EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms T Ayeni	v	**London Borough of Croydon**

HEARING

Heard at: London South **On: 23 January 2019**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: in person
For the Respondent: R Roberts solicitor

JUDGMENT on PRELIMINARY HEARING

1. The claim of unfair dismissal was presented outside the primary time limit contained in section 111(2) of the Employment Rights Act 1996 as amended by the early conciliation provisions.

2. It was reasonably practicable for the claim to be presented within the primary time limit. In any event, it was not presented within a reasonable time after that, accordingly, the claim is dismissed.

REASONS

Preliminary

1. This preliminary hearing was fixed in order to consider the Respondent's submission that the ET1 was presented out of time.

2. The Claimant gave evidence on her own behalf. There was a bundle of documents to which reference will be made where necessary.

Chronology

3. The Claimant was dismissed summarily by the Respondent on 7th March 2018. The original time limit for the Claimant to submit her claim was 6th June 2018.

4. The Claimant obtained an ACAS Early Conciliation Certificate under EC Reference Number R256189/18/89 which indicates that on 25th May 2018 ACAS received early conciliation notification from the Claimant (Day A) and that on 25th June 2018 ACAS issued the Early Conciliation Certificate (Day B). Taking into account the extension to the limitation period by participation in ACAS Early conciliation, the claim should have been submitted by no later than 25th July 2018.

5. The claim was received by the Tribunal on 11th September 2018. The claim was submitted 48 days out of time.

Evidence

7. The Claimant gave evidence that:
"…I am aggrieved because Croydon Council have gravely and seriously wronged me and behaved in a Draconian matter, and without any evidence decided to dismiss me without any reason from the job I have previously done for many years."

8. After she was dismissed, her health suffered:
"I became very ill. I became very depressed. I have 3 young children and now found myself out of work not know how I was going to support them. I have never been unemployed before then."

She was put on medication. She was also found to have medical problems relating to her Fibroid/adenomyosis. She was under specialist care and had to undergo treatments/procedure for the condition. The medication and dosage were:

- Naproxen 250mg 1 taken twice a daily
- Co-dydramol 500mg 1 taken four times a day
- Mefenamic acid 500mg one taken three time daily during period.
- Ferrous fumarate 210mg one tablet taken once daily

The combination of these medications for her condition and depression made it impossible to think straight in a normal way. She was not able to organise herself or her home. Her sister had to come to live with her to look after the children because she did not have the energy to go out. With depression, even to answer telephone or open letters can become impossible and difficult.

10. At the same time, her young son suffered a serious asthma attack and was admitted to hospital. He also received hormone treatment which required her to accompany him for treatment at the time. All this added to her depressed condition and her inability to think or act properly.

11. She explained that she is not represented and is acting in person in this matter. She has had support from Mr Pokawa, a Unison steward, at the internal disciplinary procedure. Since she was dismissed, however, she has not had his support or representation. She had initially used him to receive communications and information on her behalf but he was not always available or able to do so. He assisted in the process with ACAS, and after that she lost contact with him. He had three weeks

holiday in July. As he worked for Croydon Council, he could not get involved in private tribunal matters.

12. Detail from the ET1 and correspondence:

I. The ET1 shows Mr Pokawa as the representative for the Claimant. The address given for him is not that of the Croydon branch of Unison.
II. 13 November 2018 Mr Roberts emailed Mr Pokawa in connection with the preliminary hearing and other matters [5]
III. 10 December 2018 Mr Pokawa emails Mr Roberts that he is not available on the email system and providing alternative email addresses [22].
IV. 11 December 2018 Mr Roberts provides the emails he had sent earlier to Mr Pokawa [17]
V. 11 December 2018 Mr Roberts of the Respondent emailed Mr Pokawa to make arrangements for the preliminary hearing [21].
VI. 12 December 2018 Mr Roberts emailed again about his attendance at a meeting 29].
VII. 12 December 2018 Email from Mr Roberts seeking confirmation of the arrangements for the bundle [28].
VIII. 18 December 2018 Mr Pokawa replies stating that the bundle should be delivered to the Claimant directly [27-28].
IX. 18 December 2018 Mr Roberts replies pointing out that Mr Pokawa is on the record as the Claimant's representative [27].
X. 18 December 2018 Mr Roberts suggests an arrangement with regard to the documents [25-26]
XI. 18 December 2018 Mr Pokawa agrees to the arrangement [25].
XII. 19 December 2018 The Claimant and Mr Pokawa attend the Council offices to collect the bundle [23].
XIII. 3 January 2019 The Claimant emailed Mr Roberts to clarify the position of Mr Pokawa. "Mr Pokawa is (sic) now continues to support me in this matter before the Tribunal……however Mr Pokawa is not representing me directly. He is a Croydon Council Employee and s UNISON Steward. He supports me in his spare time as a friend." [x]

Submissions

8. The Tribunal received oral and written submissions from both parties.

Law

9. Section 111(2) of the Employment Rights Act 1996 (ERA 1996) provides:
"an Employment Tribunal shall not consider a complaint…unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination."

10. In accordance with section 207B(4) of the ERA 1996, compliance with the early conciliation procedure extends time:

> "If a time limit would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period".

11. A Tribunal may only extend time for presenting a claim where it is satisfied of the following:

> "It was "not reasonably practicable" for the complaint to be presented in time
> The claim was nevertheless presented "within such further period as the Tribunal considers reasonable"

(Section 111(2)(b), ERA 1996.)

12. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present the claim in time. The burden of proving this rests on the Claimant (**Porter v. Bandridge Ltd** [1978] ICR 943 CA). Second, if she succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

13. In **Dedman v. British Building Engineering Appliances Ltd.** [1974] ICR 53 Lord Denning held that ignorance of legal rights, or ignorance of the time limit, is not just cause or excuse unless it appears that the employee or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences. Scarman LJ indicated that practicability is not necessarily to be equated with knowledge, nor impracticability with lack of knowledge. If the applicant is saying that he did not know of his rights, relevant questions would be:

> 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing in ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse".

The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'

14. This approach was endorsed in **Walls Meat Co. Ltd. v. Khan** [1979] ICR 52. Brandon LJ dealt with the matter as follows:

> '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 may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be 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 the period of three months, 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 inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him'.

15. **Palmer & Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA followed this line and talked in terms of reasonable possibility at page 384-385.

16. In **Lezo v. OCS Group UK Ltd** UKEAT/0104/10 and **Cullinane v. Balfour Beatty Engineering Services Ltd and another** UKEAT/0537/10, it was said that a Tribunal should treat an unreasonable delay by the Claimant's skilled adviser as an unreasonable delay by the Claimant. Paragraphs 13 to 15 of the former case are particularly helpful.

DISCUSSION and DECISION

17. The Tribunal sought to elicit evidence from the Claimant targeted at the relevant dates of dismissal, contact with ACAS conciliation and the submission of the ET1 and what her state of health and extent of contact with Mr Pokawa. As in her written submission, the Claimant continued to speak in general terms about her and her son's health and having little contact with Mr Pokawa.

18. The Tribunal noted that the Claimant was very angry about her dismissal and took it that she would be motivated to find out what she could do about it.

19. Although she was ill over the period, the Tribunal was satisfied that there were periods of time when she was well enough to address the issue of her unfair dismissal. It is noted that she did not receive medication for depression, although even if she had, the Tribunal would have wanted evidence as to the effect of all the medication in the relevant period.

20. The Claimant gave contradictory evidence about her involvement with Mr Pokawa as can be seen from the passage noted in her evidence and what she said in her email of 3 January 2019. She sought to minimise her contact with Mr Pokawa after his involvement in the internal disciplinary process but was able to be specific about Mr Pokawa's holiday in July.

21. The Tribunal was in no doubt that Mr Pokawa was a skilled adviser, was aware of the relevant time limits and provided assistance to the Claimant throughout or, at least, was prepared to do so, if she wished. Although the Tribunal accepts that Mr Pokawa was not officially representing the Claimant, she still had the benefit of his skilled advice as a friend.

22. The Tribunal considered that it was reasonably practicable for the Claimant to submit her ET1 in time.

23. In any event, in addressing the timing and manner of the application, the Tribunal noted from the chronology the period of time before the ET1 was lodged. The Tribunal did not get a satisfactory reason for this delay and found that the ET1 was not presented within a reasonable time after the primary time limit as extended.

Employment Judge Truscott QC

Date 31 January 2019