EMPLOYMENT TRIBUNALS

Claimant: **Miss D Kepinska**

Respondent: **Widex UK Ltd**

Heard at: **Mold** **On: 14 March 2019**

Before: **Employment Judge Powell (sitting alone)**

Representation:
Claimant: In person
Respondent: Miss Smith (Counsel)

JUDGMENT having been sent to the parties on 17 March 2019 and reasons having been requested by the respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Introduction

1. Following a Preliminary Hearing conducted by Employment Judge Davies on 3 December 2018, and the subsequent application by the Respondent's solicitors, this open Preliminary Hearing was listed to determine whether the claim was within the Employment Tribunal's jurisdiction and if so, what necessary orders should be made in respect of case management.

2. It was clarified early on today that the Claimant's case is limited to an assertion of constructive unfair dismissal contrary to section 95(1)(c) and 98(2) & (4) of the Employment Rights Act 1996. Somewhat anticipating that clarification, the Respondent's application of 10 December 2018 asserted that the claim had been presented outwith section 111(2)(a) and (2)(b) of the Employment Rights Act 1996.

3. The Claimant is Polish, her first language is Polish. She has worked in the UK for at least eight years and can competently speak and write English to the standard needed to fulfil her duties.

The Legal Matrix

4. The first point to be considered is whether or not the claim was "out of time" and then to go on to determine whether or not the Claimant could have reasonably practicably presented the claim within time and, if the Claimant discharges the burden upon her in that respect, to consider whether the claim was presented in "such further period as the Tribunal considers reasonable".

5. The authorities which guide my approach on this are found in a series of cases but I have been first referred to the case of ***Walls Meat Company Limited -v- Khan*** **[1979] ICR 52 Court of Appeal**. Ms. Smith has referred me to a number of principles which I have considered and applied; I record them is short form here.

6. Firstly, the test is empirical and involves no legal concept, it is the pristine province of the layman. Secondly, the onus of proving that timely presentation was not reasonably practicable rests upon the Claimant, it is her duty is to show precisely why she did not present her complaint in time; ***Porter -v- Bainbridge*** **[1978] ICR 943**. However, Lady Justice Smith in ***Asda Stores -v- Krauser*** **[EAT 0165 2007]** stated that 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 would have been done.

7. There are a number of cases which give examples such as ***Dedman -v- British Building and Engineering Appliances Limited*** (*[1974] ICR at 64*), and ***Avon County Council -v- Hayward Hicks*** [1978] IRLR 118. I have noted those examples and requirement to apply an objective approach.

8. The question in any case where there is a degree of ignorance asserted by a Claimant is not only whether the Claimant party was ignorant but also whether such ignorance was reasonable and, in that context, the case of ***Dedman*** gives examples of the degree to which the Tribunal should enquire into; the opportunities which were open to a Claimant to understand the facts, were such opportunities taken, if not, why not? Essentially the test of reasonableness requires that I identify what the Claimant did not know, and what she ought to have known upon a reasonable investigation and understanding.

9. The case of ***Avon County Council*** is an example in where the individual was an intelligent and well-educated man and that was a relevant consideration as to whether his ignorance was or was not reasonable.

10. With respect to the issue of further reasonable period again I have taken a guidance from the case of ***University Hospital Bristol NHS Foundation Trust -v- Williams*** **[EAT 0291 2012]** which emphasises that the question of reasonably practicable as such further reasonable period are quite different to the test of "just and equitable extension applicable to claims of discrimination and it is not such a strict test but they are quite separate and I must not conflate the two.

11. In ***Cullinane v Balfour Beatty Engineering Services ltd*** *EAT/0537/10 it was stated* that the question whether a further period is reasonable is not the same as asking whether the Claimant acted reasonably, rather it 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' and the public interest in claims being brought promptly.

12. There are many available examples but factual examples and the dicta of the higher Courts tend to indicate that each case depends on an objective assessment of its own facts and I bear that in mind when I come to the factual findings I now make.

Findings of Fact

13. The Skeleton Chronology was very ably set out by Miss Smith on behalf of the Respondent and it is not one with which the Claimant has any substantial dispute.:

14. The dismissal of the Claimant was effective on 12 January 2018.

15. She presented her claim to the Employment Tribunal on 6 March 2018. The claim form initially appears to be in order because, the absence of an Early Conciliation Certificate reference number is explained the Claimant's decision to tick the box 2.3 to say that she was exempt from the conciliation process because her claim was for unfair dismissal and she was claiming interim relief.

