



EMPLOYMENT TRIBUNALS

Claimant: Miss Charmaine Elliston

Respondent: Regency House Residential Home

Heard at: Cardiff **On:** 24 May 2019

Before: Employment Judge R Powell (sitting alone)

Representation:

Claimant: In person

Respondent: Cerion Thomas (Deputy Home Manager)

RESERVED JUDGMENT

1. It was reasonably practicable for the Claimant to have presented her claim to the Employment Tribunal within the 3 month time period set by section 111 of the Employment Rights Act 1996, the Claimant having presented the claim more than 5 months after that period, the claim is not within the jurisdiction of the Employment Tribunal and is dismissed.
2. It is not just and equitable in the circumstances of this case to extend the time for the presentation of the Claimant's claims of discrimination and accordingly those claims are not within the Employment Tribunal's jurisdiction and are dismissed.

REASONS

Introduction

1. By a Preliminary Hearing Order, dated 2 April 2019, Employment Judge Frazer directed that preliminary issues relating to the jurisdiction of the Tribunal would be determined in a 3 hour hearing on 24 May 2019.

2. Before turning to matters of fact and the submissions put before me today, it is important to briefly trace the history of the proceedings before the Tribunal.
3. On 23 March 2018 the Claimant was dismissed from her employment with the Respondent.
4. On 8 May 2018 the Claimant presented a claim to the Employment Tribunal in respect of unfair dismissal and breach of contract.
5. On 31 May 2018 the claim was rejected under rule 12(1)(d) of the Rules of Procedure of the Employment Tribunal because the Claimant had not provided an ACAS Early Conciliation Certificate number and, whilst she had ticked box 2.3 of the claim form asserting that it was an unfair dismissal claim wherein interim relief was sought, her claim was not one for which interim relief was available.
6. On or around 2 June 2018 Claimant received a letter from the tribunal notifying her of the rejection.
7. On 22 June 2018 the statutory period for presentation of the claim expired.
8. On 6 January 2019 the Claimant presented a further claim to the Tribunal.
9. The second claim cited the same parties and complaints of unfair dismissal as the first claim. The second claim relied on the same factual matrix as the first but added a new allegation; that the reason for the dismissal may have been pregnancy or maternity leave. There was also an additional claim for a redundancy payment.

The issues to be determined

10. The respondent argues that it was reasonably practicable for the Claimant to have obtained an Early Conciliation Certificate and resubmitted her claim between the 2nd and 22nd of June 2018. In the alternative, it argues that the claim could have been resubmitted substantially before the 6th January 2019; some six months after the claimant received notification of the rejection of her May 2018 claim.
11. The claimant argues that a combination of factors, which are addressed in detail below, made it impractical for her to present her corrected claim prior to the 6th January 2019 and that she has acted reasonably promptly in these circumstances.

12. For the Claimant to succeed in her application to extend time for the purposes of her unfair dismissal claim it is necessary for her to discharge the burden of proof upon her; firstly that it was not reasonably practicable for her to have presented the claim within the statutory 3 month period and thereafter, that the time from 22 June 2018 to 6 January 2019 was a further reasonable period.
13. Similarly, with regard to section 136 of the Equality Act 2010, it is necessary for the Claimant to satisfy me that it is just and equitable to extend time for the presentation of the claim to 6 January 2019, the burden again resting on the Claimant to demonstrate why my discretion should be exercised in her favour.

The evidence and findings of fact

14. The Claimant presented a series of photographs of pages from a document which I will call a maternity book. This is a pro forma document which records many of the physical and mental circumstances of mother and child throughout the period of pregnancy. Within those are references to mental health and to physical circumstances to which I shall return.
15. I have also had a description from the Claimant that asserts that she suffered from a depressive illness for a substantial period and, prior to her pregnancy, had been taking a daily dose of 20mg of Citalopram, an anti-depressant and anxiety medication.
16. She also told me, and I accept, that she has had long term difficulties with arthritis and she was prescribed morphine for the relief of pain but that medication stopped when she became pregnant.
17. She has also described that following her dismissal in March 2018, for a period of 12 weeks, she was unable to claim any benefits, which unfortunately coincided with her partner's physical health being much impaired and he was thereby unable to work. For these reasons, between late March and early July 2018 they suffered a particularly difficult and stressful period of their lives.
18. Secondly, I accept that when their baby was born on 5 September 2018 it was a further difficult fortnight whilst their young daughter was cared for in the neonatal unit of the hospital and that subsequently, from October 2018 through to April 2019, they were in long term homeless persons accommodation.
19. The Claimant's case before Employment Judge Frazer, and before me, stated that she did not present her claim promptly because of her pregnancy, child birth and factors such as the loss of her income, her partner's loss of

income due to ill health, the loss of their home and her mental impediment, some of which flow from the above circumstances.

20. Her case is that she was so stressed that; (1) she could not face the thought of continuing with the claim or (2) that the stresses upon her mixed with the physical difficulties were so distracting or overwhelming that she could not reasonably be expected to re-present her claim form.

