At the beginning of this hearing I asked if both parties agreed that 2 February 2018 was the last date upon which the claim could have been presented and both the Claimant and counsel for the Respondent agreed. Therefore, it was not necessary to examine the chronology as to the effective date of termination. It was accepted that the last date of submission following the ACAS EC conciliation certificate reference number R216977/17/17 issued on 2 January 2018 was the 2 February 2018.

3 I heard evidence from the Claimant who also supplied a letter written by her to the Respondent's solicitor dated 12 July 2018 pursuant to the Case Management Order number 2 made on 4 April 2018. The Claimant referred to a number of factors set out in her letter of resignation to the Respondent on 11 August 2017 in which she claimed constructive dismissal. Her last day of work with the Respondent was 21 September 2017 and her contractual period with the Respondent ended on 6 October 2017. She commenced new employment with another Trust before that date, namely on 24 September 2017.

4 Initially she had been undecided as to whether she would proceed with a claim in the Employment Tribunal. She had experienced various health difficulties which were attributed to stress related illness concerned with her work with the Respondent. Her GP had informed her that it may take a number of further months for her to be fully recovered. However, she had been able to take up new employment in a challenging post with another trust, as well as commencing a monthly course in psychotherapy at the Tavistock. She submitted a formal grievance to the Respondent Trust towards the end of 2017 regarding the issues which she had raised with the Trust during her employment and which she said were the reasons she had not continue working for the Respondent. The grievance related to matters which had raised her professional concerns. That grievance was ultimately resolved by the Respondent at the end of February 2018 following the commencement of these proceedings. It was not suggested that awaiting the outcome of the investigation into the grievance was the reason why the lodging of the Employment Tribunal application was delayed.

5 In December 2017 the Claimant decided that she would indeed pursue an application to the Tribunal. She obtained advice from her representative at the Royal College of Nursing who was to refer the matter to the RCN Legal Team. She was subsequently informed that the legal team would not be assisting her as they felt that it was "too late". This was set out in an email which was not produced at this hearing but it apparently referred to the statutory time limits for commencing Employment Tribunal applications specifically referred to a three month time limit and also made reference to the need for an ACAS certificate with the possibility of a one month extension of time.

6 The Claimant said she believed that it was in December that she resolved to pursue an application and took action herself to refer the matter to ACAS. This showed on the face of the EC certificate that the referral had been on 7 December 2017 and the certificate was issued on 2 January 2018. The Claimant, having been told that the RCN Legal Team would not be assisting her, began to complete the ET1 application form but found this stressful and put it off to a later time. Subsequently she wished to check the precise date upon which the time would expire and she did this by telephoning ACAS in order to ascertain whether the one month extension would run from the end of the initial period or from the date of the ACAS certificate. The evidence of Ms Roberts was that she was told by a gentleman at ACAS that the date would run from the initial expiry namely 6 November and this would mean that her application to the Tribunal must be filed by 6 February. The Claimant explained that her reference to 5 February was following her attendance at the previous hearing when she was told about the concept of there being a "minus one day" in time limit periods.

7 Ms Roberts said that she had not found it feasible to obtain advice from other advice agencies and that her enquiries with a solicitor indicated that she would not be able to afford the fees which would be involved. She referred also to the fact that as a lay person she was not familiar with the law and that she felt it was reasonable for her to rely upon what was communicated to her by ACAS. She had double checked this, to make sure that what she was told was entirely reliable. When it was put to her by Ms Motraghi that the document from ACAS had “Conciliation Explained” specifically makes it clear that conciliators cannot decide or advise upon time points, Ms Roberts stated that she felt that it was reasonable to rely upon ACAS as an official body and that is what she had done.

Submissions

8 On behalf of the Respondent Ms Motraghi argued that it had been reasonably practicable for the complaint to have been presented by 2 February 2018 and therefore the claim was out of time. She argued that reliance upon advice from ACAS did not mean that it was not reasonably practicable to present the claim in time, the onus in these cases is upon the Claimant. The earlier stresses on the Claimant from her work with the Respondent and her health issues were resolved by September 2017 when she had been able to commence a new job and enrol on a psychotherapy course. She had contacted ACAS and herself lodged a notification on 7 December 2017. She had had support from an RCN adviser and email advice from their legal team. She was aware from early on that there was a three month time limit and that an ACAS certificate provided an extension of that time. As Ms Roberts was an educated professional person she could have prioritise the potential claim to ensure that she was suitably advised and sure as to the time which was available to her to present the claim.

