



THE EMPLOYMENT TRIBUNALS

Between:

Claimant: Mrs J Dake

Respondent: Ingleside Children's Home Limited

Hearing at London South on 21 November 2017 before Employment Judge Baron

Appearances

For Claimant: K W Perera – Legal Assistant

For Respondent: Michael Keenan - Consultant

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal that the claim is dismissed.

REASONS

- 1 The Claimant is seeking to bring claims to the Tribunal of unfair dismissal and race discrimination. The claim form on the Tribunal file was presented on 10 July 2017, and was prepared by Fadiga & Co, a firm of solicitors. The Claimant alleges that she was dismissed and that the dismissal was automatically unfair as the principal reason for it was that she had made a protected disclosure. In the claim form the Claimant states that her employment ended on 21 March 2017. The Respondent stated in the response that the Claimant had resigned on 3 March 2017. In the light of the documents shown to me at this hearing and also the oral evidence of the Claimant I do not see how the Claimant can maintain that there was an actual dismissal of her by the Respondent on 21 March. The Claimant was adamant in her oral evidence that she had resigned on 3 March. She wrote an unambiguous letter to that effect. However that point is not particularly material to the issue before me.
- 2 The Claimant was a Night Wake Support Worker in a home for young people aged 9 to 17 run by the Respondent. Certain details of the claims being made are set out in the claim form ET1 but they are limited. The Claimant said that she had been suspended for failing to report that one of the children resident at the home was missing on 2 February 2017, that nobody else was suspended, that she considered that other staff members were ganging up on her and that the management was not taking any action against any other member of staff. The Claimant said that she felt

she had no option to resign. She alleged 'unfair dismissal and/or constructive dismissal.'

- 3 Under the heading of 'Other matter' the Claimant then alleged that the Respondent had a policy of getting rid of black permanent staff and replacing them with zero hours contract or bank staff. The Claimant alleged race discrimination. She did not specifically allege that her dismissal was an act of race discrimination, but that is clearly what was intended. The second matter under this heading was an allegation that white staff were being paid more than black staff which, the Claimant said, had been raised by her at an annual supervision a few months before 2 February 2017. It appears that the Claimant is alleging that this was a protected disclosure and that that was the reason for her dismissal, although that is not entirely clear. None of these matters were raised by the Claimant with the Respondent until the claim form was presented, apart possibly from the pay issue.
- 4 In the response the Respondent stated that further details of the various allegations were required. It was stated that there had been an earlier incident on 22 November 2016 when two staff in the same role as the Claimant were found to be asleep, and they were subsequently dismissed. Both those members of staff were black. A white member of staff then resigned. The night shift arrangements were changed. Details of the allegation that the Claimant had not followed the missing child policy contrary to specific instructions were then set out. The Respondent referred to the conducting of an investigation and the subsequent arrangements for holding a disciplinary hearing. It was, said the Respondent, a case where an employee had resigned a few days before facing a disciplinary hearing.
- 5 This preliminary hearing was arranged to consider whether the Tribunal had the jurisdiction to consider the Claimant's claims taking into account the statutory time limit. It is common ground that the date of any dismissal and the latest date upon which there can have been any alleged discrimination was 21 March 2017. The Claimant contacted ACAS on 1 June 2017 under the early conciliation procedure, and the certificate was issued on 7 June 2017, being six days later. The certificate number is R145583/17/35.
- 6 The normal time limit of three months is extended to take into account the early conciliation procedure. In these circumstances the time limit is extended to expire one month after 7 June 2017, being 7 July 2017.¹ The claim form on the Tribunal file is marked as having been presented on 10 July 2017.
- 7 The Claimant was extremely unclear in giving her evidence about what occurred following her resignation. On 7 March Mr Kaba of the Respondent wrote to the Claimant saying that he believed that she may have decided to resign in the heat of the moment, and he invited her to reconsider her

¹ The relevant provisions are section 207B(4) Employment Rights Act 1996 and section 140B(4) of the Equality Act 2010.

decision. He stated that if she did not contact him by 13 March then the termination procedures would be implemented. In my view that was a very generous letter to write. Mr Kaba need not have taken that step. The letter continued by saying that the Respondent intended to continue with the disciplinary procedures. He said that the nature of the allegations was such that they still needed to be addressed and he said that the disciplinary hearing arranged for 8 March would go ahead.

- 8 No reply to that letter was sent by the Claimant because, she told me at this hearing, there was no need to do so as she had already resigned. Following the disciplinary hearing a letter was sent to the Claimant (which I did not see) which was received by her on 5 April 2017 saying that the Disclosure and Barring Service had been notified of the incident. It was at that stage that the Claimant said she had decided to do something about the matters the subject of this claim. She was aware of the ability to present a claim to the Tribunal and was then, or later became, aware of the time limit.
- 9 The Claimant was a member of a union and took some advice from that union. She said that the union had let her down and that a letter was written saying that the case had been closed. The Claimant was not able or willing to provide any more detailed evidence. At some stage the Claimant had contacted ACAS for advice, and probably made also contact for that purpose on 1 June 2017, which was the date of the commencement of the early conciliation procedure. Rules 6 and 7 of the Early Conciliation Rules of Procedure 2014 provide that the certificate will be issued after one month (although there is a facility for an extension) unless the conciliation officer earlier concludes that a settlement of the dispute is not possible in which case the certificate must be issued. There was no evidence before me as to why the certificate was issued after six days, rather than the normal period of one month.
- 10 I find that the Claimant received an email from ACAS in a standard form on 7 June 2017 with the certificate attached in .pdf format. The certificate number provided by ACAS was R145583/17/35. The Claimant told me that at that time the attachment to that email could not be opened on her mobile phone, although when at this hearing she showed me the email the attachment opened perfectly satisfactorily. The Claimant was able to open the certificate when she used her laptop at home that evening. The email from ACAS made it clear in bold text that the full number of the certificate needed to be quoted on the claim form ET1, and the format of the number was set out.
- 11 The evidence as to what occurred from 6 to 10 July 2017 was less than satisfactory, but at least some of the material facts for this point can be ascertained from the documents. The Claimant was with Mr Perera in his office during the afternoon of 6 July 2017. Although the evidence of the Claimant was confused and at times contradictory, I find on balance that the first time that she attempted to forward the ACAS email (and attachment) to Mr Perera was on 6 July 2017 when she was in his office. The attempt failed. I inspected the Claimant's mobile phone and an email

of that date was still in the Outbox. Unfortunately there was no time shown on it. I find that Mr Perera did not know the ACAS certificate number on either 6 or 7 July. At some stage he learned of the number, but it is not known how he learned of it to enable the claim to be properly presented on 10 July 2017.

- 12 It was agreed at this hearing that when contact is first made with ACAS under the early conciliation procedure a reference number is provided. In the case of a single prospective claimant the number commences with 'R' and then has six digits followed by the year in two digit format. Any certificate subsequently issued uses that reference number with a '/' and with two further digits added. Mr Perera sought to present the claim on 6 July using the Tribunal's online facility. He inserted the ACAS certificate number but without the final '/35'. In other words, Mr Perera used the reference number, rather than the certificate number. The claim form was rejected by the online system on the basis that an invalid certificate number had been inserted in the form. A screen print of the rejection was included in the bundle timed at 15:05.
- 13 Mr Perera then sent an ET1 to the London Central office of the Tribunals at 15:50 or thereabouts on 6 July by fax.² He appears also to have sent it again about an hour later, and also sent to the same office a scanned copy attached to an email at 16:42. None of those documents had the complete certificate number included.
- 14 A clerk from the London Central office telephoned Mr Perera's office on 7 July. There was an internal message sent to Mr Perera at 10:26 to the effect that the claim had been rejected and had to be sent to Leicester.
- 15 On 10 July 2017 the claim form was validly submitted using the online system, with the full ACAS certificate number having been inserted. Neither the Claimant nor Mr Perera were able to tell me how the full number had been obtained by Mr Perera nor on what day or at what time.
- 16 Mr Perera contended that the claim was in fact presented in time. The submission on behalf of the Claimant by Mr Perera was that when the faxed and emailed forms were received by the London Central office then there should have been a formal rejection of them with reasons given, and that when the Tribunal was provided with the certificate number then that should have retrospectively validated the forms. The alternative submission was that the sending of the claims to the London Central office was a valid presentation because the Claimant did in fact have a valid ACAS certificate even though the number was not on the claim form ET1.
- 17 The President of the Employment Tribunals (England & Wales) issued a Practice Direction on 14 December 2016 made under regulation 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. That provides that a claim form may be presented in one of three ways. The first is by using the online facility. The second is by posting it to

² The fax record sheet records the time as 14:54 which I suspect was because the system clock had not been adjusted.

the Tribunal's Central Office in Leicester. The third is by presenting it in person at certain specified offices of the Tribunal. Sending by fax or as an attachment to an email is not a valid method of presentation. The attempts to present the claim by fax and email were therefore doomed from the outset.