16. The Claimant's presentation of her claim on the 6th March 2018 provided a little over a month for the Employment Tribunal to process her claim and for any necessary correction to the claim form before the three-month period for presentation expired on the 11th April 2018.

17. The Employment Tribunal wrote to the Claimant by a letter dated the 25 April 2018, stating that the claim was not valid because there was no Early Conciliation Certificate.

18. On 25th April the Claimant took no action. On the 26th/27th the Claimant researched, and understood the nature of early conciliation sufficiently to telephone ACAS on Saturday 28th April 2018 and commence conciliation.

19. On Monday 30th April she received her EC Certificate and submitted it to the Tribunal the same day.

20. There was then a period between 30 April and 22 June 2018 (the date on which the application was accepted) whilst the Tribunal processed the Claimant's renewed presentation of the 30th April.

21. The Claimant's explanation for her failure to obtain the EC Certificate is a combination of:

    a. Her lack of knowledge,

    b. Limited opportunity to investigate matters thoroughly,

    c. Being inhibited by the limitations of her understanding of English, and;

    d. The above being exacerbated by mental health problems which had occurred during her employment and continued throughout the relevant period.

The Evidence relevant to the dispute

22. The Claimant gave evidence in support of her application and detailed the matters noted above.

23. In cross-examination the Claimant accepted that she had at some point in January 2018 been to see a solicitor, she believed that solicitor was an employment specialist, but the solicitor was English speaking and it is not clear the degree to which the Claimant conveyed her case or understood all which was said by the solicitor. She said that she had done her best. The legal advice received had not alerted her to the relevance or importance of early conciliation or indeed, the function of ACAS.

24. She confirmed that she had, at the library and on the internet, researched her rights and discovered the relevant time limit and been able to find the Employment Tribunal ET1 form on the you.gov site and she had clearly been able to submit that in a timely fashion.

25. When asked by myself about the wording of the box which she had ticked at 2.3 on the claim form which stated "*my claim consists only of a complaint of unfair dismissal which contains an application for interim relief*", she was unable to articulate any understanding of the words "interim relief".

26. She accepted that she had not sought to contact ACAS either by the telephone number which is on the ET1 form or by opening the option for guidance which Ms. Smith tells me is present on the you.gov website page for applicants seeking to submit a claim. I note that the ET1 form sets out the following text, albeit in a small font, at section 2.3:

    "Nearly everyone should have this number before they fill in a claim form. You can find it on your Acas Certificate. For help and advice, call Acas on 0300 123 1100 or visit www.acas.org.uk"

27. With respect to the period from 25th April to 30th April the Claimant said that she was immediately in despair by finding that her claim had been rejected, but upon discovering ACAS and its function, she acted promptly in contacting them on the 28th April Saturday and acted promptly to correct the error in her claim by 30th April.

28. The Claimant also highlighted in her submissions the periods of time when progress of her claim was wholly under the control of the Employment Tribunal. In essence the Claimant was stating that, if the tribunal had informed her of the omission before the 6th of April 2018, she would have been able to re-submit her claim before the expiry of the time limit[1].

    Submissions

29. The submissions on behalf of the Respondent were precise and clear, they were that:

    a. The Claimant was and is an intelligent woman,

    b. Whilst English is not her first language, she was sufficiently proficient for her work in the production department of the respondent's hearing aid factory and was therefore sufficient for the purpose of completing the ET1 application.

    c. She was aware of her rights, she had accessed legal advice and, in those circumstances, whilst not disputing that she was genuinely unaware of ACAS, it most unlikely that her absence of knowledge or lack of investigation could be classed as reasonable.

[1] I note that, theoretically the effect of early conciliation prior to the 11th April 2018 would have influenced the calculation of the relevant period under section 111(1)(a).

30. In short, the Respondent asserts first that it was reasonably practicable for the Claimant to have understood and contacted ACAS and done so before the first week in April which would have allowed her to submit the claim in time. Indeed, she could have done so by 6 March, the same date on which the claim was initially submitted. By reason of the above, the Claimant has not satisfied the first limb of the section 111 test and there is no need to consider subsection (1)(2).