Discussion and findings of fact

21. The claimant acknowledges that in April and May 2018, following her dismissal in March 2018, she was stressed by the loss of her job, her income, her partner's income and her pregnancy. Despite these difficulties, in April 2018 she was able to make contact with ACAS, identify her employment rights and draft a written statement of her case before submitting her claim on 8 May 2018.
22. Similarly, from November 2018, when the Claimant and her partner were unemployed, looking after their baby and living in homeless persons accommodation, she was able to make contact with ACAS in December 2018, commence early conciliation and submitted her claim in January 2019.
23. I find as follows with respect to the Claimant's first steps towards presenting a claim:
- (1) that in April 2018 the Claimant had researched her rights and understood that she could bring a claim for unfair dismissal and a failure to pay notice.
 - (2) She understood the process for submitting a claim and;
 - (3) She had understood the process for contacting ACAS before doing so.
 - (4) Her evidence was, that on contacting ACAS, she had been told that she did not need to have a Conciliation Certificate for claims of unfair dismissal and for failure to pay notice.
24. The difficulties facing the claimant in April and May 2018 were substantial; the Claimant was without income, her partner was without income and she also was suffering with her mental health, her pregnancy symptoms none of which had been in any way ameliorated by the sudden dismissal from her long-term employment.
25. She also told me that in this period she was applying for jobs and she also indicated that, but for the dismissal, she would have continued to work full-time for the Respondent.

26. All of these circumstances have led me to the conclusion that whilst I fully accept the Claimant had the impediments that she has described her account evidences that she was at the same time:
- (1) Willing and able to work full time, whether it had been for her former employer or for a potential new employer
 - (2) Able to communicate with ACAS,
 - (3) Able to research the merits of her case and the tribunal procedure
 - (4) Able to present a claim to the Employment Tribunal within 2 months of her dismissal.
27. Thus, the surrounding circumstances, upon which she now relies, did not make it impractical for her to present a claim. Her conduct demonstrates that it was entirely feasible for her to submit a claim.
28. Upon receiving the unwelcome notice of the rejection of her claim on or around 2 June 2018 the Claimant was aware that she had until 22 June 2018 to overcome that error. That would have entailed the claimant taking following steps:
- (i) Repeating the process of making contact with ACAS.
 - (ii) being firm with ACAS that she did need an early conciliation certificate number and obtaining a certificate, and;
 - (iii) repeating the process of submitting the ET form using all the original material and adding the correct reference number from her EC certificate.
29. The Claimant did not describe any change in her personal circumstances or any additional outside factors which affected her in June 2018. Her explanation for her inaction was threefold:
- (1) Her reaction to the rejection which made her unwilling to re-submit the claim.
 - (2) She was influenced by her partner's advice; that it might be better for her to look for a new career and leave the old behind
 - (3) She worried about the stress of attending a hearing at the Employment Tribunal.
30. I have also noted the Claimant stated to me that she continued to apply for employment during the later months of her pregnancy and had attended one

second interview only to be met with a discriminatory response when the potential employer saw that the Claimant was pregnant. I have also noted that from the medical notes before me that the Claimant suffered from a UTI which she described as debilitating and required antibiotics for a week and that there were other physical circumstances which affected her in that period. Nevertheless, for the greater part the summer of 2018 the Claimant felt she was able to work, had work been offered.

31. These matters suggest that the range of difficulties affecting the claimant, were not so debilitating that they would prevent her from making the requisite telephone contact with ACAS or resubmitting her claim form. The Claimant could have made an effort to repeat the April 2018 presentation of her claim April 2018 in late June or July or early August 2018.
32. I would accept it was not reasonably practicable, feasible or realistic for the Claimant to have been engaged in making submissions of claims in the weeks just before she gave birth and nor in the period when her daughter was in the neonatal unit. I also accept it would have been perhaps difficult to have made any such decision or action shortly after she and her partner lost their home in October 2018.
33. I also note that the Claimant was able to make her application to the tribunal from their homeless persons accommodation in difficult circumstances in early January 2019 and had acted quickly following the end of conciliation on 3rd January 2019; presenting her renewed claim on 6 January 2019.

Conclusions

Reasonably practicable; Section 111 of the Employment Rights Act 1996

34. Because the Claimant had been able to prepare her claim in April 2018, present it in early May 2018 and there was no material change in her circumstances between May and the 22 June 2018 I have concluded that it was reasonably practicable, allowing for the erroneous ACAS advice, for the Claimant to have presented her claim to the Tribunal in a timely fashion.
35. I have also concluded that the reasons the claimant did re-present her claim in a timely manner are those I record in paragraph 29 of these reasons.
36. I have therefore concluded that the Claimant has failed to satisfy me that it was not reasonably practicable for her to have presented her claim before the expiry of the 3 month time limit. As noted above all the Claimant needed to do between 2 and 22 June was repeat the process that she had previously accomplished, with the addition of an early conciliation certificate number.

