EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss C McNeil	**v**	**Turning Point**

Heard at: Watford **On**: 19 October 2018

Before: Employment Judge A Clarke QC

Appearances

For the Claimant: In Person
For the Respondent: Mr J Filson, Solicitor

JUDGMENT

1. So far as the claim for constructive unfair dismissal is concerned it was not reasonably practicable for the claimant to present her claim within the primary limitation period. The claim as presented on 28 September 2018 was presented within a reasonable period after the expiry of the primary limitation period.

2. As regards the claims for disability discrimination, it is just and equitable to extend the time for the presentation of those claims up to and including the presentation of the claim form on 28 September 2018.

3. All claims will proceed to the Full Merits Hearing for six days commencing on **28 May 2019** as previously ordered.

REASONS

Background and facts

1. The claimant worked for the respondent as a charity as Operations Manager from November 2000 until 29 September 2017, when she resigned. She alleges that she was constructively dismissed. She also alleges that she was discriminated against because of her disability, dyslexia, in that the respondent failed to make reasonable adjustments to her work in respect of that disability.

2. The nature of the alleged adjustments and the relevant associated provisions said to have been applied by the respondent are set out in paragraphs 7.1 and 7.3 of a Case Management Summary agreed at a hearing before Employment Judge Heal on 14 September 2018. The last date specified therein is the date allegedly imposed for producing a particular report, namely 7 July 2017. The claimant submitted at this preliminary hearing that the allegations in sub-paragraphs 7.3.2. and 7.3.3. were continuing up to the date of her dismissal. Without hearing detailed evidence, it is not possible for me to decide whether there were failures to make adjustments continuing over the period between 7 July and 29 September 2017, or whether what happened after 7 July should be seen as the continuing consequences of the application of a provision, or provisions, on 7 July.

3. The claimant did not seek to explain any failure to bring a claim within any particular period after 7 July 2017, rather she explained that she had felt that the discrimination against her was continuing, she had tried to cope, but when she could not she ultimately resigned claiming constructive dismissal.

4. At the preliminary hearing on 14 September before Employment Judge Heal everyone proceeded on the basis that the claimant's claim was presented on 28 February 2018. That is the date on the date stamp showing receipt at the Watford Employment Tribunal. Hence, claim in time issues arose in respect of both unfair dismissal and discrimination claims and Employment Judge Heal gave directions to enable both to be decided quickly, so as to minimise costs. She also gave directions to enable the matter to proceed to a Full Merits Hearing should any aspect of the claim be found to have been presented in time. The claim in time issues came before me for hearing on 28 September.

5. What happened at that further preliminary hearing is set out in paragraphs 2 and 3 of the Case Management Summary containing the record of that preliminary hearing. In short, the claimant had (as ordered) given an account of the events surrounding the presentation of her claim. She did this in an email of 18 September. For the first time it then became clear that she had at least attempted to present a claim to the London Central Employment Tribunal Office on 25 January 2018 by sending an email with a completed claim form as an attachment to it. That is not a valid method of presenting a claim to an Employment Tribunal. Hence, no claim had been validly presented. With the agreement of the respondent I devised an approach on 28 September by which a second claim was presented and responded to on that date and this preliminary hearing was fixed to determine the claim in time issues then arising.

6. I adjourned the hearing on 28 September to today in order to enable the claimant to seek legal advice. She did so and I have been assisted by a very detailed set of written submissions on her behalf by the Stevenage CAB and by equally detailed written and oral submissions from Mr. Filson on behalf of the respondent.

7. The claimant gave evidence regarding the making of her claim. She has severe to very severe dyslexia - the respondent does not dispute that this amounts to a disability for the purposes of the Equality Act 2010. For that reason, the claimant finds completing forms online to be very difficult. Her practice (adopted in this case) is to download the form and complete it offline.

8. The claimant accepts that she did "scan read" the "checklist" which appears as page 15 of the claim form when downloaded. This enabled her to obtain the gist of what was said on that page. She understood that she should receive some kind of acknowledgment from the Employment Tribunal of a form submitted online. The page does not make clear that when it refers to a form "submitted online" this does not include a form attached to an email and nowhere on what I have been shown does the documentation she downloaded make clear that a claim form so presented is not presented by a permissible method. In any event, I am satisfied that the claimant assumed, based upon what she had read, that this was a permissible method. I also accept that at this time the claimant was under considerable stress and that this exacerbated the symptoms of her dyslexia which made reading and completing documents even more difficult.

9. The events that followed her supposed presentation of her claim did not suggest to the claimant that the method she had chosen to submit her claim was impermissible. She received an email acknowledgement of the receipt of her email. She was not told that she had used an impermissible method of presentation. The form was then passed by London Central to Watford and no one at either office appears to have realised that an impermissible method of presentation was used, nor is this clear from the documents appearing upon the Employment Tribunal file at Watford. Hence, before Employment Judge Heal the matter was able to proceed on the false basis that the claim was presented on the date (28 February) which appeared on the Watford date stamp.

