



THE EMPLOYMENT TRIBUNALS

Claimant: Miss H Laidler

Respondent: Engie Services Limited

Heard at: North Shields Hearing Centre **On:** Friday 22nd February 2019

Before: Employment Judge AM Buchanan (sitting alone)

Representation:

Claimant: In person

Respondent: Mr A Ryan of Counsel

JUDGMENT ON PUBLIC PRELIMINARY HEARING having been sent to the parties on 26 February 2019 and written reasons having been requested in accordance with Rule 62(3) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 by the respondent on 6 March 2019, the following reasons are provided:

REASONS

Preliminary Matters

1. By a claim form filed on 9 November 2018 supported by an early conciliation certificate on which Day A was shown as 9 October 2018 and Day B was shown as 9 October 2018 the claimant advances a claim of unfair dismissal pursuant to sections 94/98 of the Employment Rights Act 1996 ("the 1996 Act") in respect of her dismissal by the respondent on 12 December 2017.
2. By a response filed by the respondent on 28 December 2018 the respondent denied all liability to the claimant and raised jurisdictional issues in respect of time limits.
3. The file was reviewed by an Employment Judge and a Public Preliminary Hearing was ordered to take place to determine a preliminary issue which came before me this afternoon.

The Preliminary Issue

4. The issues for me to determine were:

4.1 Did the claimant file her claim for unfair dismissal within 3 months of the effective date of termination of her employment as required by section 111 of the 1996 Act?

4.2 If not, was it reasonably practicable for the claim to have been filed within that time limit?

4.3 If not, has the claim been filed within such further period as was reasonable?

The Hearing

5. At the hearing I heard evidence from the claimant who was cross examined. There were no other witnesses. The claimant had no documents to produce. I asked a few questions of my own of the claimant in order to clarify one or two matters.

6. The respondent called no witnesses. A short bundle of documents was produced comprising the pleadings and copies of correspondence sent by the respondent to the claimant over the period 21 March 2016 until 25 January 2018: I considered these documents in detail.

Submissions

7. For the respondent Mr Ryan made submissions which are briefly summarised:

7.1 The claimant has not advanced medical evidence and one option would be to adjourn to enable her to do so.

7.2 It appears there is a very good excuse for the claimant's non-activity prior to 5 February 2018 and for a period thereafter.

7.3 The claimant did progress her internal appeal but this was before the death of her son. She had access to the Internet and it was feasible for her to have brought a timely claim.

7.4 Reference was made to **Avon CC -v- Hicks 1978 ICR 646** and the difficulty for any claimant to say that she was not aware of a right to bring a claim. The claimant ought to have been aware.

7.5 From May/June 2018 the claimant's health had improved and the claim could have been filed. There was no reason or explanation for the delay from October through to November 2018. In short it was feasible to bring the claim in time but, if not, the claim was not filed within a reasonable time thereafter.

8. The claimant submitted that she was not capable of acting until she took action in October 2018. Even today she is not herself. She was not aware of any time limit for a claim until she went to the citizens' advice bureau ("CAB") in October 2018 and she brought a claim as quickly as she could after having spoken to ACAS and then finding the claim form online and completing it.

9. On behalf of the claimant, her mother-in-law Carole Shaw submitted that the trauma which the claimant and her husband gone through with the serious illness of their son resulting in his death in February 2018 was enormous. Their son had been mainly in hospital for over three years and they had spent all their time with him at the hospital and the toll that had taken on them could not be overstated. All of it had taken a toll on the mind of the claimant and even today she remains affected by those events and she does not function mentally as she used to. The care which the claimant gave to her son was all consuming and explains her failure to bring this claim in time.

The Law

10. I reminded myself of the relevant provisions of section 111 of the 1996 Act.

111(2) 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.

11 (2A).....section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection 2(a).

11. I reminded myself that what is “reasonably practicable” is a question of fact. I reminded myself of the words of Shaw LJ in **Wall’s Meat Co -v Khan 1979 ICR 52** in referring to the reasonably practicable test:

“The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce lawyers’ complications into what should be a lay man’s pristine province. These considerations point me to express the emphatic view that the proper forum to decide such questions is the employment tribunal and that their decision should prevail unless it is plainly perverse or oppressive”.

12. I reminded myself of the decision of the Court of Appeal in **Palmer -v- Southend-on-Sea Borough Council 1984 ICR 372** when the court concluded that “reasonably practicable” in section 111 of the 1996 Act does not mean “reasonable” which would be too favourable to employees and does not mean “physically possible” which would be too favourable to employers, but means something like “reasonably feasible”.

13. In respect of the meaning of “reasonably practicable” I noted the guidance of Lady Smith in **Asda Stores v Kauser [2007]** given in these words:-

“The relevant test is not simply a matter of looking at what was possible but to ask whether on the facts of the case as found it was reasonable to expect that which was possible to have been done”.

14. I referred to the decision in **Avon CC -v- Hicks** (above) referred to by Mr Ryan. I noted that the Employment Appeal Tribunal in that case rejected the submission that “ignorance however abysmal and however unreasonable is a universal excuse”.

15. I reviewed the cases in relation to a claimant’s illness and whether that prevents a claim being submitted in time. I noted the decision in **Asda Stores Ltd -v- Kauser 0165/2007** to the effect that mere stress as opposed to illness or incapacity is unlikely to be sufficient to excuse a failure to file in time. I noted the facts of that case relating to a claimant who was suffering from stress by reason of potential criminal charges being filed against her.

16. In respect of matters to take account of when considering if a claim has been presented within a further reasonable period, I reminded myself of the decision in

University Hospitals Bristol NHS Foundation Trust -v- Williams 0291/2012 where the Employment Appeal Tribunal stated that this provision does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the expiry of the time but rather it requires the tribunal to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expires. In particular, I should consider whether the claim was filed within a reasonable time once the obstacle to preventing the claim being filed in time had been removed. There is no hard and fast rule about what period of delay is reasonable and the extent of the delay is simply one of the circumstances I need to consider. I noted the guidance of Mr Justice Underhill in **Cullinane -v- Balfour Beatty Engineering Services Limited 0537/2010** in the terms that whether the period between the expiry of the time limit and the eventual presentation of the claim was reasonable requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted. I must not lose sight of the fact that it is a general principle that time limits should be observed and litigation progressed efficiently and without delay.

Relevant Findings of Fact

17. Having reviewed the papers to which I was referred and having assessed the evidence before me, I make the followings of fact on the balance of probabilities relevant to the issues before me:

17.1 The claimant began work for the respondent in May 2007. In May 2015 her son became very seriously ill and she was absent from work from that date and did not in fact return to work after that date. The claimant was permitted unpaid leave of absence by the respondent in November 2015.

17.2 The claimant's son was born in 2013 and when he was 18 months old in May 2015 he was diagnosed with stage IV neuroblastoma (a rare type of cancer mainly affecting babies and young children) and was admitted to hospital initially for a period of six weeks but in fact the majority of the following months until the claimant's son died in February 2018 were spent in hospital. Given the age of her son the claimant had to stay in hospital with her son whenever he was admitted.

17.3 In September 2016 at the time when her son's medical treatment was due to come to an end, the claimant's son suffered a relapse which meant he had to undergo further intense and distressing treatment in order to try to arrest the progress of the disease. Her son's treatment included blood transfusions, chemotherapy and radiotherapy.

17.4 In March 2017 the claimant's son suffered a further relapse and as a result was prescribed stronger chemotherapy which resulted in him suffering from infections and being gravely ill.

17.5 In December 2017 the claimant and her husband were advised that the disease from which their son was suffering had spread to his brain and that there was no further treatment which could be offered to him. The claimant's son died on 5 February 2018.

17.6 In 2017 the respondent began to write again to the claimant in respect of her absence and received no response from the claimant. I make no findings as to whether

or not the claimant received the several letters which the respondent says it sent to the claimant because that is not relevant to the decision I have to make, but I do note that the post code on the letters sent to the claimant was slightly incorrect. However, the claimant accepts she received a letter from the respondent dated 12 December 2017 on 16 December 2017 which terminated her employment by reason of gross misconduct for being in breach of the sickness absence policy of the respondent. There had been a hearing on 12 December 2017 which the claimant had not attended.

17.7 The claimant appealed against the dismissal and an appeal hearing was arranged for 11 January 2018 but the claimant could not attend as she was dealing with her son's medical treatment and the hearing was re-organised for 24 January 2018. The claimant could not attend that meeting as, on the evening before the rescheduled meeting, the claimant was told her son had to be re-admitted to hospital. She telephoned the respondent and was told the appeal would proceed in her absence which it did and the appeal was dismissed.

17.8 The effective date of termination of the employment of the claimant was 16 December 2017. For the claim of unfair dismissal to have been presented in time, the claimant should have contacted ACAS for early conciliation by 15 March 2018. In fact, the claimant contacted ACAS for early conciliation on 9 October 2018 and conciliation came to an end on that same day. ACAS directed the claimant to the relevant sites to access the claim form. The claim form was filed on 9 November 2018 almost 8 months out of time.

17.9 The claimant was prescribed anti-depressant medication after the death of her son which she took from February 2018 until at least June 2018.

