EMPLOYMENT TRIBUNALS

Claimant: Miss D Pews

Respondent: Star Kids Club Limited

Heard at: Ashford

On: 29 January 2019

Before: Employment Judge Pritchard
Members: Mr D Clay
Ms S Dengate

Representation
Claimant: In person
Respondent: Mrs O Thompson

JUDGMENT

1 The Claimant's claims of pregnancy discrimination and unfair dismissal were presented in time and shall proceed to be considered by the Tribunal.

2 The Respondent's application to amend its response and defend the claims is granted.

REASONS

1. This claim has had an unhappy procedural history.

2. Preliminary Hearings were listed to take place on 10 August 2018 and 27 September 2018 but postponed, the first because of the unavailability of judicial resources and the second because of the Claimant's illness.

3. The case was listed for final hearing today before an Employment Judge sitting alone (presumably in accordance with section 4(3)(g) of the Employment Tribunals Act 1996 because the Respondent ticked the box in its ET3 Form indicating that it did not intend to defend the claim). However, the Tribunal administration had arranged for a full tribunal (an Employment Judge sitting with members) to hear the case. I had regard to

the fact that the Respondent had attended the Tribunal and the likelihood that a dispute on facts or law might arise. I took the view, having regard to section 4(5) of the Employment Tribunals Act 1996, that I should continue to consider the claim sitting with the members. In the event, the Tribunal considered the preliminary issues referred to below and did not proceed to consider the merits of the case.

4. Upon discussion, it was clear that the Claimant was alleged that her dismissal was both discriminatory and unfair by reason of her pregnancy. The Respondent explained that it intended to defend the claim and must have ticked the box in the ET3 in error.

5. Two preliminary issues arose to which the full Tribunal gave its consideration. Firstly, whether the Claimant had presented her claims within the statutory time limits. Secondly, whether the Respondent should be permitted to amend its Response and defend the claim.

Time limits

6. The Claimant commenced employment with the Respondent on 14 June 2017 and was dismissed with effect from 18 September 2017. She entered into ACAS Early Conciliation on 2 October 2017 and ACAS issued a certificate on 26 October 2017. The Claimant presented her claim to the Tribunal 16 November 2017 but without having entered the conciliation certificate number on her ET1 claim form. This is a substantive defect under Rule 12(3) of the Employment Tribunals Rules of Procedure 2013. Having regard to the extension of time under the ACAS Early Conciliation Procedure, the primary time limit expired on 10 January 2018.

7. Because she had heard nothing, the Claimant made telephone enquiries of the Tribunal in March 2018. She was told to forward to the Tribunal a copy of the ACAS certificate. She did so promptly and an Employment Judge gave instructions that the claim should be accepted with effect from the date the certificate was sent to the Tribunal, namely 27 March 2018 (not 22 June 2018 as the Claimant was mistakenly informed by the Tribunal's letter dated 26 June 2018).

8. In the meantime, on 29 December 2017, the Claimant gave birth. Her baby was born 6 weeks' prematurely and had to be placed in intensive care.

9. The Respondent had nothing to say of relevance about the time limit point.

10. Section 123(1) of the Equality Act 2010 provides that a discrimination complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable.

11. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. In accordance with British Coal Corporation v Keeble

[1997] IRLR 336 a Tribunal may have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay, the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case; see Department of Constitutional Affairs v Jones [2008] IRLR 128.

12. By Section 111(2) [section 23(2)] of the Employment Rights Act 1996 a Tribunal shall not consider an unfair dismissal complaint unless it is presented to a Tribunal:

12.1. Before the end of the period of 3 months beginning with the effective date of termination or;

12.2. 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 have been presented before the end of that period of 3 months

13. The burden of proof in showing that it was not reasonably practicable to present the claim in time rests upon the Claimant; see Porter v Bandridge Ltd [1978] ICR 943 CA. If the Claimant does succeed in doing so then the Tribunal must also be satisfied that the time in which the claim was in fact presented was in itself reasonable. One of the leading cases is Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 CA in which May LJ referred to the test as being in effect one of "reasonable feasibility" (in other words somewhere between the physical possibility and pure reasonableness).

14. In Adsa Stores Ltd v Kauser EAT 0165/07 Lady Smith described the reasonably practicable test as follows: "the relevant test is not simply 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".

15. The Tribunal determined that it was not reasonably practicable for the Claimant to have presented her unfair dismissal claim in time and that she presented it in a reasonable period thereafter. The Tribunal also determined that it would be just and equitable for the Claimant's pregnancy discrimination claim to proceed.

15.1. The Claimant initially presented her claim within the time limit.

15.2. The Claimant's ignorance of the dire ramifications of failing to include the ACAS certificate number in the ET1 Claim Form was reasonable. It was not reasonable to expect the Claimant, heavily pregnant at the time, to investigate further.

15.3. The Claimant was pre-occupied with the premature birth of her baby and hospital care and could not reasonably have been expected to act sooner.

15.4. After the Claimant made telephone enquiries of the Tribunal, she acted very promptly by immediately providing a copy of the certificate as requested.

15.5. Until the Claimant made those telephone enquiries, there appears to have been no correspondence from the Tribunal informing the her that her claim had been rejected (if that is the case – there is no correspondence on file to suggest it was rejected).

15.6. In circumstances in which the Respondent has indicated that it does not intend to defend the Claim, it cannot be said that the Respondent will be unduly prejudiced if the claims are permitted to proceed. If the Respondent's application to amend its response is to be granted (see below) the prejudice to the Respondent appears to be limited to the loss of a limitation defence; there was no suggestion that memories might fade for example.

15.7. The delay, from the expiry of the primary time limit to the date of rectification, is relatively short.

Application to amend the response

16. In considering the Respondent's application to amend its response, the Tribunal had regard to: Selkent Bus Company Ltd v Moore 1996 ICR 836; Centrica Storage Ltd v Tennison EAT 0336/08; and Nowicka-Price v Chief Constable of Kent Constabulary EAT 0268/09.

17. The key issue for consideration was the relative prejudice which would be caused to the parties by granting or not granting the application.

18. The ET3 Response Form asks a very simple question, clearly expressed: "Do you defend the claim?" to which the Respondent ticked the box "no". Mrs Thompson, on the Respondent's behalf, gave a rather unsatisfactory reason for ticking the box: she said she did not understand the form and was shocked by the fact that the Respondent was facing a Tribunal claim. However, the Tribunal was satisfied that this was a genuine mistake, not least because Mrs Thompson attended the Tribunal with the intention of defending the claim and bringing with her a copy of a letter from the Respondent to the Claimant setting out the reasons why, according to the Respondent, she was dismissed. If the application is not granted, judgment would be entered in the Claimant's favour in respect of a claim in which the key issue – the reason for the dismissal – is in dispute. The Tribunal concluded that the balance of prejudice fell in the Respondent's favour and that the application should be granted.

Employment Judge Pritchard

Date: 29 January 2019