EMPLOYMENT TRIBUNALS

Claimant: Ms H Jones

Respondent: The City and County of Cardiff

Heard at: Cardiff **On:** 17 January 2020

Before: Employment Judge S Jenkins (sitting alone)

Representation:
Claimant: Mr A Leaf (ELIPS Representative)
Respondent: Mrs R Russell (Solicitor)

JUDGMENT having been sent to the parties on 17 January 2020 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to consider whether it was just and equitable to extend time under section 123 of the Equality Act 2010 ("EqA") to allow the Claimant's claim of disability discrimination to proceed.

2. In that regard the Claimant's dismissal, i.e. the act complained of for the purposes of the EqA, took place on 27 May 2018. In terms of time limits, that required the Claimant to have made contact with ACAS by 26 August 2018, i.e. three months from the date of the act complained of. However, such contact was not made until 6 October 2019, with the claim form being submitted on 13 October 2019, after the issue of the early conciliation certificate on 10 October 2019. On the face of it therefore, the Claimant's application was just over 13 months out of time.

3. At the start of the hearing, the Claimant's representative indicated that the Claimant had also intended to submit an unfair dismissal claim and therefore was applying to amend her claim to submit such a claim, on the basis that it would simply involve a "relabelling" of her existing claim. I therefore indicated that I would consider whether to allow such an amendment, and also then whether it would be appropriate to extend time under section 111 of the Employment Rights Act 1996 ("ERA"), applying the significantly stricter, "reasonable practicability" test under that section, in addition to the matter that had been listed for consideration..

4. I heard evidence from the Claimant and considered various documentation to which my attention was drawn by both parties. I also considered the submissions of the parties.

Issues and Law

5. The first issue for me to consider was whether to allow the application to amend the claim to introduce the claim of unfair dismissal. In this regard, I bore in mind the Presidential Guidance on amendments and the primary case authority, that of Selkent Bus Company Ltd v Moore [1996] ICR 836. Both the Presidential Guidance and the Selkent case direct that regard should be had to all the circumstances, and in particular any injustice or hardship which would result from the amendment or the refusal to amend.

6. The Selkent case set out a non-exhaustive list of factors to be considered, namely; the nature of the amendment, the applicability of time limits, and the timing and manner of the application to amend. The Presidential Guidance reiterated the Selkent factors, but also noted that there is a distinction to be drawn between applications to amend which add new claims essentially out of facts that have already been pleaded, i.e. "relabelling", and applications to add new claims which are entirely unconnected with the original claim.

7. The second issue for me to consider was whether to extend time to allow the disability discrimination claim to be pursued. In that regard, section 123 EqA notes that a claim must be brought within three months of the act complained of, and the latest act to be complained of in this case was the dismissal in May 2018. Bearing in mind that the claim was not lodged until October 2019, it was clearly lodged outside the required time frame and therefore I needed to consider whether it would appropriate to extend time on the "just and equitable" basis.

8. In that regard, I was mindful of the case law in this area, notably that of Bexley Community Centre v Robertson [2003] IRLR 434, which noted that time limits are to be complied with, that there is no presumption in favour of the exercise of the discretion to extend time, and that is the exception rather than the rule. I also took into account the direction provided by the case of British Coal

Corporation v Keeble [1997] IRLR 336, and the indication in that case that the factors applicable in applications to amend in civil cases under section 33 of the Limitation Act 1980 should be considered.

9. That section directs that the primary consideration is of the prejudice that each party would suffer having regard to all the circumstances of the case, with particular factors being: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected; the extent to which the opposing party has cooperated with any request for information; the promptness with which the claimant acted when they knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice when they knew of the possibility of taking action.

10. I also noted the guidance provided by the case of Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, which was that the application of the section 33 factors does not require the tribunal to be satisfied there was a good reason for the delay, but that the reason advanced is a relevant matter to which to have regard. I also noted the case of Hutchinson v Westward Television Ltd [1977] IRLR 69, which indicated that an employment tribunal in this type of case is entitled to take into account anything it considers relevant.

11. Finally in terms of issues, if I decided that it would be appropriate to allow the application to amend to include a claim of unfair dismissal, I would need to consider whether to extend time to allow that claim to proceed. In that regard, I noted that section 111 ERA requires such a claim to be brought within three months of the dismissal, which clearly had not happened in this case. The section however required me to consider whether it had been reasonably practicable for the claim to have been brought within the relevant time period and, if not, whether it was submitted within such a reasonable time thereafter. I noted that the case of Porter v Bandridge Ltd [1978] ICR943, indicated that the onus on demonstrating that it was not reasonably practicable to bring a claim, and that it had been brought within a reasonable time, rests on the Claimant. I also noted a range of cases which indicated that a debilitating illness may prevent a claimant from submitting a claim in time, and therefore may mean that it was not reasonably practicable for the claim to have been brought within time.

Facts

12. As this was only a preliminary hearing, and as I heard only limited evidence from Ms Jones in relation to the issues I needed to address, my findings are limited, although there did not seem to be any material dispute in relation to the background facts.

