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THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Mrs K Tangen

**The Committee of Pevensey &
Westham Playgroup**

Held at London South

On 6 February 2019

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: In Person

For the Respondent: Mr W Williams, Counsel

JUDGMENT ON PRELIMINARY HEARING

The decision of the tribunal is:-

1. The application to amend the particulars of claim to include additional allegations of disability discrimination is refused.
2. To the extent that a claim for disability discrimination is included in the claim form, it is struck out under Rule 37 for non-compliance with an order of the tribunal, for not being actively pursued and as having no reasonable prospect of success.
3. The claims for unfair dismissal, breach of contract (notice pay), holiday pay and arrears of wages may proceed.
4. The claim for a redundancy payment is in time and it may proceed.

REASONS

1. A preliminary hearing was conducted by Employment Judge Freer on 23 October 2018. He ordered that a further preliminary hearing should take place to consider:-
 - (i) whether the Tribunal has jurisdiction to consider any of the Claimant's claims having regard to the provisions relating to the applicable statutory time limits;
 - (ii) whether all or any of the Claimant's claims should be struck out under Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013;
 - (iii) whether the Claimant should be ordered to pay a deposit to pursue all or any of the claims under Rule 39 of the Rules of Procedure 2013.
2. I heard evidence from the Claimant in person. The Respondent did not call any evidence.
3. It was agreed that the key issues for me to consider today were first of all whether it had been reasonably practicable for the Claimant to bring her claims for unfair dismissal, breach of contract and for unlawful deduction from wages in time; and if not whether they had been brought within such further period as was reasonable. Second it was necessary to consider whether the claims for disability discrimination had been brought in time and if so whether they had any prospect of success.
4. The facts I have found and the conclusions I have drawn from them as follows.
5. On the claim form the Claimant asserted that she had been dismissed on 15 December 2017. In her further particulars supplied on 31 January she describes her claim as one of "constructive unfair dismissal". In fact, having heard evidence from the Claimant it became clear that she had taken no steps to resign her employment on 15 December. The Respondent is an unincorporated charity run by a committee. All of the committee members had resigned on 6 December 2017. The Playgroup had closed on the last day of Christmas term, the 15th December 2017. As a result of the committee

resignations, East Sussex County Council said that they would not fund the Playgroup from 1 January 2018.

6. The Claimant worked termly but was paid weekly across 52 weeks of the year. She would normally expect to be paid for the Playgroup Christmas holidays. She was paid one week in arrears. The last payment she received was on 1 December. She would have expected to have received her final payslip on 4 January 2018. It was common ground between the parties that the latest date on which the Claimant could have been employed by the Playgroup was 4 January 2018.
7. That would put her primary limitation date for applying to the Tribunal as 3 April 2018.
8. The Claimant commenced early conciliation on 5 March 2018 and an early conciliation certificate was provided by ACAS on 9 March 2018. It is agreed that at that point the Claimant had one month to submit her Employment Tribunal Claim, i.e. she should have lodged it by 9 April 2018.
9. The evidence of the Claimant is that she did not know that she had to submit her claim by 9 April at the time. In fact, she completed the form on 9 April and used the “check your claim” tool on the Government website. She then submitted her claim but it was not received by the Tribunal until 10 April 2018. It is agreed that the claim was submitted one day outside the time limit.
10. The Claimant says that after the Playgroup closed she first approached the Redundancy Payments Office to claim her redundancy payment and the other sums due to her. She produced a letter from that office dated 8 January 2018 stating that the Redundancy Payments Office could not pay the outstanding sums as her employer was not insolvent.
11. The Claimant then approached the CAB for advice. They referred her to a firm of local solicitors who would provide a free half hour of legal advice. She received this advice around 5 March 2018. She was advised to go to ACAS immediately and commence early conciliation. The Claimant understood that

by approaching ACAS this would “stop the clock”. She completed her form seeking early conciliation that same day, 5 March. The early conciliation certificate was issued on 9 March.

12. The evidence of the Claimant is that the advice she received from the lawyer was not put in writing. She said that she had understood that lodging her form with ACAS would stop the clock but she had not understood that there was any time limit that applied after that.
13. The Claimant continued to seek legal assistance and representation. She was advised to make a claim on her household insurance for legal expenses cover. She put in a claim on 9 April but heard nothing back until June. She was able to appoint solicitors who represented her from July onwards and attended the preliminary hearing on her behalf; but they withdrew in October 2018. It appears that this was because of issues related to her insurance.
14. I have considered whether it was reasonably practicable to put the claim in by 9 April 2018. Mr Williams refers me to the case of ***Dedman v British Building and Engineering Appliances [1973] CA***. He says that this is clear authority for the fact that if the Claimant has sought advice and has been given incorrect advice by her adviser about time limits, any claim must lie against that advisor and that is not an excuse for not making an Employment Tribunal claim in time.
15. I note that guidance and I considered it carefully. However, I consider that the circumstances here are different to those in ***Dedman***. The Claimant did not obtain advice from an advisor on 5 March 2018 under the terms of a formal retainer. She simply received 30 minutes of free advice, and that advice was not confirmed in writing. On the basis of the evidence provided to me today, I am not able to say with any certainty that the advice provided to her had been incorrect or misleading. The rules relating to the effect of early conciliation upon time limits are rather complicated. It may be that some effort was made to explain to her the time limit that would apply after early conciliation was completed. Prior to early conciliation it is not possible to predict what the new time limit will be. Whatever she was told I accept that the information that the Claimant took away with her was that starting early conciliation “stopped the

clock". I accept that she was not aware that having started the early conciliation process, a time limit applied after that process had concluded. There was no suggestion that the Claimant had any opportunity to go back to the solicitor for further advice after she had received her early conciliation certificate.

16. Mr Williams has provided me with a copy of the case of ***Mrs S Kauser v ASDA Stores Limited UKEAT 0165/07/RN***. I refer to the words of Lady Smith at paragraph 17: "the short point seems to be that the Court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what is possible but asking whether, on the fact of the cases found, it was reasonable to expect that which was possible to have been done". I accept that in this case it would have been possible for the Claimant to have lodged her claim on or before 9 April 2018. However, given that I have found that she had no awareness that her time limit expired that day, I conclude that it was not reasonably practicable for her to do so. In fact, she submitted the claim just one day out of time on 10 April 2018. It was therefore submitted within a further reasonable period. In all the circumstances I find that her claims for unfair dismissal, notice pay, holiday pay and arrears of wages can proceed.

Disability Discrimination

17. On her claim form, the Claimant ticked the box indicating that she wished to claim disability discrimination. However, when she added details of her claim to paragraph 8.2 she included no allegations of disability discrimination whatsoever.
18. The Respondent served a request for further and better particulars. At the hearing on 23 October Judge Freer ordered that these should be provided by 13 November 2018.
19. The Claimant did not serve further particulars within the time limit. Her solicitors withdrew on 30 October. She then made strenuous efforts to find other representation. She was worried about completing the further particulars

without assistance. Eventually she spoke to ACAS who advised her that she must do so.

20. The Claimant served a document purporting to be further particulars of her claim on 31 January 2018. This was over eight months since she lodged her claim and over two months after the date in Judge Freer's order.
21. The Claimant has a form of leukaemia and it is accepted that this would amount to a disability under the Equality Act 2010. However, her allegations of discrimination related to her disability were still not completely clear from the document provided. The document appeared to raise entirely new matters from the issues set out on her claim form which related mainly to her dismissal.
22. In discussion during the course of this morning's hearing, the Claimant stated that she was complaining about an enforced reduction in her pay and hours on 1 December 2017 and about the offensive way in which she had been treated at a meeting on that day. She says that the reason for this treatment was her disability.
23. The Claimant also complained about a letter written by the Respondent to the Tribunal and dated 5 June 2018. This letter accompanied the Response. It stated that the Claimant had been difficult to work with. There is a reference to the Claimant being asked to cut her hours and delegate more of her duties. The letter recognises that the Claimant had health issues and stated that as a result the Respondent had to 'tread carefully'.
24. The Claimant says that this letter is in itself an act of post employment discrimination.
25. I consider these allegations carefully. In relation to the allegation relating to reduction of wages, I have been supplied with a great deal of evidence today relating to the financial situation of the Playgroup. This includes minutes of meetings where the need to make pay reductions had been discussed.

26. The Claimant has been unable to provide any explanation today of why she believes that the decision to cut her pay was related to her disability rather than related to the economic circumstances of the Playgroup.
27. Likewise, I accept that the meeting on 1 December where the pay reduction was discussed with her was likely to have been a difficult and possibly a heated meeting. The notes of the meeting that have been provided confirm that to be the case. However, the Claimant has provided no information from which it would be possible to reach a conclusion that the reason why the Claimant was treated as she was on 1 December was related to her disability, as opposed to being a difficult discussion about what must have been an unpalatable cut in wages.
28. In all the circumstances, I find that this allegation has no reasonable of success.
29. In relation to the letter dated 5 June 2018 sent to the Tribunal, this appears to be a letter sent in response to the claim. It accompanied the response submitted by the Respondent. It is true that the letter does refer to the Claimant's health, but I have treated it as part of the response to these proceedings. It would be highly unusual for a document provided as part of the defence to a tribunal claim to be treated as constituting a separate act of discrimination. I accept that in some cases such a letter could constitute an act of victimisation or past harassment. But in this case it is clear that the Respondent is simply trying to explain what had taken place. I am not satisfied that this letter is capable of amounting to an act of disability discrimination. I find that such an allegation would have no reasonable prospect of success.
30. As the further particulars raised by the Claimant are in any event entirely new matters I have considered whether she should be given leave to amend her claim to include them. In line with the guidance set out in the case of *Selkent* I have considered all the circumstances and whether it is in the interests of justice to allow these claims to proceed. I have decided that it is not. The Claimant could have included these additional allegations in her claim form and is not able to explain why she did not do so. She raises entirely fresh matters

and it is not a question of 're-labelling' the allegations set out in her claim, most of which related to her dismissal. The allegations are over nine months out of time. The merits are very poor. It is not appropriate in this case to grant leave to amend.

31. The Claimant did indicate that she wanted to bring a claim for disability discrimination on her claim form but provided no details of her allegations. I have considered the application to strike out this claim, to the extent that it was brought, under rule 37. I repeat my view that the claim as now understood has no prospect of success. If I am wrong on the prospects of the two allegations, I note in particular that the Claimant failed to comply with the order to provide the particulars of her disability claim in compliance with the Order of Judge Freer by 13 November 2018. I also find that the claim for disability discrimination has not been actively pursued.
32. For all these reasons, the Claimant's application for leave to amend her claim to include these additional allegations of discrimination is refused. To the extent that a claim for disability discrimination was brought in the claim form, that claim is struck out under Rule 37.

Employment Judge Siddall
Date: 15 February 2019