10. It is not disputed by the respondent that had a claim been validly presented on the 25 January 2018 then the claim for constructive unfair dismissal would have been presented within the primary limitation period. This is as the result of the amendments to the limitation period provisions in the Employment Rights Act 1996 resulting from the introduction of ACAS Early Conciliation. A Certificate was sought within the three-month primary limitation period and granted on 18 January 2018, such that the time for presentation of the claim (as extended) expired on the 18 February. A presentation of a claim on 25 January 2018 would have been well within time. This is not an instance of a claimant waiting to the very end of the primary limitation period before attempting to commence proceedings. Had she been told shortly after receipt of her email that the presentation was ineffective, then she could (and would) have presented a further form using a valid method of presentation.

11. Whether a claim for disability discrimination presented on 25 January 2018 would have been presented within the primary limitation period applicable to such a claim will depend upon the date of the last failure to make

reasonable adjustments. If this was 7 July, then such a claim would be out of time. If the date is that of the day of alleged constructive dismissal then the claim would have been presented within time.

12. I am satisfied that the claimant was unaware of the fact that her January claim was not properly presented until this was explained to her on 28 September 2018. I am also satisfied that until that moment she reasonably understood that she had done what was needed to present a claim on 25 January, but that for some reason it was not to be treated as presented until it had got the Watford Office on 28 February. Mr. Filson tentatively suggested that had she acted reasonably the claimant would have found out that the 25 January submission was invalid rather sooner than she did. He suggested that she should reasonably have taken advice after the hearing before Employment Judge Heal and would then have learnt of the problem. I do not consider that it was unreasonable for her not to have done so. She was ordered to write a factual account of what had happened and this she did. She had no reason to suppose that in revealing that she had submitted the completed form to London Central as an email attachment she was revealing (contrary to how the case had proceeded before Employment Judge Heal) that there was no valid claim ever submitted to the Employment Tribunal.

13. Once the claimant understood the problem, she acted as quickly as she could (with the assistance of the Employment Tribunal and the respondent) to submit a valid claim.

The law

14. The basic legal principles are not in dispute and are straightforward:

    14.1 If a claim for unfair dismissal is presented outside the primary limitation period then the claimant must show that it was not reasonably practicable to present the claim in question within that period.

    14.2 If that is established then the Employment Tribunal must consider whether the claim was presented within a reasonable period after the primary limitation period expired.

    14.3 A claimant who submits a claim "late" must show that any mistake which led to that late submission was a reasonable one for her to make in order to show that it was not reasonably practicable to submit a claim in time. As Lord Justice Brandon said in Walls Meat Co Ltd v Khan [1979] ICR 52 at paragraph 60:

> "The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment maybe physical, for instance the illness of the complainant or a postal strike; or the impediment maybe mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as

> impediments making it not reasonably practicable to present a complaint within [time], if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquires as he should reasonably in all the circumstances have made …"

14.4 If a claim for disability discrimination is presented outside the primary limitation period, then the Employment Tribunal can extend that period so as to validate the presentation of the claim if it is just and equitable to do so.

14.5 Where, as here, a claimant has submitted a defective claim and then sought to cure the defect, or has submitted a further claim, it is the second claim that must be evaluated in terms of the claim in time principles. In particular, the Employment Tribunal must ask whether it was reasonably practicable to submit that second claim in time. It is not the case that merely because a first claim has been submitted (albeit defectively) within the primary limitation period, then the second claim must be viewed as one which it was reasonably practicable to have submitted within the primary limitation period. In this regard see Simler P in Adams v British Telecommunications PLC (UKEAT/0342/15/LA). That was a case where the claimant put in a claim form which contained only part of the Early Conciliation Certificate Number. That rendered it, in effect, a nullity, but the Employment Tribunal Administration did not alert the claimant of this for some time and, when it did, a further claim form was promptly submitted. Of course, as Simler P made clear, the circumstances in which the first invalid claim was submitted are not irrelevant. As she stated (at paragraph 19):

> "The question for the Tribunal, in those circumstances, was not whether the mistake she originally made … was a reasonable one but whether her mistaken belief that she had correctly presented the first claim on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances."

14.6 The just and equitable test which applies to discrimination claims is one which it is often easier for a claimant to satisfy than the "reasonable practicability" test. However, the test does not direct or permit the Tribunal to ignore the primary limitation period and simply ask itself whether it would be just and equitable to allow the claim to proceed. The Employment Tribunal must proceed from the proposition that Parliament expected the time limits which it had set to be adhered to.

14.7 The test of justice and equity is a broad one and the relevant facts will depend upon the facts of the particular case, but the factors set out by the High Court in Keeble in relation to personal injury cases are often relevant. These encompass the reason for the delay, how promptly the claimant acted once aware of the relevant matters, the

impact of delay on the prospect of a fair trial and the prejudice to the respective parties in allowing or not allowing the case to proceed.

