



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS
sitting alone

BETWEEN:

Mrs K Rose

Claimant

and

Caterham School Ltd

Respondent

ON: 8 May 2018

Appearances:

For the Claimant: Ms A Stroud, Counsel

For the Respondent: Mr T Webb, Counsel

REASONS FOR THE JUDGMENT DATED 8 MAY 2018 (PROVIDED AT THE RESPONDENT'S REQUEST)

1. In this matter the claimant complains that she was unfairly dismissed and not correctly paid for her holiday. She also says that she was directly discriminated against because of her sex and age and that she was subjected to harassment in May 2011 related to her sex and age.
2. This preliminary hearing was listed to determine whether the Tribunal has jurisdiction to consider the whole or part of the claims taking into account the statutory time limits for presentation of claims.

Evidence & Documents

3. I was provided with and read signed witness statements from both the claimant and her solicitor. The contents of those statements were not challenged by the respondent. There was also an agreed bundle of documents before me.

Relevant Law & Practice Direction

4. Complaints of unfair dismissal and incorrect holiday pay must be submitted before the end of the period of three months beginning with the effective date of termination or failure to pay, or within such further period as the Tribunal considers reasonable if it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period (s111(2) of the Employment Rights Act 1996 and regulation 30 of the Working Time Regulations 1998). That primary time period may be adjusted depending on the applicability of the early conciliation provisions.
5. Whether it was reasonably practicable for the claimant to submit the claim in time is a question of fact for the Tribunal to decide having looked at all the surrounding circumstances and considered and evaluated the claimant's reasons. In essence this test requires the claimant to demonstrate that it was not feasible to present the complaint within time (*Palmer v Southend on Sea Borough Council* 1982 ICR 372).
6. It is settled law (*Dedman v British Building and Engineering Appliances* 1973 IRLR 379) that where a claimant receives and relies on advice from a professional legally qualified representative, any error on the part of that representative will be imputed to the claimant. Any remedy is against the adviser for negligent advice.
7. Any complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable (section 123 of the Equality Act 2010). The date of the act complained of will be when it occurred (or is alleged to have occurred).
8. The Tribunal has a very wide discretion in determining if it is just and equitable to extend time. It is entitled to consider anything that it considers relevant and there is no principle of law which dictates how that discretion is to be exercised (*Chief Constable of Lincolnshire Police v Caston* 2010 IRLR 327). The onus is however on the claimant in this regard.
9. When considering anything that it considers relevant a Tribunal will consider whether a fair trial is possible and the balance of prejudice. Also, the factors listed in section 33 of the Limitation Act 1980 which include a) length and reasons for delay, b) the likely effect of the delay on the evidence c) the promptness with which the claimant acted once they knew the facts d) their knowledge of the time limits and e) the steps they took to get professional advice (*British Coal Corp v Keeble* 1997 IRLR 336) - this is however a useful checklist rather than a statutory requirement (*Southwark London Borough Council v Afolabi* 2003 IRLR 220).
10. Conduct extending over a period is to be treated as done at the end of that period (section 123(3)(a)). (This is distinct from an act with continuing consequences where time runs from the date of the act as above.) Where an employer operates a discriminatory regime, rule, practice or principle then that will amount to an act extending over a period (*Barclays Bank plc v*

Kapur (1991 ICR 208 HL). When deciding if there is such conduct, however, *Hendricks v Commissioner of Police for the Metropolis* [2002] EWCA Civ 1686 confirms that the correct focus is on the substance of the complaint that the respondent is responsible for the state of affairs leading to the alleged discrimination rather than too literal approach in analysing whether a regime, rule, practice or principle exists on specific facts. This approach has been confirmed in the context of the 2010 Act in *Rodrigues v Co-operative Group* EAT July 12. At the preliminary stage, the test to apply to determine whether the claimant has produced sufficient evidence of a continuing act is whether he/she has established a prima facie case and the Tribunal must ask itself if the complaints are capable of being part of an act extending over a period (*Aziz v FDA* 2010 EWCA Civ 304).

11. On 2 November 2017 a Presidential Practice Direction on the presentation of claims in the Employment Tribunals (England & Wales) was issued. That states:

'A completed claim form may be presented to an Employment Tribunal in England & Wales:

Online by using the online form submission service provided by Her Majesty's Courts and Tribunals Service, accessible at www.employmenttribunals.service.gov.uk;

By post to: **Employment Tribunal Central Office (England & Wales), PO Box 10218, Leicester, LE1 8EG.**

A claim may also be presented in person to an Employment Tribunal Office listed in the Schedule to this Practice Direction (and exceptionally by email to such an Office only during the period 26 July 2017 to 31 July 2017 inclusive and not otherwise).'

Findings of Fact

12. Having assessed all the evidence, both oral and written, I find on the balance of probabilities the following to be the relevant facts.
13. The claimant resigned from her employment with the respondent on 24 August 2017. At that point she had already consulted and had the benefit of advice from her solicitors.
14. Early conciliation started on 27 September 2017 and a ACAS certificate was issued on 27 October 2017.
15. The solicitor acting for the claimant, having consulted the Court & Tribunal finder website, emailed a claim form to the London South Employment Tribunal on 21 December containing claims of unfair constructive dismissal, unpaid holiday pay, sex and age discrimination. A number of breaches of the contract of employment from 10 January 2017 to the conclusion of an investigation in July 2017 were set out as breaches relied upon in the constructive dismissal claim and also as allegations of direct age and sex discrimination. In addition a discrete act of age and sex harassment on 27 May 2011 was relied upon.

16. An automatic response was sent to the solicitor on 21 December 2017 at 11.15 which said, inter alia:

‘... Please note that any Claim or Response forms will need to be checked before they are accepted and this reply is only confirmation of receipt...’

