



EMPLOYMENT TRIBUNALS

Claimant
Ms Lisa Shaw

-v-

Respondent
Leicester City Council

PRELIMINARY HEARING

Heard at: Nottingham **On:** 21 June 2018

Before: Employment Judge Evans (sitting alone)

Representation

For the Claimant: Mr M Halissey, the Sure Trust
For the Respondent: Mr Attreides, Solicitor

JUDGMENT

1. It was not reasonably practicable for the Claimant to present her claim of unfair dismissal within 3 months of the effective date of termination.
2. The Claimant submitted her claim of unfair dismissal within a reasonable further period following the expiry of the three month period beginning with the effective date of termination.
3. The Employment Tribunal therefore has jurisdiction to hear the Claimant's claim of unfair dismissal which will now proceed to a full hearing.

REASONS

Background

1. The Claimant was dismissed by the Respondent with effect from 15 August 2017. On 5 January 2018 she presented a claim of unfair dismissal to the Employment Tribunal ("the Claim").
2. The Claim was presented outside the three month time limit which applies to unfair dismissal claims. The Tribunal therefore listed a Preliminary Hearing to determine whether the Claim was out of time with the result that the Tribunal would have no jurisdiction to hear it.
3. The Claimant was represented at the Hearing by Mr Halissey of the Sure Trust. She had not prepared a witness statement before the Hearing and had not produced a

bundle of documents. The Respondent was represented by Mr Attreides. The Respondent had prepared a bundle of documents running to 32 pages.

The discussion at the beginning of the Hearing and the issues

4. Mr Halissey is a support manager for the Sure Trust. He explained that the Sure Trust worked with people who had learning difficulties. He explained that the Claimant had learning difficulties.
5. I discussed with the Claimant and Mr Halissey what obstacles her learning difficulties might give rise to at the hearing and how these might best be overcome so that the Claimant could understand the hearing and participate fully in it. Mr Halissey explained that the Claimant might have difficulties understanding what was said to her and, also, documents relevant to the case. Mr Halissey said – and the Claimant agreed – that the best way to deal with these difficulties was to make sure that questions were put to the Claimant as simply as possible.
6. It was agreed that Mr Halissey would use his expertise to check whether the Claimant understood the questions that she was being asked. He sat next to the Claimant whilst she was giving evidence and I gave him regular opportunities to satisfy himself by speaking to the Claimant that she understood what was being said both whilst she was giving evidence and during the hearing generally. It was also agreed that the evidence in chief of the Claimant would be obtained by me asking her simple questions.
7. At the beginning of the hearing I explained to the Claimant that the hearing would not decide whether she had been unfairly dismissed. I explained that all that I would do as a result of the hearing was to decide whether she would be allowed to continue with her claim. I explained that there was a potential problem with her claim because the law said that an unfair dismissal claim must usually be begun within three months of someone being dismissed. I explained that because the Claimant had been dismissed on 15 August 2017 she should have begun her unfair dismissal claim by 14 November 2017 but, in fact, she had begun it on 5 January 2018.
8. I explained the two part test set out in section 111 of the Employment Rights Act 1996 to the Claimant. I explained that it would be necessary to explore (1) why the Claimant had not begun her claim by 14 November 2017; and (2) why she had then waited until 5 January 2018 to begin it. I explained that, technically speaking, the issues for me to decide were:
 - 8.1. Whether it had been not reasonably practicable for the Claimant to begin her claim on or before 14 November 2018;
 - 8.2. If it was not reasonably practicable, whether the further period within which the claim was presented was reasonable.

The Law

9. Section 111(2) of the 1996 Act provides that:

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.*

10. The leading case in relation to reasonable practicability remains Palmer and Saunders v. Southend-on-Sea Borough Council [1984] 1 All ER 945, [1984] IRLR 119. In this case, May LJ stated that the test was one of reasonable feasibility: "We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done - different, for instance, from its construction in the context of the legislation relating to factories: compare Marshall v Gotham Co Ltd [1954] AC 360, HL. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [Singh v Post Office [1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"- is the best approach to the correct application of the relevant subsection."

