



# EMPLOYMENT TRIBUNALS

BETWEEN

*Claimant*

*Respondent*

Miss H Cusack

AND

Care UK Limited

## PRELIMINARY HEARING

Heard at: North Shields

On: 29 November 2017

Before: Employment Judge Speker OBE DL

### *Appearances*

For the Claimant: In person

For the Respondent: Mr S Proffitt Solicitor (DAC Beachcroft)

## **JUDGMENT AT PRELIMINARY HEARING**

- 1 It was not reasonably practicable for the claimant to present her claims for unfair dismissal and disability discrimination within the statutory time limit and the Tribunal is satisfied that the claims were presented within a reasonable time thereafter and that it is just and equitable for the disability claim to proceed. Accordingly these claims for unfair dismissal and disability discrimination may continue.
- 2 The full hearing shall take place as previously indicated at **North Shields Hearing Centre, 2<sup>nd</sup> Floor, Kings Court, Earl Grey Way, Royal Quays, North Shields, Tyne and Wear, NE29 6AR** on **14, 15 and 16 February 2018** and the directions previously made on 3 October 2017 shall stand.
- 3 The respondent has now conceded that the claimant had a disability at the relevant time namely from or about November 2015 to March 2017.

## **REASONS**

- 1 This preliminary hearing was held pursuant to directions made by Employment Judge Johnson at a private preliminary hearing at North Shields on 3 October 2017 when he directed that the preliminary hearing today 29 November 2017 should consider the issues of whether the claimant is and was at all material times suffering from a disability as defined in section 6 of the Equality Act 2010 and whether any of her claims are out of time and if so, whether time should be extended.

### **Out of time issues**

- 2 Mr Proffitt provided the Tribunal with a bundle of documents running to 118 pages and produced a skeleton argument dated 29 November 2017. The claimant had filed a supplemental statement dealing with the question of late submissions of her application and her justification of that. That statement also dealt with issues as to disability discrimination although it was not necessary to go into those aspects of her statement bearing in mind that Mr Proffitt had confirmed that disability was conceded.
- 3 The claimant gave evidence to the Tribunal and was cross-examined. The essential effects with regard to the out of time issues were as follows. The claimant was employed by the respondent as a Senior Care Assistant from or about 1 August 2007 until her dismissal on 21 January 2017. She underwent an operation in November 2015 which had complications and she was off work from that time and was expecting to return in around March 2016. Tragically her 17 year old son died of a medical condition in March 2016 and as a result of this she was not able to return to work.
- 4 The claimant submitted a number of sick notes although it is an issue in the case as to whether these were lodged with the respondent as often as required. Sick notes in March 2016 referred to groin pain related to her surgery and from 21 March 2016 to bereavement, reactive depression as well as chronic groin pain and those sick notes which were available to the Tribunal repeated these causes as the reason for continued absence from work. The claimant underwent occupational health assessment in May 2016. A sick note in November 2016 referred to anxiety and depression. Various letters were sent by the respondent's Area Manager to the claimant. Ultimately a disciplinary meeting was held on 24 January 2017. The claimant did not attend and the decision was made in her absence that she be dismissed and she was informed by a letter which would have arrived on 25 or 26 January 2017, this being taken as the effective date of termination.
- 5 On 9 February 2017 the claimant appealed by a handwritten letter. An appeal meeting took place on 24 February 2017 which the claimant attended. Minutes were produced. The appeal hearing was held by Karen Morrison, Regional Manager. Reference was made to the claimant having made a trip to Turkey in October 2016. The claimant explained that that had been motivated by the death of her elder son, the father of both of her sons being

Turkish. The trip to Turkey had been to see the claimant's mother-in-law and for the youngest son to see his grandmother and family.

- 6 On 2 March 2017 the claimant was notified by letter from Karen Morrison that her appeal was unsuccessful. There was a Facebook entry undated which the claimant conceded she had posted which referred to her decision to "start the ball rolling" in relating to challenging her dismissal. After this the claimant contacted ACAS by telephone and e-mail. She was aware from her managerial role with the respondent that it was necessary to contact ACAS in advance of making a Tribunal claim in relation to dismissal. Her contact with ACAS was on 28 March 2017. The claimant also conceded that she was aware that there was a three month time limit for presenting claims to a Tribunal following dismissal.
- 7 On 12 April 2017 ACAS issued an early conciliation certificate. The claimant was aware that she had until 12 May 2017 to present her claim.
- 8 Towards the end of April the claimant became seriously unwell. A statement of fitness for work prepared by her doctor on 21 April 2017 stated that she was not fit for work due to post bereavement emotional trauma, post traumatic stress disorder, depressive illness and neurological disorder and she has been referred to neurology.

The last line above referred to the fact that her GP had specifically referred her to the Neurosciences Department at the Royal Victoria Infirmary in Newcastle upon Tyne although the claimant told the Tribunal that she was still awaiting an appointment.

- 9 The claimant stated that around this time she was in a poor state with regard to her mental health and was having flashbacks about her son and could not think straight. She had to move in with her mother and rely upon her mother and sister to deal with her affairs including retaining her tenancy and handling her finances as well as looking after her younger son (aged 12) as she could not cope with anything. She was not able to focus upon any question of preparing an application to the Tribunal and was in a very bad state. She said that her family were concerned about her and that she made suicidal threats.
- 10 Eventually she was recovering and was able to return to her own home on 10 July 2017 and was feeling better. She then set about preparing her claim form and submitted it to the Employment Tribunal on 15 July 2017. In the form at section 8.2 she stated that she was aware that presentation of the claim was outside the time limit and referred to the fact that her mental health at the time the claim should have been submitted was so bad because of a connection with the anniversary of her son's death and she could not function or even get out of bed and she had only just found the strength to seek advice and commence her unfair dismissal claim. She admitted that the reference to the up and coming anniversary of her son's death was inaccurate but explained that her mental health was affected both up to and after the anniversary of her elder son's death and it was not possible for her to cope with preparing her application.

- 11 In answer to Mr Proffitt the claimant conceded that ACAS had confirmed that she had one month after the issue of the certificate in order to put in a claim but that she was feeling low and then “fell to the floor”. She went to see her GP because she could not function and that produced the sick note referred to dated 21 April 2017. She did not ask her family to help her with the issue of a Tribunal application as she could not cope at all. She had tried to keep in touch with work during the time that she was off and maintained that records had not been kept of the numerous communications by her and by her family with the respondent.

### **Submissions**

- 12 Mr Proffitt referred to his detailed skeleton argument and the relevant statutory provisions. He stressed that the claim form was submitted 64 days out of time. He made reference to the decision in **Robertson v Bexley Community Care [2003] IRLR 434** and the Tribunal’s extension to extend time:-

Auld LJ:

“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”.

He also referred to the need for the Tribunal to balance prejudice to the respondent as well as to the claimant. He referred to a contradiction in that the claimant had been able to contact ACAS by phone and e-mail but claimed not to have been able to deal with the relatively simple task of preparing the ET1 claim form which did not require significant information or particulars. He suggested that it made no sense that the claimant could deal with early conciliation but not submit her claim. Even in evidence she had conceded that it was not a question of ignorance of the relevant time limit as she was well aware of it. He suggested there was no intervening act or impediment between the issue of the ACAS certificate and the eventual submission of the claim form on 15 July 2017.

Whilst the health problems and tragic loss are highly unfortunate, these did not he submitted justify the claimant’s suggestion that it had not been reasonably practicable for her to present her claim. On the balance of prejudice the claim was very clearly out of time and there was prejudice to the respondent having to respond to such a claim when such an interval had passed.

Mr Proffitt further stated that the claimant found herself in regrettable and tragic circumstances but the default in lodging the claim did not meet the statutory test and the Tribunal should not base its decision on sympathy for

the plight of the claimant but on the strict criteria set out in statute. He asked that the claims be struck out for lack of jurisdiction.

- 13 Miss Cusack responded stating that it was a big thing for her to have to put in a claim. Although she dealt with the ACAS early conciliation, she then suffered a significant deterioration in her mental health in April and this was shown by the sick note dated 21 April 2017. Her condition had changed drastically and she was given further medication and the doctor confirmed that she was suffering from post bereavement emotion trauma, post traumatic stress disorder and a depressive illness. This justified him deciding to refer her to the RVI for treatment. She submitted that it was not reasonably practicable in all the circumstances for her to submit her claim form and that she did so as soon as she recovered sufficiently.

### **The law**

14 **Section 111(2) Employment Rights Act 1996:**

- “(2) 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”.

**Section 123(1) Equality Act 2010:**

- “(1) Proceedings on a complaint may not be brought after the end of –
- (a) the period of three months starting with the date of the acts to which the complaint relates, or
  - (b) such other period as the employment tribunal thinks just and equitable”.

- 15 It is clear that the complaints in this case were presented outside of the statutory period. From the evidence produced and the evidence given by the claimant and the documentary evidence including the sick note dated 21 April 2017 I accept that the circumstances of the claimant and the effect upon her mental health were such that they made it difficult for her to cope during the period between the issue of the ACAS early conciliation certificate and the end of the statutory time limit. I accept that she was able to deal with the early conciliation process following dismissal and that she was aware from her work experience of the process and of the statutory time limit. However such was the impact upon her of her mental health and post traumatic stress disorder

that she was unable to handle her affairs or deal with responsibilities in life to such an extent that she needed to move in with her mother and rely upon family members to take control. I find that in those circumstances it was not reasonably practicable for her to present her claim to the Tribunal in time. That continued to be the case for some weeks until her health improved so that she could return home and once again take control. As soon as that occurred she promptly addressed the question of issuing the Tribunal application and lodged it with the Tribunal.

- 16 With regard to the disability claim and for the same reasons and applying the statutory test I find that it is just and equitable to allow the claim to proceed as the default was the result of the circumstances outlined.
- 17 I therefore extend the time for the issue of these applications so that they are treated as within the extended time limit and may therefore proceed.
- 18 In making this decision I balanced the prejudice to the respondent in having to deal with a later claim against the prejudice to the claimant. I find that in view of the unfortunate circumstances of the claimant's health and the trauma she suffered that the prejudice to her in not being able to proceed with her claim exceeds that to the respondent in having to deal with the claim which was initially lodged out of time.
- 19 I was also influenced by a document produced by the claimant namely a decision of the Social Entitlement Tribunal in Newcastle on 10 April 2017 by which it was declared that Miss Cusack was entitled to employment and support allowance with the work related activity component and this sets out the points scored and the difficulty which she had in dealing with personal action tasks because of her impaired mental function.

### **Further progress**

- 20 Having announced this decision I reminded the parties that at the hearing on 3 October 2017 Employment Judge Johnson had made detailed case management orders for the progress of the case dealing with disclosure, witness statements, bundles of documents and other matters and I confirm that all of those directions remain in force and are to be followed by the parties.
- 21 The claimant did not have with her the bundle which had been prepared by the respondent for today's hearing although it was stated that it had been sent to her. The claimant was reminded that she should bring with her to the Tribunal hearing all of the relevant papers and that will include the up to date bundle which is prepared for the final hearing.
- 22 Mr Proffitt raised the question of the type of disability about which the claimant complains. This is referred to on page 20 of Employment Judge Johnson's summary where he asked that the claimant decide which of the types of discrimination were the basis of her claim, direct discrimination contrary to

section 13, discrimination arising from disability contrary to section 15 and failure to make reasonable adjustments contrary to sections 20 and 21. The claimant confirmed that in her most recent supplemental statement to the Tribunal for this hearing she had stated that she wishes to pursue a complaint of disability discrimination under section 15 of the Equality Act 2010 – unfavourable treatment because of something arising in consequence of her disability. Mr Proffitt asked if she confirmed that she was maintaining that what she was complaining about was her dismissal and the claimant confirmed that this was indeed the case.

**CONSEQUENCES OF NON-COMPLIANCE**

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

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**Employment Judge Speker OBE DL**

**Date 15 December 2017**