37. It would have needed the Claimant to demonstrate to me some particular change in her circumstances for me to have concluded that which was feasible in April/May was not feasible in June/July. The Claimant was not able to evidence such change in circumstance. On the contrary, the claimant's account evidenced a change of mind rather health or external factors as the reason for her inaction.
38. Further, I conclude that any further reasonable period would not have extended past early August 2018; the period in which the claimant was still seeking employment.
39. For these reasons I have concluded that the Claimant's claim of unfair dismissal is one which is without the Employment Tribunal's jurisdiction and is therefore dismissed.

Just and Equitable Extension: Section 136 of the Equality Act 2010

40. I note that the Tribunal is empowered to grant an extension of time "if, in all the circumstances of the case, it considers that it is just and equitable to do so" and I follow the guidance in ***Hutchinson -v- Westward Television Limited [1977]*** and the description is broad and certainly broader than the "not reasonably practicable formula which I have applied in relation to the unfair dismissal claim.
41. I recognise that the relevant elements to the exercise of my discretion in the traditional fashion may include matters as set out in ***British Coal Corporation -v- Keeble [1977] IRLR 336*** and further I recognise that notwithstanding the breadth of my discretion it is being held that the "time limits are exercised strictly in employment cases" and there is no presumption that a Tribunal should exercise its discretion to extend time on the "just and equitable" ground unless I can justify the failure to exercise the discretion as the onus is always on the Claimant to convince the Tribunal that it is just and equitable to extend time.
42. The exercise of this discretion is the exception rather than the rule: ***Robertson -v- Beckley Community Centre [2003] IRLR 434***.
43. In this case the first point to which I return are the factual findings made in respect of the section 111 jurisdiction, I also bear in mind my conclusion that, as a matter of fact, it was feasible for the Claimant to have presented her claim before the expiry of the 3 month time period.
44. In reconsidering that factual matrix under the more generous ambit of the 136 jurisdiction I have also considered the ***British Coal -v- Keeble*** criteria.

45. I have concluded that the Claimant was aware of the material facts from the date of her dismissal. Secondly, there was no apparent impediment in her understanding of the process or the time limit. Thirdly there is, after more than a year, some likelihood a degree of impaired recollection of events for witnesses. Those matters have weighed against the Claimant, albeit modestly.
46. The essence of the Claimant's application really depends upon the merits and the strength of her assertion that the health and social factors which I have described above warrant the exercise of the just and equitable extension in this case.
47. It is always necessary for the Tribunal, when exercising its discretion to identify the cause of the Claimant's failure to bring the claim in time; **Accurist Watches Limited -v- Wadher UK EAT/0102/09** and it is always good practice for the Tribunal to make clear findings of facts from the evidence adduced. In this case I hope I have fulfilled that task.
48. It then falls to me to consider whether or not that evidence is sufficient to warrant the exercise of the discretion.
49. I have concluded in this case it is not sufficient. I remind myself that the burden rests upon the Claimant and that the exercise is the exception rather than the rule, (albeit I do not for a moment direct myself that the circumstances must be "exceptional").
50. In this case on the Claimant's evidence she was sufficiently healthy to be willing to accept paid employment hence her multiple efforts to obtain employment. She was undoubtedly in the same material circumstances in April/May 2018 through till July/August of 2018 and those material circumstances are proven, by the Claimant's own conduct, to be circumstances in which she was able to make contact with ACAS and present a claim to the Employment Tribunal. There is nothing about the circumstances which she has described to me which would lead me to conclude, on the balance of probabilities, that she was more impaired in the period between 31st May and late July 2018 than she was on or before that date.
51. I have concluded that the Claimant was dissuaded from renewing her application by the factors Noted above, principally; (1) statements made by her partner who thought it might be better for her to look for a new career and leave the old behind and (2) the perceived stress of attending a Tribunal for a contested hearing at some point in the future.
52. I note that the stress of litigation is something which is commonplace. I take on board this stress upon the Claimant was likely to be more than a person

who did not have her other health and social conditions. But I note further that that level of stress was not an impediment to the Claimant submitting her claim on 8th May nor her willingness to carry on with the claim until she received the rejection on 2 June 2018. I also note that the circumstances of her life were far from easy in the period December 2018 and January of 2019 at which time she again was able to go through the intellectual and mechanical processes necessary with ACAS and the Tribunal.

53. In all the circumstances I have reached the conclusion that during the period between June and July/early August 2018 the Claimant's circumstances were such that she could have re-presented a claim. I have reached the same conclusion in respect of the period of November 2018 to January 2019.
54. For these reasons the Claimant has not persuaded me that it is just and equitable to provide an extension because, throughout the primary period and for a month or so after the expiry of the primary period, the difficulties the Claimant faced have been demonstrably not sufficient to stop her complying with the Early Conciliation process or the submission of a Tribunal claim. I reach the same conclusion in respect of the period between November 2018 and January 2019.
55. For these reasons I do not consider it just and equitable to extend time for the presentation of a claim until 6 January 2019 and the claim is therefore not within the Tribunal's jurisdiction and is dismissed.

Employment Judge R F Powell
Dated: 9th December 2019

JUDGMENT SENT TO THE PARTIES ON

.....21 December 2019.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS