

REASONS

The Issues

1. The claimant alleges constructive unfair dismissal and s.20 Equality Act 2010 discrimination - a failure by the respondent to make reasonable adjustments. The issues to be determined at this Preliminary Hearing are as follows:
 - a. Whether all or any of the claimant's claims are out of time, and if so whether time should be extended on any of them;
 - b. Whether all or any of the claims should be struck out as having no reasonable prospects of success, and/or a deposit ordered as a condition of being permitted to proceed with all or any of them on the ground that they have little reasonable prospects of success.
2. The Hearing was held on an 'ELIPs day', and the parties were delayed while ELIPs representative Mr Woodhead dealt with other cases. The Hearing commenced early afternoon, and the Tribunal records its gratitude for the forbearance shown by the parties and their representatives, and for Mr Woodhead's work on this matter.
3. The respondent has conceded that the claimant was a disabled person by reason of depressive illness during the material period of this claim. During submissions Mr Difelice for the respondent conceded that two of the eight by the reasonable adjustments are 'arguable' and he did not pursue a strike-out or a deposit order in relation to these claims. During closing submissions, Mr Difelice further conceded that, in light of the respondent's earlier concessions, he would not be pursuing strike-out or deposit order on the remainder of the disability discrimination claims.

Witnesses

4. I heard evidence from the claimant and her husband, Mr Dan Kelly. Prior to the hearing starting I read the papers and the bundle prepared by the respondent's representatives.

Were the claims brought in time?

5. The parties agreed that there were two limitation periods to calculate as the claimant has brought claims for disability discrimination at work and unfair dismissal. The claimant contacted ACAS on 24 March 2017 to register a complaint under the ACAS early conciliation process. She resigned her employment on 3 April 2017, the primary limitation period for her claims expired on 2 July 2017. The claimant is arguing that the alleged failure to make reasonable adjustments continued to the date of her resignation. The ACAS Conciliation Certificate was issued on 24 April 2017. The claimant submitted her claim on 6 August 2017.

6. The parties agreed that the whole of the ACAS Conciliation period could be used to calculate the limitation period for the in-work disability discrimination claims. The limitation period calculation is therefore:
Day A – 24 March
A+1 – 25 March
Day B 24 April
A+1 - B = 31 days

Adding 31 days to the primary limitation period gives a claim deadline of 2 August 2017. The disability discrimination claim was therefore issued out of time.

7. Given the cause of action for her claim of unfair dismissal did not commence until the day of her resignation, and taking into account the case of *Tanveer*, the limitation period is therefore:

Day A – 24 March
A+1 – 25 March
Day B 24 April
A+1 - B = 31 days less 9 days (25/3- 2/4 incl.) = 22 days

The primary limitation period ended on 2 July 2017; plus 22 days gives an extended limitation period to 24 July 2017. The claim was issued on 6 August 2017 and is therefore out of time.

Application to extend time

8. On behalf of the claimant an application to extend time was made: in relation to her disability discrimination claims was an application for an extension of time on a “just and equitable” basis; on her unfair dismissal claim the claimant sought an extension of time on the basis that it was not reasonably practicable for her to submit her claim in time.
9. Mr Kelly gave evidence as to his wife’s health, that following her dismissal he was “really struggling” between his work, looking after his three young children, and his worries for his wife’s safety; he was having to make sure she took her medication, he would have to prepare her pill-box and at times look after her, including preparing her meals. At times, she could not leave the house. He says his employer was understanding, he was also working overtime because of money issues.
10. The claimant’s medical records show she has suffered from a long-term depressive illness including acute episodes of ill-health. The claimant said that her overriding concern following her resignation was her health and ensuring that her children were not taken away from her. For the purposes of this Hearing I considered the claimant’s disability impact statement, and I noted that its contents were consistent with the claimant and her husband’s evidence. I noted also the medical evidence and this was also consistent in the main with this evidence. There was one entry on her GPs notes dated 16

May 2017 which states the claimant *“feels may be ready for work now husband disagrees.”* At this time the records show that the claimant had also reduced her medication, while there is evidence that this was a temporary change; a month later she was experiencing several symptoms consistent, said her GP, with a quick withdrawal from medication and she was advised to increase her dose. It is apparent that throughout the period after dismissal and before she submitted her claim, the claimant was suffering from very significant ill-health.