The Claimant's evidence

11. A full record of the Claimant's evidence is set out in the record of proceedings on the Tribunal's file. However it may reasonably be summarized as follows:
- 11.1. The Claimant has epilepsy – she described it as “temper epilepsy”. She takes tablets to help her cope with the condition. If she does not take the tablets she loses her temper;
 - 11.2. The Claimant was aware on 15 August 2017 that she had been dismissed on that date;
 - 11.3. The Claimant could remember appealing her dismissal. She was “not pretty sure” about when she had decided to appeal. She could not remember what had happened at the appeal or when exactly it had taken place but she knew that she had lost the appeal;
 - 11.4. The Claimant's trade union representative, Dave Mitchell, had helped her at the appeal but she could not remember if he had helped her after that or if he had talked to her about the possibility of bringing a claim;
 - 11.5. She had known that she needed to contact ACAS because her mother's gardener's son had lost his job and contacted ACAS. The gardener had told the Claimant's mother about this and given her the phone number of ACAS. Her mother had passed the number on to the Claimant;
 - 11.6. The Claimant has spoken to ACAS. She could not remember whether she had talked to ACAS about bringing an employment tribunal claim. She did not understand why she had been sent the Early Conciliation Certificate. She could not remember what ACAS had said to her;
 - 11.7. The Claimant had not begun the Claim herself. She did not use the internet and had not used a computer when employed by the Respondent other than to check emails. Her Aunt Margaret, a sister of her mother, had probably begun the Claim. The Claimant had not been present when her aunt had done this but she remember Aunt Margaret collecting papers from her house including the Early Conciliation Certificate;
 - 11.8. The Claimant did not know how she had known that it was possible to bring an unfair dismissal claim. She thought perhaps her mother had told her about this;
 - 11.9. The Claimant did not know why she had not begun the Claim before 14 November 2017 or why she had waited until 5 January 2018 to begin it. She could not remember if she had discovered it was possible to bring an unfair dismissal claim before or after her appeal;
 - 11.10. Nobody apart from her mother, Aunt Margaret, Mr Mitchell and ACAS (as detailed above) had helped her. She had not met Mr Halissey until March this year.

12. Mr Halissey also briefly gave evidence. He explained that the Claimant's learning difficulties meant that she was "quite poor" in terms of her ability to understand things including basic instructions. For example, she could be easily confused about when and where a meeting was due to take place even if Mr Halissey had made sure she had written the appointment down and had then phoned her to confirm the appointment. He would speak to the Claimant's mother to confirm appointments. She did not necessarily remember things she was told. She had failed to meet him as arranged on the morning of the hearing because she had been confused about the fact that she could not use her free bus pass before 9.30am even though Mr Halissey had discussed this issue with her.

Submissions

13. Mr Attreides had provided a short skeleton argument. He contended in that document that the Claimant had been represented by her trade union up to and including the date of her unsuccessful appeal on 20 November 2017. It had therefore been reasonably practicable for her to present her claim in time because this representation meant that it was highly likely that she was aware or should have been aware of the time limit for bringing a claim. Alternatively, the Claim had not been presented within a reasonable further period.
14. Mr Attreides did not make significant additional oral submissions. When I asked him whether, having heard the Claimant's evidence, it was the Respondent's view that the Claimant would have understood the concept of a time limit if it had been explained to her, he accepted that it might be difficult to argue that she would have. However Mr Attreides observed that the Respondent could not concede the issue of the time limit, given that it was a jurisdictional one, and in any event the second limb of the test in section 111 of the 1996 Act remained.
15. Mr Halissey made brief oral submissions. He submitted that the Claimant had not been aware of the relevant time limit.
16. After the parties had made their submissions I reserved my judgment: the hearing had over run its listing and I had another case in my list to hear.

Findings of Fact

17. I have taken all of the evidence that was before me into account when making the findings of fact below although I do not refer to all of it.
18. Turning first to the dates relevant to the issues I have to consider, the Claimant was dismissed on 15 August 2017. The reason that the Respondent gave for her dismissal was that they believed that she was guilty of misconduct. The Claimant appealed against that dismissal and the appeal was held on 20 November 2017. The appeal was rejected by a letter dated 27 November 2017. The Claimant contacted ACAS on 27 December 2017 and an Early Conciliation certificate was issued on 29 December 2017. The Claim was presented on 5 January 2018.
19. I make the following findings about the Claimant's evidence and her ability to understand and act upon the time limits established by law for employment tribunal claims.
20. I find that the Claimant gave evidence honestly. I find that she understood the importance of being truthful and did her best to answer the questions she was asked in a truthful manner. However I also find that she had difficulty understanding a number of the questions put to her, however simply they were put, and consequently was confused about how she should answer. Equally, at times the way in which she

gave her evidence indicated that she was “suggestible”. Examples of these matters included:

- 20.1. The Claimant was asked in cross examination whether her mother had told her about the possibility of bringing an unfair dismissal claim before or after the appeal hearing. She was asked about this in cross examination because at different points in her evidence in chief she had said both that this was before and after the appeal. When asked in cross examination she said “after”. When then asked if she was sure she said “either before or after”. When asked whether in fact she could not remember she said “I can’t remember”. When asked if she had any idea of when it might have been she said “no”.
- 20.2. The Claimant was asked in cross examination if ACAS had told her the claim was “out of time”. She said “that’s correct” in a manner which implied she understood what “out of time” meant. However when I asked her what “out of time” meant she said “I’m not sure” and it was apparent to me that she did not understand the question that she had just answered.
21. I find that the Claimant was represented until the conclusion of her internal appeal by her trade union representatives. However I also find that her trade union representatives did not agree to act for her in any employment tribunal claim because her trade union did not present any claim on her behalf. I find that the trade union representatives either did not explain to the Claimant that she could bring a claim of unfair dismissal if she so wished and the time limit for any such claim or, alternatively, that the Claimant did not understand any advice that she might have been given in relation to time limits. I therefore find that the Claimant was ignorant during the three month period from her dismissal to 14 November 2017 of the need to bring an unfair dismissal claim within three months of being dismissed.
22. So far as the period from 14 November 2017 to 5 January 2018 was concerned, I find that until 27 November 2017 the Claimant was essentially awaiting the outcome of her appeal and not looking beyond that. I find that at some point between 27 November 2017 and 27 December 2017 the Claimant’s mother gave her the phone number of ACAS which she had obtained from her gardener who was aware of the need to contact ACAS before beginning an employment tribunal claim. I find that by this time the Claimant understood that bringing an unfair dismissal claim was possible and that she had to contact ACAS before beginning a claim. I find that is why she called ACAS on 27 December 2017. However I also find that the Claimant was still not aware that such a thing as a time limit existed. I find that after contacting ACAS the Claimant enlisted the assistance of her aunt who then began the Claim, without any real involvement by the Claimant.

Conclusions

23. In light of my findings of fact above, I conclude that it was not reasonably practicable for the Claimant to bring her unfair dismissal claim on or before 14 November 2017 which is when the three month time limit expired. I find that it was not reasonably practicable for her to bring her claim before that date because:
 - 23.1. She did not have representatives who were concerning themselves with the possibility of an unfair dismissal claim;
 - 23.2. She was ignorant of the three month time limit;
 - 23.3. Such ignorance was reasonable in light of the Claimant’s learning difficulties which I find result in the Claimant being unable to understand what a time limit is.
24. After the expiry of the limitation period the Claimant did not present the Claim for a further 7 weeks and three days. I find that that reasons for the further delay were:

- 24.1. The fact that until 27 November she was not looking beyond her appeal outcome;
 - 24.2. The fact that she was not professionally represented;
 - 24.3. The Claimant's continuing ignorance of the existence of a time limit (which I find to be a reasonable ignorance in light of her learning difficulties);
 - 24.4. The fact that she did not, I find, receive systematic assistance from her mother or her aunt (neither of whom were present at the Preliminary Hearing which took place before me). Her mother obtained the number of ACAS for the Claimant but it was then her aunt who presented the Claim just over a week after the Early Conciliation certificate had been issued.
25. The question for me to answer in relation to the second limb of the time limit issue is not whether the Claimant acted reasonably in waiting until 5 January 2018. Rather what I must do is objectively considered the factors causing the delay and what period should reasonably be allowed in those circumstances for a claim to be begun having regard, of course, to the strong public interest in claims being brought promptly and against a background where the primary time limit is six months.
26. I have identified that factors causing the delay in the previous paragraph. Taking those factors into account, I have concluded that the Claimant succeeds. The Claimant's learning difficulties and the fact that she is not professionally represented put her at an enormous disadvantage in pursuing the Claim and the period reasonably to be allowed should take due account of that. In reaching this conclusion I have also taken into account that the Respondent did not suggest that it was in any way prejudiced by the delay in the Claimant bringing the claim.

Employment Judge Evans

Date: 13 July 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

16 July 2018

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FOR EMPLOYMENT TRIBUNALS