- 18 That being the case the attempted presentation did not get to the stage under the Employment Tribunals Rules of Procedure 2013 whereby the claim form ET1 is considered by a clerk. If it had got to that stage then the clerk would have been obliged under rule 12(1)(e) to refer the matter to a judge, and the judge would then have been obliged under rule 12(2A) to instruct that the claim be rejected. That presumably is the 'formal rejection' to which Mr Perera referred. It may then have been possible for an application to have been made for a reconsideration under rule 13, and for the claim to have been treated as presented on the date when the defect was rectified in accordance with rule 13(4). However all that is theoretical as the claim form was not presented to the Tribunal at all until 10 July 2017.
- 19 Having decided that the claims were presented out of time the next consideration is whether time should be extended. In respect of the unfair dismissal claim the tests are whether or not it was reasonably practicable for the claim to have been presented in time, and if not, whether it was presented within such time thereafter as the Tribunal considers reasonable.³ The test in respect of the discrimination claims is whether the claim was presented within such time after the expiry of the limitation period as the Tribunal considers just and equitable.
- 20 A critical question to be considered in connection with either head of possible extension is the reason for the delay. All I can say about the delay from 5 April to 6 July 2017 is that the Claimant was unable to explain it satisfactorily. She produced one form Med3 dated 28 March 2017 covering the period to 4 April 2017 stating that the Claimant was advised that she was not fit for work because of hypertension. The Claimant made vague assertions about having been let down by her union but without any detail.
- 21 I have to conclude that it was reasonably practicable up to 5 July 2017 for the Claimant to have presented her claim. I entirely fail to see what was stopping her from doing so, particularly from 7 June 2017 when the ACAS certificate was issued. The Claimant received the email from ACAS and was able to open the certificate on her home computer. I have considered separately the question as to whether the technical problem experienced on the afternoon of 6 July 2017 makes any difference. I conclude that it does not. The Claimant was aware of the time limit, and should not have taken the risk of leaving the matter to the last minute. Further, Mr Perera and the Claimant were aware at 3.35 pm that the online submission had failed. He had until midnight the following day to effect a presentation. Clearly what should have been done was that steps should have been taken to ascertain the number and then submit the claim before midnight on 7 July either online, or by personal delivery to a Tribunal office in

³ Section 111 Employment Rights Act 1996

London. Sending copies of the incomplete form to the London Central office was simply a waste of time. I therefore find that the unfair dismissal claim was presented out of time and that time is not to be extended.

- 22 I now turn to the discrimination claim where the issue is whether it is just and equitable to extend the time. The passage often cited to Tribunals in this connection is from the judgment of Auld LJ in *Robertson v. Bexley Community Centre* [2003] IRLR 434 CA:

25 It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.

- 23 Further, the use of the factors in section 33 of the Limitation Act 1980 has been approved, although that provision does not strictly apply. I emphasise that this is not a checklist, but it can be of assistance. Smith J said the following with reference to that provision:

It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to -

- (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 party sued had cooperated with any requests for information;
- (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
- (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

- 24 I have already set out my conclusions concerning the various delays after 5 April 2017. It was not suggested by Mr Keenan that there was any specific prejudice caused to the Respondent by the delay above and beyond having to defend the claim, and he did not suggest that the cogency of any evidence was likely to be adversely affected. The Claimant had not sought any information from the Respondent, and indeed had not made any of these allegations until the claim form was presented, save possibly for mention of pay discrimination. As far as the final point is concerned the Claimant left it until the last day to consult solicitors.

- 25 The issue of prejudice to the parties must be considered. I was not addressed by Mr Keenan or Mr Perera on the merits or otherwise of the claim which is a factor which could have been material to the question of prejudice. If I were to extend the time limit then the Respondent would have to incur the time and cost of defending it, whereas if I were not to extend the time limit then the Claimant would not be able to pursue that claim.

- 26 I must decide the matter against the background of there being a statutory time limit, the guidance in *Robertson*, and thus of the Claimant having to justify why in the particular circumstances of the case it is fair to extend that limit. The Claimant has failed to persuade me that it would be just and equitable to extend the limit. The Claimant did not contact the Respondent

about any of the matters to which she now refers. She did not pursue her claims with any alacrity, and she left it right until the penultimate delay before seeking to present the claim. In my judgment she is entirely the author of her own misfortune, and the Tribunal should not allow the Claimant to cause the Respondent to have to defend the claims in these circumstances.

Employment Judge Baron

Dated 22 November 2017