11. Mr Kelly says that on 28 July he posted a handwritten employment tribunal claim form to Cardiff Employment Tribunal, this was received at Cardiff ET on 1 August 2018. He was unaware that it should have been sent to Leicester; he called the tribunal and was told the claim could not be accepted and he completed the on-line form as soon as he could after this call. Mr Kelly and his wife sought advice at a pro-bono centre in Cardiff, the nearest free advice centre, and received two appointments with 20 minute appointments. He received some advice on the claim but he could not recall receiving any advice on time-limits. He could not afford to take advice from elsewhere. The claimant gave similar evidence.
12. On being questioned why he did not find time to bring the claim after the ACAS Certificate, his evidence was *“This is [the claimant’s] case. I can’t pluck words from her mouth if she’s unable to speak. It causes a lot of distress with my wife as soon as it’s mentioned as an issue.* He said that the *“first opportunity”* to put in the claim was the handwritten application as this was the *“first time she is able to talk through it.”*, and only a couple of days later he was, he said, chasing this application with the Cardiff ET. I accepted Mr Kelly’s account of the difficulty the claimant had even communicating about the case.

Whether the claim unfair dismissal claim has any prospect, or any reasonable prospect of success

13. At the time of her dismissal, the claimant was facing a disciplinary process relating to several incidents of inappropriate behaviour of a sexual nature towards staff members (mandocas) at events after work, leading them to feel uncomfortable in work, especially given her role and responsibilities. On 6 February 2017, she was told she was to attend an investigation meeting and she was written to on 7 February confirming her suspension. In the subsequent disciplinary invitation letter these incidents were stated to be incidents of alleged gross misconduct as the incidents could be deemed harassment of a sexual nature. On 5 March 2017, on the evening before the disciplinary hearing, the claimant resigned, citing *“accusations made by other employees have made my position untenable”*. She cites the length of the process and that 15 staff members were interviewed yet only 6 sets of interview notes were given to her. She says she considered herself constructively dismissed (page 56).
14. The claimant’s medical records show she received repeat prescriptions for depression medication throughout 2016 and into 2017; she was prescribed

sertraline 100mg tables twice a day. She was also prescribed diazepam and was receiving cognitive analytic therapy.

15. In her evidence to tribunal, the claimant stated that the reasons for dismissal were not just those in her email of resignation, she said there was "... also massive health and safety issues - fabrication of dates, fridge stuff being left on dry stores. Buns placed under meat, no hairnets." The claimant said that she had "organised a meeting with general manager. I asked for a meeting. I was due to start work at 4.00 - she said come in for meeting. She said I was suspended." The claimant believes that she has retained details of these concerns in text messages.

Submissions:

16. For the respondent, Mr Difelice argued the claimant had time to submit her claim; she had been able to submit a detailed grievance and attend a grievance meeting; she was in a position to explain herself. When I asked whether her health had worsened post-dismissal, Mr Difelice argued that medical records (page 39) showed that there were periods she was feeling better; there were "windows of opportunities" for the claimant. Mr Difelice questioned how it became so "difficult for her to talk about the case". She was able to visit the advice centre; if it's possible to talk, and she could frame the basis of a claim form, he argued.
17. On the issue of bad advice, Mr Difelice argued we did not know the advice given, but there was no good reason for the claim being out of time.
18. Mr Difelice accepted that there was greater discretion on the tribunal on the reasonable adjustments extension of time application. The reason for the delay was not ill-health of the claimant, there was the possibility of taking action earlier, but the claimant delayed issuing until August. While the claimant had taken some steps to get advice, the steps taken were not enough. A prudent claimant would take some steps to find out knowledge of the time limit.
19. On the strike-out/deposit order applications: Mr Difelice argued that page 56 set out the reasons for resignation, and they were clearly not related to an allegation of breach of trust and confidence by the employer. On the claimant's evidence today, she is adding layers. However, Mr Difelice accepted that the allegation that witness statements had been withheld, who were perhaps witnesses in her favour, was a "serious allegation".
20. On the reasonable adjustments strike out/deposit applications, Mr Difelice accepted that because some claims were potentially arguable, he would not pursue an application on this claim.
21. For the claimant, Mr Woodhead (and on occasion Mr Kelly) argued that the fact is the claimant could not reasonably practicably submit a claim: the evidence was she had difficulty speaking, her health was poor. While she did seek advice, the claimant was not capable of putting claim in; for

example after visiting the advice centre in Cardiff the claimant was unable to talk about her case. Mr Kelly referred to his dated laptop, that he could not fill the forms in on-line, he printed them off and filled them in.