14.8 For a failure to make reasonable adjustments claim time starts to run when the employer makes a decision not to make any particular adjustment or acts in a manner inconsistent with making it, see: Humphries v Chevler Packaging Ltd (UKEAT/0224/06). However, the Court of Appeal has made clear that where there is no incident or pronouncement on the part of the respondent employer, time will begin to run from the end of the period in which the employer might reasonably have been expected to make such an adjustment: see Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640.

14.9 The parties in their respective written submissions referred to a number of other authorities. I have considered each of them, but do not find it necessary to recite them or the principles of law relevant in relation to them in this judgment.

Application of the law to the facts

15. I am satisfied that the claimant's belief that she had presented a valid claim to the Tribunal in January 2018 was a reasonable one. She did not appreciate that an online submission involved completing the form online and submitting it by clicking on the 'submit' button, as distinct from doing what she did. The material which she read did not make this clear and no one had so advised her. It may well be that relevant guidance is available somewhere on the internet, but she did not see it and on the basis of what she did read, she reasonably believed that she was acting correctly. In this regard I bear in mind her disability. She believed that the Employment Tribunal had acknowledged receipt of her claim. She was unaware of the impact of the way she had chosen to try to submit her claim until 28 September 2018. The Employment Tribunal did not alert her to the problem at any time prior thereto. Once the matter was referred to Watford and a file opened it would not have been possible for any Employment Judge to detect what had happened in the past as the file documentation gives no indication of the prior attempted presentation to London Central. Whether or not the mode of receipt of the case papers from that office at Watford might have indicated how they had arrived at London Central in the first place is unclear, but no one alerted the claimant (or any Employment Judge) to any possible problem.

16. Where a claimant reasonably believes that they have made a valid submission of a claim, as this claimant did, it is not reasonably practicable to submit a second (and identical) claim. There would be no need. Where it turns out that the claim supposedly validly submitted was not validly submitted at all, then (and only then) would it make sense to submit a further claim. Such a claimant would be expected to act promptly in those circumstances. I am satisfied that this claimant did so.

17. For those reasons I find that it was not reasonably practicable to submit the claims submitted on 28 September 2018 within the primary limitation period. I also find that this second claim was submitted within a reasonable period after the expiry of that primary limitation period.

18. I now turn to the disability discrimination claim. In the light of what I have already noted I consider that if I cannot establish that the claim is in time if the last discriminatory act was on 7 July 2017, then the claim in time issue must be left to be determined at the Full Merits Hearing. I cannot determine the factual issues which are critical to determining whether there were acts (or failures to act) which might, in law, be acts of discrimination after 7 July. Hence, for present purposes, I proceed on the basis that 7 July 2017 is the crucial date for claim in time purposes.

19. If that is so, then the primary limitation period would have expired on the 6 October 2017 and a claim presented on 25 January 2018 would have been presented some three and a half months out of time. Hence, it would be necessary to consider whether it would be just and equitable to extend time.

20. I consider that it is just and equitable to extend time for the presentation of this claim up to 28 September 2018 for the following reasons:

    20.1 It follows from the findings that I have already made that I consider that the period of delay from 25 January to 28 September 2018 is appropriately explained so that the real issue concerns the delay from 6 October to 25 January, part of which is, of course, explained by the operation of the Early Conciliation Process.

    20.2 I accept that the claimant did not make a complaint in the period from 7 July up to her alleged constructive dismissal because she considered that the discrimination was ongoing and she was hoping that the respondent would make adjustments to help her. She did take action within three months measured from that date and extended by the Early Conciliation amendments to the relevant claim in time provisions in the 2010 act.

    20.3 If the claimant cannot bring the claim she is prejudiced by the loss of a potentially valuable claim. If she can bring it, the respondent is exposed to the risk of having to meet such a claim. However, I consider (and Mr. Filson accepts) that the consideration of such a claim would not involve the calling of additional evidence. All of the evidence relevant to these disability discrimination claims will need to be considered as part of the unfair dismissal claim. There will be some, but not extensive, additional submissions to be made. I do not consider that the total delay in time to date will have any substantial impact on the ability of an Employment Tribunal to conduct a fair (to both sides) trial of these matters. I certainly do not consider that the relatively short period of delay, upon which I consider that I should concentrate, would have done so.

Conclusion

21. In all of the above circumstances I consider that:

21.1 It was not reasonably practicable for the claimant to present her claim for constructive unfair dismissal within the primary limitation period.

21.2 I consider that her claim for constructive unfair dismissal was submitted to the Tribunal (on 28 September 2018) within a reasonable period after that primary limitation period had expired.

21.3 I consider it just and equitable to extend the time for presentation of the disability discrimination claims so that a claim in respect thereof presented on 28 September 2018 would be presented in time. I emphasise (see above) that in doing so I have proceeded on the basis that the relevant date for the last discriminatory act is 7 July 2017 without deciding that that is necessarily so.

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Employment Judge A Clarke QC

Date: ……31.10.18 ……..

Sent to the parties on: .07.11.18.....

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For the Tribunal Office