9 Ms Motraghi referred me to the well known case of *Marks & Spencer Plc v Williams-Ryan* [2005] EWCA Civ. 470 which sets out a number of well known authorities on the time issue which include *Dedman v British Building and Engineering Appliances Ltd* [1974] 1 All ER 520 CA; *Palmer v Southend-on-Sea Borough Council* [1984] 1 All ER 945 CA; *Riley v Tesco Stores Ltd* [1980] ICR 323 CA and *Wall's Meat Co Ltd v Khan* [1979] ICR 52 CA. She emphasised that this was not a case where there was reliance upon a solicitor or other professional legal adviser and that the reference to the conversation with ACAS did not mean that that case came within the test cases relating to reliance upon a professional adviser.

10 On her own behalf, Ms Roberts repeated what she had said in evidence namely that she had undergone a period of stress and ill health related to her employment and she had found it difficult to deal with the completion of the Employment Tribunal claim form. She had relied upon guidance given to her by ACAS and this was the reason why, when she submitted her claim, she believed that it was in time. She therefore acknowledged that the claim was late, but argued that it should be accepted.

The Law

11 The legal test which I must apply here is that set out in Section 111(2) of the Employment Rights Act 1996 which provides as follows:

“Employment tribunals shall not consider a complaint of unfair dismissal 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.”

12 Various guidance has been provided by the Courts in looking at the question of reasonable practicability. Whether it was reasonably practicable for a complaint to be presented in time is a matter of fact for the Tribunal taking into account all the circumstances of the case. These circumstances can be wide and can include whether an employee was physically prevented from complying with the limitation period. It may also be relevant to investigate whether at the time of dismissal the Tribunal knew that he/she had the right to complain of unfair dismissal. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and if so by whom. I have to consider the nature of any evidence given to the employee. An employee may be able to justify to a Tribunal that a late application is because necessary information and evidence did not come into the possession of the Claimant until a later time.

13 In this case the Claimant could have presented the application as she had all the evidence and information she needed in order to complete her Tribunal application.

14 I cannot reasonably take into account the health issues. Nothing was produced to me by way of medical evidence but from the facts it appears that the health issues were resolved to the extent that the Claimant was able to take up a challenging new employment. I take it from this that she would also have been able to undertake the task of completing the Tribunal application form, which ultimately she was able to do. The reference to the stress and the question of the grievance were matters of priority rather than matters which made it not reasonably practicable for the claim to be prepared and presented. Accordingly the only point of significant concern in considering the concept of whether it was reasonably practicable or not centres around the fact that the Claimant's case was that she had been informed by a person at ACAS that the time limit ran out a short time after it in fact did, meaning that when the Claimant presented her claim she believed it was in time when in fact according to the law as properly applied, it was not.

15 The evidence surrounding a conversation with Acas was not as clear as it might be. The Claimant was asked if she had any contemporaneous notes in relation to her conversation with ACAS but she did not and she had not produced to the Tribunal the email from the RCN which apparently made reference to the time limits and the extension.

16 This was not one of those cases where a Claimant had been advised as to the effect that she must await the outcome of the happening of another event such as completion of an internal enquiry or an appeal or a grievance. The present case involved a suggestion that a person at ACAS had advised incorrectly that the time limit

expired two days or so after it actually did. However, the evidence about the ACAS conversation was open to misinterpretation and the Claimant herself acknowledged that there may have been some miscommunication. I found Ms Roberts to be a very honest witness. However, my decision must be based upon the evidence produced and the clear legislation.

17 The test to be applied in unfair dismissal cases is set out in Section 111(2) and is different from that which applies in discrimination cases where the Tribunal can extend the time limit if it considers it “just and equitable” to do so. As previously stated, the test for me is whether it was reasonably practicable for the claim to have been presented within the time allowed by law. On the evidence produced, it clearly was reasonably practicable for Ms Roberts to have verified the test over the months leading up to the expiry of the time limit. She had dealt with the ACAS early conciliation certificate, she had obtained guidance from the RCN and she had all the evidence and material she needed to complete her application and indeed had already commenced the task of doing so but had discontinued this.

18 It is very clear in this case that the claim form was presented out of time albeit by only two days and that the Claimant had every opportunity to have presented it within time. I find that it was reasonably practicable to present it in time. Therefore this claim is out of time and the Tribunal does not have jurisdiction. Accordingly I dismiss this claim.

Employment Judge Speker

1 June 2018