22. Mr Woodhead referred to *University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12*, where the EAT accepted that serious mental health difficulties, overlaid with other difficulties in her life, meant it was not reasonably practicable for her to submit her claim in time.
23. On the deposit and strike-out applications, Mr Woodhead argued that full evidence was clearly required for both claims. He accepted that the claimant's letter of dismissal did not reference her claims on health and safety issues, but he argued that there was a possibility that the statements withheld may contain evidence; that in any event the claimant's lack of confidence in her disciplinary was linked to her lack of confidence in her employer; that this in itself could be a repudiatory breach.

The Law

24. Employment Rights Act

s.111 Complaints to employment tribunal.

- (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer
- (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.

s. 123 Time limits

- (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
25. Employment Tribunal Rules of Procedure 2013

Striking out

37. (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
- (a) that it is scandalous or vexatious or has no reasonable prospect of success;

Deposit orders

39. (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
- (2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
- (3) The Tribunal’s reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
- (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
- (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
- (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
 - (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
- otherwise the deposit shall be refunded.

The Tribunal’s conclusions on the facts and law

Extension of time

Was it reasonably practicable for the claimant to present her unfair dismissal claim within the time limit?

26. I accepted the following evidence: the claimant suffered from serious mental ill-health of the claimant throughout limitation period; she consequently had an inability to properly think about her dismissal, an issue which was causing her significant distress; the families difficulties with coping generally; Mr Kelly's additional hours at work and his caring responsibilities; the fact that the claimant and her husband took steps, when the claimant was able, to find out about her rights; that she appears to have received at best sketchy advice at the advice centre in limited appointments. I considered that all these issues, taken together, meant it was not reasonably practicable for her to submit her claim in time. The claimant and her families were facing overwhelming difficulties, the family did what it could to progress issues, when she was able.

Did the claimant submit her claim within a reasonable further period?

27. I considered whether the claim was submitted with a reasonable period after the time limit expired. I determined yes; I accepted that the claimant's husband was relying on at best very sketchy advice, that when being advised in very short appointments at an advice centre he had not received advice on time limits, that when he became aware of time limits he acted with due urgency to submit his claim (on old and inadequate computer equipment and with poor computer and internet skills) that he chased Cardiff ET about his claim with reasonable speed, and when he found out he had submitted it wrongly to Cardiff he made an on-line application immediately.

Is it just and equitable to extend time for the discrimination claim?

28. I considered that the length of the delay was short, four days, and that there were good reasons for the delay, set out above. I did not consider that this short delay would cause difficulties with the parties' case, and that the claimant acted promptly when she realised what the time-limits were.

Strike-out application

29. I considered whether, on the arguments and evidence I heard, whether there were no reasonable prospects of the claim succeeding. I noted that the test for the respondent in this case was a high one and should only be exercised "very exceptionally" *Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330*.
30. I considered whether the facts as alleged by the claimant disclosed no arguable case in law. I noted that the claimant was alleging witness statements had been withheld in the disciplinary process, which was one of her allegations on dismissal. I also noted that (while it was disputed this was a reason for her resignation) the claimant alleged she raised serious health and safety issues, and has evidence of this. For these reasons, I considered it could not be said that the allegations disclosed no arguable case in law, and for these reasons the respondent's application fails.

Deposit Order

- 31. Does the unfair dismissal claim have little reasonable prospects of success? I accepted that the test is not as high as a strike-out application (*Van Rensburg v Royal Borough of Kingston-Upon-Thames and others* UKEAT/0096/07; UKEAT/0095/07), but, at the same time a deposit order may be a significant deterrent to bringing a claim, and I accepted that a careful and caution approach is required before ordering a deposit. I noted that the claimant’s evidence was that evidence had been withheld; also, that the process was unfair. I noted that the respondent was aware of the claimant’s medical issues and I noted that there may be arguments on the fairness of the process adopted which impacted on the claimant’s decision to resign.

- 32. The claimant also says she raised serious health and safety issues and has evidence of this, and this was a factor in her dismissal. There was no evidence in front of me that the claimant had raised such issues, and less evidence that this was a factor in her dismissal. It may well be that this element of her constructive dismissal claim stands little reasonable prospects of success, however I felt I could not separate out this allegation from the other reasons she gives for her resignation, in particular withholding of evidence, and I could not say that the claim overall stands little prospects. I agreed with the respondent that an allegation of withholding evidence is serious, but if there were significant numbers of witnesses interviewed whose notes were not disclosed to the claimant, I considered that she may have an argument on this part of her claim. For these reasons, the respondent’s application for a deposit Order does not succeed.

Judgment sent to the parties
On

.....11 September 2018.....
For the staff of the Tribunal office

EMPLOYMENT JUDGE M EMERY
Dated: 9th September 2017

.....