31. The Claimant resists that application emphasizing the adverse impact her poor mental health had upon her ability to function and understand, in her second language, matters of law and procedure which were entirely new to her along with the efforts she had made to understand the law and procedures relevant to her claim.

My conclusions

"Reasonable Practicability"

32. The first question is one of fact. I have to determine whether or not the Claimant has, on the balance of probabilities, proven that it was not reasonably practicable for her to have (a) understood the role of ACAS (b) contacted ACAS and (c) submitted an EC Certificate with her claim to make it complaint with Rule 12(1)(c) of the 2013 Employment Tribunal Rules of Procedure. before the expiry of the three-month time limit on 11 April 2018.

33. I have had to balance the force of the argument put forward by Miss Smith with the evidence from the Claimant.

34. If the Claimant, in my judgment was sufficiently competent to understand and assimilate technical advice and legal vocabulary in the English language at the material times I would have little sympathy with her case.

35. I am satisfied, on the balance of probabilities, that the degree to which the Claimant failed to understand the meaning of the EC Certificate references on the claim form and the content of box 2.3 on the ET1 from was a consequence of her limited English language abilities further inhibited by her impaired mental health.

36. I have taken into account the fact that she received legal advice, but employment law is not easily translated into a vocabulary which is not technical and she has not given evidence that she was advised, or understood that she needed to comply with the early conciliation process.

37. I find as a fact, the Claimant had no understanding of the meaning of the words "interim relief" which has led me to the conclusion that her

understanding was limited to the words “unfair dismissal” and consequently she understood that she could submit her claim for unfair dismissal.

38. In reaching this decision I am careful not to confuse the state of ignorance with the state of reasonable ignorance.

39. I have concluded that the Claimant, within the limitations of her mastery of English and impaired mental health, acted to the best of her ability to: (a) understand her rights by contacting a solicitor (b) taking legal advice from a solicitor whom she believed was an employment law practitioner (c) undertaking personal research (d) managing to identify how to present a claim and (e) doing so in a timely fashion. Her error with regard to her ignorance of the early conciliation process and significance of an EC Certificate is one which I am persuaded was reasonable in the Claimant’s circumstances.

40. For these reasons I consider that the Claimant has proven that her personal circumstances and her efforts to comply with the applicable procedures made it “not reasonably practicable” for her to present the claim with an EC Certificate until she had notice of her failing which was somewhat delayed by the Employment Tribunal.

41. I note that had the Employment Tribunal been able to reply to her application within twenty-eight days of receipt it is likely (based on her actual response in late April 2018) that she would have been able to submit an EC certificate with in the time limit.

42. As the Claimant has discharged the burden of proof for section 111(2)a I turn to the second limb of the test.

A further reasonable period

43. Again, dealing with the further period under section 111(2)(b), I bear in mind that these are principally matters of fact.

44. Prior to the 25th April 2018 the Claimant was not aware that there was any difficulty with her application. She continued to be unaware that she had failed to follow the early conciliation procedure.

45. In the five days, including a Sunday, which followed receipt of the tribunal’s notice of her error she commenced and completed the early conciliation process and lodged the EC Certificate with the Employment Tribunal.

46. Although the Tribunal did not accept the renewed application until the 22nd June, the Claimant had submitted it on the 30th April 2018.

47. The majority of the delay in this period was consequent to the Employment Tribunal's workload and it is not a matter for which the Claimant could bear any responsibility or which, in any practical sense, she could have influenced.

48. In my judgment the Claimant acted as quickly as could reasonably be expected in the context of her personal circumstances (as outlined above). I take into consideration the public interest in claims being resolved promptly, the strict time limits in the Employment Tribunal and the possible disadvantage to the respondent caused by the Claimant's delay.

49. Assessing the circumstances objectively I have concluded, by reason of the above, that the Claimant has proven that she acted promptly and expediently. In respect of her own conduct, she submitted the claim within a further reasonable period for the purposes of section 111(2)(b).

50. For these combined reasons therefore, I extend time for presentation of the claim to then 22 June 2018 for the purposes of section 111(2)(b) and thereby the claim is with the Employment Tribunal's jurisdiction and will proceed.

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Employment Judge Powell
Dated: 28th April 2019

REASONS SENT TO THE PARTIES ON

30 April 2019

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS