



EMPLOYMENT TRIBUNALS

Claimant: Miss H Twohey

Respondent: Birmingham City Council & Others

OPEN PRELIMINARY HEARING

Heard at: Birmingham

On: 7 May 2019

Before: Employment Judge Broughton

Appearances

For the Claimant: In person

For the Respondent: Mr E Beever, Counsel

REASONS FOR THE JUDGMENT OF 7 MAY 2019

The Claimant's claims were all presented out of time and were dismissed.

The Issues

1. An Open Preliminary Hearing was arranged to consider two issues of time limits in relation to the Claimant's claims as set out by Employment Judge Lloyd at the previous Preliminary Hearing on 12 March 2019.
2. There was a third issue arranged for this Hearing in relation to whether or not the Claimant qualified as a disabled person under the Equality Act 2010, but that was conceded by the Respondent.
3. The Claimant brought claims of unlawful deduction of wages and disability discrimination.

The Relevant Time

4. The former related to a period from November 2016 to January 2017, when the Claimant was on long term sick leave and her contractual entitlement dropped to half pay. This was at a time when she said she was fit for work and so, on her case, she was entitled to be paid.

5. The last alleged under-payment was, therefore, at the end of January 2017.
6. Her disability discrimination claims, despite a number of attempts, still lacked a lot of the necessary clarity and particularity that would be required. However, I was able to establish that she was effectively claiming under a number of potential headings;
 - firstly, disability related harassment and bullying by her Line Manager for the period from January to May 2016.
 - also, for that same period, she alleged a failure to make reasonable adjustments, both in relation to the removal of existing adjustments and a failure to make others.
 - she also appeared to be alleging a failure to make reasonable adjustments whilst she was off sick thereafter and, specifically, regarding a transfer that she and her union representative had requested. She said that issue remained unresolved until January 2017.
7. The Claimant expressly confirmed that there were no allegations of discrimination, or indeed anything else, after January 2017.

Background Facts

8. The Claimant has a hypothyroid condition which the Respondent conceded today did amount to a disability, as defined, at all relevant times.
9. She got a new team manager in January 2016, and raised a number of allegations about being bullied and the Respondent removing, or not offering, adjustments over the next few months.
10. The Claimant claimed that this caused her to become unwell, such that she was signed off by her GP in May 2016 and she remained off work until August 2016. There was then, apparently, a discussion about a possible return to work in another team, although that didn't happen, at least not immediately.
11. The Claimant was ultimately called to a full case hearing to consider her absence which, for some reason, was delayed until November 2016.
12. At that Hearing, the Claimant claimed she was told to raise a grievance if she wanted a transfer. As a result, the full case Hearing was adjourned and the Claimant raised a grievance with the assistance of her union representative. She was alleging, amongst other things, a failure to make reasonable adjustments at around the same time.
13. She also instructed a law firm who wrote to Birmingham City Council. The result appears to have been that the Claimant was offered a transfer which took effect in January 2017.

14. The Claimant returned to work on full pay and there were no subsequent issues in relation to her work in the new team.
15. The grievance and the full case Hearing were somewhat delayed, only completing in November 2017. The outcome was that the Claimant's new role was made permanent. Her grievance was only partially upheld, however. Any suggestion from the full case Hearing that her employment may be terminated in relation to her absence was removed.
16. The Claimant did not formally appeal until January 2018 and, whilst she offered some reasons for this delay, the Respondent rejected her appeal on the basis it was presented too late.
17. The Claimant said before me that the only relevant outstanding issue at that stage was in relation to what she considered was her lost pay. She felt entitled to continue to pursue this even though the part of the grievance that hadn't been upheld was in relation to the delays in 2016 on which she relied.
18. The Claimant said that she then spoke to HR. She claimed that they said that, given that the grievance process was now concluded, the only way to obtain the pay would be with approval from the Head of Service. The Claimant made contact but her request was refused at a meeting on 9 February 2018.
19. The Claimant appeared to continue to push for payment despite this decision and it was only on 3 August 2018 that the Head of Service said she would no longer even reply to such repeated requests.
20. Those are the basic facts as I found them for the purposes of the issues before me today.

The Law

21. There are different tests that I must apply in relation to the claim for unpaid wages (s.23 Employment Rights Act 1996) and for disability discrimination (s.123 Equality Act 2010). They were helpfully set out by the Respondent and not in material dispute.
22. In relation to the first claim I have to identify the relevant date and then determine whether it was reasonably practicable to put in the claim within 3 months or, at least, to enter early conciliation in that timeframe and, if not, whether, it was presented in such further timescale as was reasonable in all the circumstances.
23. For the discrimination claim, again, I have to identify the relevant dates and then determine whether or not, assuming it is outside the 3-month primary time limit, it would be just and equitable to extend time in relation to some or all of the claims.
24. In the wages claim, time must run from the date of the last alleged deduction which is the end of January 2017.

25. In relation to the harassment claims time runs from May 2016. In the reasonable adjustments claim it runs from January 2017, when the adjustment of the transfer was made and her pay was restored and no further adjustments were contended for.

Decision

26. The Claimant entered early conciliation on 30 August 2018, and so, on a simple analysis, she was some 16 months too late.
27. Her explanation for the delays started with the initial period when she was off sick which would perhaps justify the period until she was fit for work, on her case in September 2016.
28. The Claimant's explanation for the delays thereafter was that she was repeatedly advised throughout to exhaust the internal proceedings first.
29. It is well established that incorrect legal advice from a lawyer in relation to the reasonably practicable test is generally not an adequate explanation or excuse, albeit it may be a relevant consideration for the just and equitable test for discrimination.
30. That said, the Claimant's principal argument was that she had been wrongly advised by ACAS which is a somewhat different scenario. Wrong advice from ACAS may potentially assist in an argument that it wasn't reasonably practicable to present a claim in time. There was no independent evidence one way or the other, other than what the Claimant said, in relation to what advice she received. It was surprising nothing was documented.
31. It seemed to me that it is possible that she did get some wrong advice at some point along the way. That said, it was her case that she was advised by several people from ACAS, several others from her union and, indeed a law firm over the period from April 2016 right up to the time of entering early conciliation.
32. It stretched credibility beyond breaking point that all of those individuals would have given the same wrong advice as claimed.
33. Even if the reason for the delays was to pursue the internal procedures, it was accepted by the Claimant that these were exhausted by November 2017 in relation to the disability claims. It was further accepted that her subsequent attempt to secure the lost wages from the Head of Service was not part of any relevant internal procedure.
34. In any event, in relation to that latter issue it was clear that the Claimant's request was rejected on 9 February 2018.
35. It is not open to an employee to attempt to extend time by simply repeating requests that have already been refused.
36. Moreover, the Claimant accepted that she had fully discussed the possibility of a tribunal claim and been advised on the issue of time limits in or around

November 2017. This was despite her, at best, surprising suggestion that this had never been discussed or considered before by anyone from ACAS, the union or her lawyers.

37. As a result, there was no good reason that she couldn't have put in her disability claim by around December 2017, certainly no later than February 2018 and, even if all of her explanations were accepted, the Claim regarding her wages, again, could and should have been presented by late February or early March 2018 at the latest.
38. So, even if it wasn't reasonably practicable to raise the wages claims due to the alleged ACAS advice until all internal procedures had been exhausted, they were clearly all exhausted by early February 2018 at the very latest, if not November 2017. As a result, the claim could, and should, have been presented sooner and a further period of 6 months was too long in that regard. It was not reasonable to wait until told to stop communicating, having continued to request something that had already been refused.
39. For all those reasons the unpaid wages claim was presented out of time.
40. In relation to the disability claim, I have considered the reasons for the delay and, as already stated, there is no concern or issue regarding the delay during the initial period that she was off sick. In fact, certain allegations only crystallised at the end of that period in any event. I am also prepared to accept in this context that it was reasonable to pursue her grievance internally first, especially, as she alleged that she had received some ACAS advice to that effect. That said, I repeat that I do not accept her suggestion that so many advisers all gave the same wrong advice.
41. However, there was no valid reason thereafter. The Claimant had got her permanent transfer by November 2017, with her grievance partially upheld and the internal procedures exhausted. That was, at the very least, confirmed by the date on which her appeal was rejected in January 2018.
42. She had, by that stage, even on her own admission, already had advice regarding the possibility of the Tribunal claim and the necessary timescales and so, it seems to me, that she was more than able to have issued shortly thereafter, early in 2018 at the latest, even if still attempting to persuade the Head of Service in relation to the pay issue.
43. So, for the reasons already given and certainly in relation to the period from February to August 2018, there was no justification for a delay of a further 6 months.
44. The claimant is only seeking a modest sum, significantly less than the costs of a full tribunal.
45. There would be significant prejudice to the Respondent having to answer claims going back 3 years. It will be 4 years by the Hearing date and so, even though a part of that period was not the Claimant's fault, time limits are in place for a reason and are decided by government and any extension is the exception

rather than the rule. Given the lack of any good reason for delay in those last months and,

- the question marks over the Claimant’s credibility regarding
 - the advice received being so consistently wrong from so many advisers and
 - the Claimant’s alleged lack of knowledge or consideration of the Equality Act or Tribunal claims or time limits before November 2017, even though she had received so much advice and the possibility of her claims were effectively highlighted in the letter from her lawyers in December 2016 and;
- the potential prejudice to the Respondent;
- the ongoing lack of clarity regarding some of the claims.

It would not be just and equitable to extend time in this case.

Employment Judge Broughton
13.8.19

Sent to the parties on:
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For the Tribunal:
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