



EMPLOYMENT TRIBUNALS

Claimant: Ms M Pletts

Respondent: Mrs Elsie Eugenie Audas by her Attorney, Mr Neil Riddell

Heard at: Teesside

On: 9 November 2018

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: In person

Respondent: Miss H Gardiner, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims of unfair dismissal, failure to pay holiday pay, unauthorised deductions from wages and breach of contract are struck out because they were not presented within the period of three months from the effective date of termination, or the date upon which payment of the holiday pay were due and it was reasonably practicable for the claims to have been submitted in time.
2. The claimant's claim of disability discrimination is struck out because it was not presented within the period of three months less one day from the last act or omission complained of and I do not find it would be just and equitable to extend the time limit.

REASONS

Background

1. The claimant says that she was employed as one of two live-in carers for the respondent, who is a 98-year-old woman who has Alzheimer's disease, from May

2016 to 5 February 2018. The respondent denies that the claimant was employed or a worker, but that issue did not need to be decided today.

2. Because of the respondent's incapacity, her affairs are administered by an attorney, Neil Riddell, who is her nephew. Mr Riddell was appointed on 23 January 2018.
3. The claimant brought claims of unfair dismissal, failure to pay holiday pay and breach of contract. In her response, the respondent submitted that all claims were out of time. On 21 September 2018, the case came before Employment Judge Hargrove, who made a case management order dated 27 September 2018 that was sent to the parties on 3 October 2018. The case management order set up today's public preliminary hearing to determine:
 - 3.1. Whether the claimant's claims of unfair dismissal/breach of contract and holiday pay due on termination were presented outside the time limit of three months from the effective date of termination taking into account early conciliation and whether the claimant's claim of an unauthorised deduction from wages was presented outside the time limit of three months from the date of the last of a series of deductions or non-payments, and if not, whether it was reasonably practicable to present such claims in time and whether they were presented within such further time as was reasonable, and;
 - 3.2. Whether the claimant's claim of disability discrimination in respect of her dismissal on 5 February 2018 was presented inside the time limit of three months, taking into account early conciliation, and if not. Whether it would be just and equitable to extend time.
4. Employment Judge Hargrove also made a case management order for the preparation of this public preliminary hearing.

Hearing and Evidence

5. At the outset of the case, I had not been given a bundle of documents or witness statement for the claimant. I asked her if she had complied with paragraph 2 of the Order of EJ Hargrove and she confirmed she had a bundle and a witness statement. She handed the bundle up. I went through it with her and decided that 10 of the documents in the bundle were relevant to the issues that I had to determine.
6. The claimant was relying on the protected characteristic of disability. I explained that in order to rely on that protected characteristic, she had to meet the definition of disability in section 6. She had produced no medical evidence confirming a diagnosis or the effect on her of the side effects of the treatment she had received.
7. The case management order had intimated that the claimant may be calling the ACAS officer who handled the early conciliation to give evidence. The claimant confirmed that she would not be calling the ACAS officer.

8. Ms Gardiner confirmed that the letters dated 25 October 2018 from Mr Neil Riddell and Mrs Gillian Wilks (Mr Riddell's daughter) were the respondent's evidence for the purpose of this hearing.
9. We then broke to enable an agreed and relevant bundle to be created.
10. On the resumption, Ms Gardiner said that the limitation dates had been discussed at the private preliminary hearing and that the effective date of termination was recorded as 5 February 2018. The claimant's claim for unauthorised deduction of wages was a claim of failing to pay the National Minimum Wage in a series of deductions that ended in September 2017.
11. Time started to run on the breach of contract and unfair dismissal claims at the effective date of termination, 5 February 2018. She had calculated that the limitation date after early conciliation was 2 July 2018. I had made a calculation in the break and agreed with Ms Gardiner's date for limitation. The effective date of termination was 5 February 2018; the application for early conciliation had been presented on 19 April 2018; the early conciliation certificate was dated 2 June 2018; the limitation date was 2 July 2018 and the claim had been presented on 4 July 2018.
12. The claimant gave evidence by reference to her statement of 24 September 2018. Her evidence in chief was that she received her early conciliation certificate on 2 June 2018, having submitted her application on 19 April 2018. The early conciliation process had been prolonged because Mr Riddell had requested an extension of time of two weeks.
13. At the time she had received the early conciliation certificate, the claimant was informed by the ACAS officer that the respondent was going to send a response imminently. She had hoped that the promised response would lead to a settlement.
14. She had wanted to submit her claim to the Tribunal as soon as she had received the early conciliation certificate and, on 5 June 2018, read up about the claim process on the Government website page titled "Make a claim to an employment tribunal". She produced a copy of the relevant pages. She submits that the second page produced has an example of how the time limits work:

"You have 2 months left to make a claim. You then start your early conciliation, which takes six weeks and isn't successful. ACAS then sends you your early conciliation certificate – you will then have 2 months left to make your claim."
15. The claimant did not draw my attention to the following line of the guide, which stated *"Contact ACAS if you have any questions."*
16. I was referred to email correspondence between the ACAS officer and the claimant dated 20 June 2018. It was obvious that the claimant had been chasing a response or offer from the respondent. The ACAS officer noted that a certificate had been sent out on 2 June 2018 and added that if the claimant was

intending to pursue the matter to a Tribunal, she had “approximately 1 calendar month from the date it was issued.”

17. The claimant said she had been receiving chemotherapy and radiotherapy for cancer in February and March 2018, but was feeling particularly well in early June.
18. She said that she has no internet access at home, but has access at her place of work, about 20 miles/30minutes from her home. She said she could not use the internet facilities at her local library because of “time limits” (from which I assumed she meant opening hours) and because her claim was private. She was at work through much of June, but had little time to herself.
19. After receiving the ACAS officer’s email on 20 June, she decided to give the respondent another week to send a response. However, she was unexpectedly required to fly to France on 27 June 2018 because her daughter, who lives there, was ill. She referred to a document she sent to the Tribunal titled “Case Number 2501336/2018: Request for Comments”. In that document, she set out the circumstances of her trip to France. She had intended to lodge her claim by 29 June, but ended up going to a hospital appointment with her daughter in Carcassonne on that day. She flew back the following week.
20. She confirmed that she wanted to have dealt with everything by the end of June and was aware of the ACAS officer’s advice, but was unable to submit her claim by 1 July 2018, which was a Sunday. Instead, she took the application to the Tribunal’s office in North Shields on Wednesday 4 July. She submits that her claim was 2 days late by one piece of advice (the ACAS officer) and almost a month early by another (the gov.uk website).
21. She complains that she had little time to consider the respondent’s response.
22. She submits that the respondent would not be done any injustice by allowing her claims to proceed.
23. In her document submitted to the Tribunal, she had said that her last day of work with the respondent had been 25 December 2017 and she had been paid for the last time on 29 December 2017.
24. In answer to cross-examination questions, the claimant said she had written her ET1 on Tuesday 3 July 2018. She knew her claim was out of time because of what the ACAS officer had told her. She was relying on the gov.uk website. Her intention had been to lodge the claim by 29 June 2018.
25. She had returned from France late on Sunday 1 July, at about 9.30pm. She was not at work on Monday 2 July, but she felt tired and could not write coherently. She was not happy with the standard of the claim she had written.
26. She had not submitted the claim on Wednesday 3 July because she did not have the energy. On 4 July, she took her car to Darlington and got the train and Metro to the Tribunal office.

27. She had booked her flight to France at about midday on 26 June and had flown on 27 July. She had researched time limits on 5 June 2018 and would have liked to have submitted the claim then. When she had looked at the gov.uk site, she had understood the time limit to be two months from the date of her certificate. She knew she had a certain period of time. It was put to her that the website said:

“Once you receive your certificate, you’ll have the same amount of time to make your claim as you did before you started conciliation.”

28. The claimant accepted this but never calculated the due date and just relied on the example. She said she could not say if she had considered if she had 2 months left to make a claim. It was put to the claimant that her evidence is that she thought she had until 2 August 2018 to lodge a claim, but had done so on 4 July and had told the member of the Tribunal staff that she thought it was late.

29. I noted that in paragraph 15 of her ET1, the claimant had written:

“I am told that this claim may be out of time; however, I had to go to France suddenly on 27 June and did not return until the beginning of this week.”

30. The claimant said that she had used the wrong words. She knew there was a time limit: two months after the conciliation certificate. She had got the idea that the claim may be out of time from the ACAS officer’s email that she had received on 20 June. She had never pinned down a date for limitation. She had it in her head that it would be OK by the start of June. June was busy at work.

31. She accepted that she did not know what the respondent’s promised response would be, so she may have had to issue a claim. It was put to her that she could have drafted a claim “just in case” or drafted and lodged it as a backstop. Her response was that she wanted to draft a good claim, which I did not consider to be a proper answer to the question.

32. The claimant was asked if she had had difficulty in concentrating on 2 June 2018 and said that she had had a very good experience of chemotherapy and radiotherapy and had had a delayed effect from it. She said she had had some pain immediately after the treatment, but that it was not particularly severe in April and had gone by May. She was “really ready” in June.

33. Her fatigue had started in mid-June. She had been aware that the side effects of her treatment could have been delayed, but thought that her fatigue could have been her workload.

34. It was put to the claimant that she could have gone into work early to use her computer and internet access. She said that sometimes, it (her computer) would just not work. She could not use another computer because of GDPR rules. She was aware that she could lodge a claim online and agreed that she could type up her claim on her own computer at the local library or office.

35. The claimant said that she could not have submitted her claim between booking her flight at midday on 26 July and flying at 5.00pm the following day because she was worried about her daughter. She took her papers with her to her

daughter's home but believed she had until August to submit them. She didn't know how long she would be in France.

36. Her daughter has internet access. She could have filed her claim from France, but that was not on her mind. I had not been what she had gone to France to do. If she had been detained in France until August, she would have filed her claim from France. It was put to the claimant that she had had 27, 28, 29, 30 June and half of 1 July to lodge her claim. She agreed, but said she had an appointment with her daughter at the hospital on 29 June.
37. She had booked her flight on Saturday on the internet, but the connection dropped before she could print her boarding pass.

Closing Submissions – Respondent

38. Ms Gardiner submitted that the wording of section 111(2)(a) was "...before the end of the period of three months...", not "on the last day". The claimant had had a period of three months in which to lodge her claim and I should look at the reasonable practicability of lodgement over the whole period.
39. The claimant had not presented a good enough reason not to have put her claims in on time. She says she was awaiting a response from the respondent, but that response may not have been positive and she could have been forced to issue anyway. Or she could have just prepared a claim and waited.
40. Knowledge of a limitation date does not assist the claimant because she admitted that she had not pinned it down. She misinterpreted the advice on the government website. Her evidence is that she thought the limitation date was 2 August 2018, yet her ET1 states that she has been told that it may be out of time on 4 July.
41. She had received a warning from the ACAS officer on 20 June 2018. Even if it was not reasonably practicable to issue when she was in France, she could have issued on her return; a computer and internet access were available. It is possible to pause and save an application online.
42. The claimant was able to book her flight online. She returned home in the evening of 1 July and the deadline was 2 July. She did not begin working on the application until Monday evening.
43. There are no documents corroborating her evidence of illness and treatment or the effect of that treatment on her ability to lodge a claim in time. It was reasonably practicable to have filed all the claims that are subject to that test in time.
44. The test for the disability discrimination claim is whether it would be just and equitable to extend time. I have a broad discretion, but it is not unfettered. I have to be satisfied that there was a good reason for delay. The claimant knew that there was a time limit, but did not ascertain what the actual date was. The evidence has not deteriorated because of the delay, but the first hurdle is not cleared.

Closing Submissions – Claimant

45. The claimant submitted that she doesn't like to admit what has happened to her. She has good days and bad days. She believed in all truth that she had until August. Events conspired against her to mean that she couldn't send the application in.
46. She had not had an opportunity to make the application from France. She went to see her daughter and was tired from the flights there and back.
47. At the college where she works, she does not do personal work, except in her own time. She could not use her office when other people were there. She has done her best in all the circumstances.
48. She had felt morally bound to bring the proceedings. That will come out at the full hearing.

Decision

49. I delivered an extempore decision on the day of the hearing in which I set out the reasons that I had made the decision I did. Unfortunately, I did not have a dictation machine with me, so I advised the parties of their right to request written reasons, but warned them that the written reasons may be somewhat different to the extempore decision. The claimant requested written reasons.
50. The purpose of the public preliminary hearing was only to determine whether the claimant's claims had been made on time and, if they had not, whether I was satisfied that it was not reasonably practicable for the complaints of unfair dismissal, unauthorised deduction from wages, breach of contract and non-payment of holiday pay to have been presented before the end of the three-month period and that, if it was not reasonably practicable to have submitted the claims in time, whether they had been submitted within such further period as I considered reasonable.
51. The legal test for unfair dismissal is contained in section 111(2) Employment Rights Act 1996. The same test applies to holiday pay claims under regulation 30(2) of the Working Time Regulations 1998, with the three-month period beginning with the date on which it is alleged that the payment should have been made. The same provisions apply with regard to claims of unauthorised deduction of wages in section 23(2) Employment Rights Act 1996, the three-month period beginning with the date of payment of wages from which the deduction was made. The three-month period for breach of contract claims starts from the effective date of termination in accordance with article 7 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.
52. I make the following findings of fact from the evidence of the claimant and the documents produced:
 - 52.1. The claimant's last payment from the respondent was on 29 December 2017. That fact is drawn from the claimant's own evidence. That date is the start of the limitation period for the claims

of unauthorised deduction of wages and non-payment of holiday pay;

- 52.2. The claimants' appointment with the respondent ended on 5 February 2018. That is the effective date of termination for the calculation of the time limits for the claims of unfair dismissal, breach of contract and (because the termination of her appointment was cited as the sole instance of disability discrimination) disability discrimination;
- 52.3. The claimant started early conciliation on 19 April 2018 and was issued a conciliation certificate on 2 June 2018.
- 52.4. Her claims of unauthorised deduction of wages and holiday pay are out of time because she did not commence early conciliation until 19 April 2018. Her last date for commencing early conciliation on those claims was 28 March 2018;
- 52.5. Her claims of unfair dismissal, breach of contract and disability discrimination are out of time because they should have been lodged on or before 2 July 2018. All claims were lodged on 4 July 2018.

53. As Lord Scarman commented in **Dedman v British Building & Engineering Appliances Limited [1974] ICR 53**:

"Where a claimant pleads ignorance as to his or her rights, the Tribunal must ask further questions:

- What were his opportunities for finding out that he had rights?
- Did he take them?
- If not, why not?
- Was he misled or deceived?"

54. In this case, the claimant had had access to the internet and an ACAS officer. She had been on the gov.uk website, which is full of advice about making an Employment Tribunal claim. She did not take any of the opportunities to seek advice about exactly when the limitation date for her claims was and did not give a plausible reason for failing to do so. She says she relied on the gov.uk website that she says told her that she had two months from the date of her conciliation certificate to bring a claim, but admits she was aware of the advice from the ACAS officer dated 20 June that she had approximately a month from the date of the certificate and she did not follow the advice immediately below the example that she says she relied upon to ask ACAS if she had any queries about limitation dates. She did not claim to have been misled or deceived. I find that she was not misled or deceived.

55. In the case of **Porter v Bandridge Limited [1978] ICR 943** the Court of Appeal ruled that the correct test is not whether the claimant knew of his or her rights,

but whether he or she ought to have known of them. I find that the claimant ought to have known about her rights to bring a claim and the time limits in which those claims should have been brought. She clearly thought she had a claim, because she started ACAS conciliation. I note the words of the Employment Appeal Tribunal in the case of **Avon County Council v Haywood-Hicks [1978] ICR 646**, which rejected the idea that ignorance, however abysmal and however unreasonable, is a universal excuse. It said that this offended the notion of common sense and that an intelligent and well-educated man ought to have investigated his rights within the time limit and claimed in time. Given that the unfair dismissal legislation has been in force since 1972, Tribunals will rarely be sympathetic to the notion that claimants were wholly ignorant of their rights. I find that the claimant is an intelligent and obviously well-educated woman. Holiday pay rights have been in force since 1998, rights protecting workers against unauthorised deductions from wages have been in force since 1986 and it has been unlawful to discriminate on the grounds of disability since 1996. The Employment Tribunal has had jurisdiction over breach of contract claims since 1994. I find that the claimant has not presented any credible evidence that she could not have obtained definitive and accurate information about her claims and their respective limitation dates.

56. The claimant produced no corroborative evidence concerning the effect upon her of her cancer and the effect of the treatment she received. Her evidence was vague and inconsistent on the subject. On any interpretation of the evidence, she was fit and feeling well for a good portion of the period from 2 June 2018, when her conciliation certificate was granted, until the limitation date. She was aware that her treatment could have side effects and that these could be delayed. It therefore does not assist her case to have failed to have at least started to draft an application, even if she did not file it, before Monday 1 July.
57. The claimant failed to demonstrate on the balance of probabilities that she could not have filed her application online at any time and, especially from 26 June 2018 to 2 July 2018. She had access to a computer and internet at home and at work. Her excuses about not being able to submit the claim at work are not credible. Neither are her excuses for not being able to file the claim from her local library. She admitted that she booked her airline tickets online on 26 June. If she had done any research, she would have found out that an ET1 can be saved as it is drafted and can be returned to. I am afraid to say that I find the claimant's excuses to smack of being retrospectively created.
58. The claimant's evidence of her inability to file a claim whilst in France was not credible either. I cannot see why she would take her papers with her and then do nothing with them.
59. Her credibility is further undermined by her evidence that she believed her limitation date was 2 August 2018. I simply cannot agree with the claimant's interpretation of the example on the gov.uk website. It has to be read as a whole. If a claimant still has two months left to bring a claim and starts early conciliation, they have two months left at the end of the conciliation process. The two-month period at the end is predicated on there being a two-month period when early conciliation starts. Her professed belief flies in the face of the advice she

received from the ACAS officer and the true legal position, which she could have researched online or rung ACAS for confirmation on.

60. The claimant did not even start early conciliation within the three-month time limit for her claims of unlawful deductions from wages and failure to pay holiday pay. She offered no explanation for that failure and I therefore have no hesitation in finding that it was reasonably practicable for the claims to have been brought in time. Those two claims are struck out as the Tribunal does not have jurisdiction to hear them.
61. For the reasons set out in my findings of fact above, I find that it was reasonably practicable for the claimant to have brought the claims for unfair dismissal and breach of contract within the time limit. Those two claims are struck out as the Tribunal does not have jurisdiction to hear them.
62. The test for discrimination claims is set out in section 123 of the Equality Act 2010, which states that the time limit is the period of 3 months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable.
63. The discretion to grant an extension of time under the 'just and equitable' formula has been held to be as wide as that given to the civil courts by section 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions. Under that section, the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.
64. I find that delay was only 2 days, but was for the main reason that the claimant placed reliance on an extract from a website that she completely and unreasonably misunderstood and did nothing to ascertain what the true limitation date was. Ms Gardiner accepted that the delay was unlikely to affect the cogency of the evidence. The claimant has tried to provide all information requested of her. She did not act with great promptness once she knew of the facts giving rise to the cause of action; she said that she wanted to issue the proceedings in early June. She made no effort whatsoever to obtain appropriate professional advice or even the free advice available from ACAS on the time limits applicable to her claims.
65. Were I to exercise my discretion, the respondent would face the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence.
66. The same principles apply in the just and equitable arena to those in the reasonably practicable arena in respect of the claimant's ignorance of the law. I have already made my findings on that point above.

67. When considering whether to grant an extension of time under the 'just and equitable' principles, the fault of the claimant is a relevant factor to be taken into account.
68. It is necessary for me, when exercising my discretion, to identify the cause of the claimant's failure to bring the claim in time. In **Accurist Watches Ltd v Wadher** **UKEAT/0102/09/MAA**, Underhill J stated that, whilst it is always good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents (para 16). What a tribunal is not entitled to do, however, is to make assumptions in the claimant's favour on contentious factual matters that are relevant to the exercise of the discretion; as the burden is on the claimant to show that it would be just and equitable to extend time, where a contentious matter is relied on there must be some evidential basis for it. In this case, the claimant brought no evidence of the effect that she said the side effects of her treatment had on her other than her own oral evidence.
69. When balancing the factors for and against the exercise of my discretion in the claimant's favour, I find the fact of the delay and the reasons put forward for the delay together with her failure to properly and conscientiously ascertain the correct limitation date tip the balance in favour of the respondent and I therefore decline to extend time, as I do not find it just and equitable to do so. The Tribunal therefore does not have jurisdiction to hear the claimant's claim of disability discrimination and that claim is struck out.

Employment Judge S A Shore

Date 29 November 2018

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