17.10 It was only in October 2018 that the claimant emerged from the period of intense grief and began to return to normal functioning. Until that point the claimant and her husband relied on family members to help them with shopping and other daily tasks and the claimant began for the first time to go out of the house. Previously she did not do so as she did not wish to meet people and have to deal with references to her son. She considered she would like to return to work and then realised that she had no work to return to. She considered she had been unfairly treated and approached the CAB in North Shields for advice and was told that she must contact ACAS for early conciliation. The claimant was told that her claim was out of time but that she could still file a claim. The claimant then searched the internet in respect of unfair dismissal, she discovered that she could file a claim on line, she accessed the claim form and filed the claim on 9 November 2018. The claimant was not fit for work until 1 October 2018 at the earliest.

Conclusions

18. I consider first whether it was reasonably practicable for the claimant to have brought the claim of unfair dismissal in time which means approaching ACAS for early conciliation by 15 March 2018. I conclude that it was not reasonably practicable for that deadline to have been complied with in the circumstances of this case. The deadline was five weeks and two days after the death of the claimant's son. I listened to the evidence and submissions of the claimant, and those of her mother in law, and I am satisfied, even without medical evidence, that the claimant was effectively consumed with grief after the death of her son, as was her husband, and that they were neither of

them functioning in any normal way in the period of three months allowed for a timely claim. Given that they have no other children and that the claimant and her husband had devoted almost three years to helping their son through very difficult and distressing medical treatment, I accept that the claimant was consumed by anxiety about her son from 16 December 2017 until 5 February 2018 and thereafter consumed by grief until the time limit expired in March 2018 to such an extent that it was not feasible for the claimant to have brought a timely claim. I accept the claimant's evidence to this effect and indeed the brief but eloquent submission of her mother-in-law who explained the effect the death of her son had had on the claimant. I accept that grief affects people in different ways. I accept that the death of a child can be particularly hard to accept and can be likely to consume with grief the parents of the child more so perhaps than the death of a person of mature years and I accept that this was so in the case of the claimant. The effect on the claimant was not merely stress as in **Kauser** (above) but was all consuming and debilitating grief and that was the obstacle to a timely claim. I conclude that it was not reasonably practicable for the claim to have been brought in time for, in the time allowed for a timely claim, the claimant was consumed first with anxiety about her son and secondly with grief over the death of her son to such an extent that it was not feasible for her to have brought her claim of unfair dismissal.

19. And so I move on to the second question which is whether the claimant has brought her claim within such further period as is reasonable. I make an objective assessment of all the relevant factors and, in particular, consider whether the claimant filed her claim within a reasonable period after the obstacle was removed which prevented the claim being filed in time in the first place.

20. I consider that the debilitating grief from which the claimant suffered after the death of her son was only effectively removed at the beginning of October 2018 when she felt able to consider a return to work. I take account of the fact that the anti-depressant medication was discontinued in May or June 2018 but that does not mean the barrier of grief was removed. The claimant stated and I accept that it was only in October or late September/early October 2018 that she thought about returning to work and the realisation dawned that there was no work to return to as she had been dismissed.

21. With the barrier removed, the claimant contacted the CAB and ACAS and was told she could make a claim for unfair dismissal but that the claim was out of time. ACAS open and closed early conciliation on the same day 9 October 2018. The critical pinch-point for me is the delay which occurred between 9 October and 9 November 2018 and whether that further period is a reasonable period of time. This is the crucial and difficult question in this application. I have looked at all the circumstances of this case and I am just persuaded that by filing the claim within one month of the 9 October 2018 that the claimant did file her claim within such further period as was reasonable within section 111(2) of the 1996 Act. Had it been any later than that, then I would not have been persuaded but, on balance, I am satisfied that the period to 9 November 2018 was a reasonable period in which to have filed the claim given the exceptional and difficult circumstances of this case and the presence of an obstacle to a claim being brought which lasted up to October 2018. The claimant needed to access the claim form and complete it and a period of one month in which to do so, given all that had gone before, is a reasonable period of time. On that basis I will allow this claim to proceed to full hearing.

22. I have considered the decision in **Avon CC** (above). I do not find that decision has relevance to my decision in this matter which is not based in any way on whether or not the claimant knew of her right to claim unfair dismissal before approaching the CAB in October 2018.

23. I issued case management orders separately to bring this claim on for a final hearing. I emphasised that this Judgment has no bearing on the merits or otherwise of the claim for unfair dismissal for I have not considered the merits at all. The claimant advised that she had found alternative work from December 2018 and there was no ongoing loss. In such circumstances and given she only became fit to work in October 2018, the period of loss is short.

EMPLOYMENT JUDGE BUCHANAN

**REASONS SIGNED BY EMPLOYMENT
JUDGE ON 14 March 2019**

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