17. On 22 December 2017 the Tribunal emailed a letter to the solicitor with the heading (in bold capitals and large font) ‘RETURNED CLAIM FORM NOTICE’ which advised that from 29 July 2013 there were only three prescribed methods of presenting a claim form (online, by post to the central office in Leicester or by hand to a designated office) and that as the claim form had not been presented by one of those methods, it could not be accepted.

18. That day was the last day the solicitor’s firm was open before the Christmas holidays. The solicitor handling the matter did not see the letter until 28 December 2017. There was no information before me as to whether he was in the office on 22 December 2017 or indeed whether the office was open all that day.

19. Time expired on all claims (except harassment – see below) on 23 December 2017.

20. On 28 December 2017 the solicitor sent a letter to the Tribunal central office in Leicester on 28 December 2017 enclosing:

- a. an extract from the Tribunal website showing the LS Tribunal postcode;
- b. copies of the relevant correspondence;
- c. a copy claim form.

21. The letter concluded that the claim form should be accepted as submitted on 21 December 2017.

22. Having received no reply, the solicitor chased the Tribunal on 18 & 29 January 2018. On 1 February 2018 Ms Cattley of the Tribunal confirmed to the solicitor that the claim form had been accepted and it would be served on the respondent.

23. It was when the Tribunal filed its response, that the preliminary time issue was identified.

Conclusions

24. The first question to answer is when did time start to run?

25. The claimant says that the act of direct discrimination relied upon was a continuing act which continued until her resignation. In the paragraph before the specific breaches were set out in the claim form it does state that the inadequacies of the investigation combined with the demeaning course of action established was the last straw and that this led her to have no choice but to resign when she did. And that therefore time should start to

run for all the allegations, with the exception of harassment, from the date of resignation.

26. The respondent says that time for the discrimination claims should start to run from the conclusion of the investigation in July 2017 as that is the last particular breach relied upon.
27. I conclude that for the unfair dismissal, holiday pay and direct discrimination claims time started to run on 24 August 2017, the date of the claimant's resignation. That is clearly the correct position in relation to the claims of constructive dismissal & holiday pay and, on a proper reading of the claim form, is also correct for direct discrimination as the acts complained of continued through to the end of employment.
28. As far as the claim of harassment arising from the incident in May 2011 is concerned, however, I conclude that that was a stand-alone incident and cannot form part of any later continuing act in 2017. Accordingly time started to run for that complaint sometime in 2011 and the claim submitted in December 2017 is very significantly out of time. In respect of that claim I am not persuaded at all, even if it is pursued by the claimant which is not clear, that it would be just and equitable to extend time in her favour.
29. As far as the remaining claims are concerned, I start by considering the claimant's argument that they were in fact submitted in time on 21 December 2017. This argument is based on a particular reading of the Presidential Practice Direction namely that when the direction sets out methods by which the completed form 'may' be presented, this should be interpreted as permissive language as opposed to mandatory. I do not agree. Reading the relevant rule of the Employment Tribunal rules together with the entirety of the Practice Direction, I conclude that the methods of starting a claim are limited to those that are set out in the Practice Direction. Accordingly when the claim form was sent by email to the Tribunal on 21 December that was an error and was not effective.
30. That being the case I then consider whether to extend time to allow the submission on 28 December 2017 to be effective.
31. Dealing first with the claims of unfair dismissal and unpaid holiday pay, I conclude that it was reasonably practicable for these claims to have been submitted in time and as they were not, those claims will not be allowed to proceed.
32. In reaching that decision I have considered very carefully the claimant's argument that the failure of her solicitor to properly research the relevant rules and to submit the claim in accordance with them, should not be laid at her door (as case law suggests it usually would be when considering this particular discretion) first because there was a supervening event in the form of the wording of the Tribunal's acknowledgement of his email on 21 December 2017 and second by looking at all the facts generally.

33. As far as the acknowledgement email is concerned, I agree that its wording is unfortunate and it could be read as suggesting that claim forms can be lodged by email to the local office. However the fact is that the solicitor concerned received that acknowledgement after he had submitted a claim form presumably believing at that stage that he was submitting it correctly i.e. the error had already occurred. Therefore I do not construe that email acknowledgement as being a supervening event such as to disturb the usual position. Further, the Tribunal emailed the solicitor on the following day and expressly advised him of his error. At that point time had not expired. It so happens that that was the last working day before the Christmas holidays and the solicitor did not see the email. Ultimately, however, that is to ensure that correspondence is read and attended to promptly. Even if the solicitor was out of the office, which is not clear, he and/or the firm have a professional responsibility to ensure that correspondence is considered in the absence of a fee earner. The fact that it was the last working day before Christmas is irrelevant; it was a working day.
34. Turning to whether the claims of direct age and sex discrimination should be allowed to proceed on the basis that it would in all the circumstances be just and equitable, I conclude that in the claimant's favour.
35. In particular I bear in mind that the length of delay was not excessive. The reason for the delay was a straightforward error by the solicitor and the error was corrected very promptly once he became aware of it. It is clear that there has been no failure or lack of cooperation by the claimant herself. As to the balance of prejudice I conclude that comes down heavily in the claimant's favour. The prejudice faced by the respondent in having to defend this claim is no different to having to defend it if submitted in time. Of course there has been further delay between December and this hearing, but I do not consider that material in all circumstances. Further, the delay that will now follow between this hearing and any full merits hearing would be the same delay faced by the respondent in any event. If there are concerns about cogency of evidence, I suggest both parties attend to at least first drafts of witness statements as promptly as possible.
36. Accordingly the claims of direct age and sex discrimination shall proceed but the others shall not.

Employment Judge K Andrews
Date: 16 July 2018