13. The Claimant was employed by the Respondent as a social worker between August 2005 and May 2018. She suffers from some psychological conditions, the principal one appearing to be borderline personality disorder, and that has led to her reacting adversely to difficult life events.

14. In particular, this led to the Claimant suffering a mental health crisis, due to matters in her personal life, in 2016, which, in addition to leading to a lengthy period of sickness absence, also led to her incurring criminal convictions not related to matters within the workplace. Those convictions led to the Claimant being disciplined by the Respondent upon her return to work in March 2017, and the imposition of a final written warning noted to be live for an 18-month period. Initially the Claimant was also demoted, but that element of the disciplinary sanction was overturned on appeal.

15. The Claimant suffered a further mental health crisis in October 2017, again due to matters in her personal life, which again led to a lengthy period of sickness absence and to further criminal convictions. As a result of that, the Respondent implemented disciplinary action on the Claimant's return to work, and dismissed her in May 2018, based on the cumulative effect of the further incidents on top of the live final written warning. The Claimant did not appeal that decision.

16. In addition to the Claimant's medical conditions, she had a number of difficult life issues with which to contend at the time of her dismissal and subsequently. The most compelling of these was Family Court proceedings relating to the custody of her two young children. She was also however involved with County Court proceedings regarding the recovery of an investment in a property from her ex-partner, and the recovery of her belongings from her ex-partner. Finally, the Claimant was the subject of regulatory proceedings brought in respect of her by the Social Care Council.

17. I noted that the Claimant applied for several jobs, she herself mentioned some 13 to 14, during this period, in order, for obvious reasons, to try to earn a living. She was initially successful with three of her applications, but the job offers were withdrawn once the prospective employers became aware of the Claimant’s convictions.

18. In relation to the matters noted above, it appears that the County Court proceedings had been resolved in June and July 2018, and that the Family Court proceedings were ongoing through 2018 and 2019, with periodic court hearings, in fact four in number, until the Family Court matter was finally resolved on 10 October 2019. The Social Care Council issued a final judgement in respect of the Claimant just before Christmas 2019, which was that the Claimant was removed from the register of social workers.

19. In terms of the Claimant's knowledge of her possible employment tribunal claims, she confirmed in evidence that she was aware of the three-month time limit within which tribunal claims must be brought, broadly at the time at which she was dismissed. However, she contended that her condition and the other events in her life were exhausting, and meant that she was not emotionally able to deal with the prospect of bringing employment tribunal claims, the particular word she used was that she did not have the "headroom" to do so, before the conclusion of the Family Court proceedings.

20. The Claimant confirmed that she had taken some advice from her trade union at the time of her dismissal, but not subsequently, and that she had not had the finances to take legal advice.

21. In terms of medical evidence, I could see, from the bundle of documents referred to me, that a report had been produced by a consultant psychiatrist on 30 July 2019, which noted that the Claimant had been stable for "about three months", which I took to mean the period roughly from the end of April through to the end of July 2019. The Claimant in her evidence appeared to accept that that state of affairs had applied, pointing out that the report did not mean that she had been stable before that particular period or after that particular period.

Submissions

22. The Respondent noted the relevant case law to which I have referred above, and contended that there would be prejudice to the Respondent in terms of the delay of the hearing of this case if it went forward, as it would be likely to take place some two years after the events, and that would impact on the recollection of witnesses. The Respondent contended that the Claimant's health was the main issue, together with the impact of the Family Court proceedings, but that the medical evidence did not suggest that the Claimant had been incapable of pursuing a claim.

23. The Claimant herself in her submissions noted that borderline personality disorder was an unpredictable condition, and she reiterated her comment that the fact that the psychiatrist had said that she been stable for a three month-period did not mean that she been stable before and after that.

24. The Claimant's representative noted the Morgan case and that the cogency of the reasons advanced for the delay in commencing proceedings was not conclusive. He contended that the Claimant would be put to significant prejudice if the claims were not allowed to proceed, whereas the Respondent would not suffer any real prejudice, certainly in terms of recollection of events, as the case was not particularly fact sensitive.

Conclusions

25. Dealing first with the application to amend, I noted that the factual elements of the Claimant's unfair dismissal claim were already pleaded in her Claim Form in relation to her disability discrimination claim. In my view, this was therefore very much a case of "relabelling", and bore in mind, if this case went forward, that the Respondent would have to deal with all the factual matters as part of the disability discrimination claim. I did not consider therefore, that there would be any injustice or hardship to the Respondent in allowing the application to amend to include an unfair dismissal claim as well. Therefore, my conclusion was that the application to amend should be granted.

26. Turning to the extension of time points, and first considering the disability discrimination claim, I noted the guidance provided by the Bexley Community Centre and Hutchinson cases, and I also noted the guidance provided by the British Coal Corporation case, and the factors set out in section 33 of the Limitation Act 1980.

27. Of those factors, I was not convinced that the cogency of evidence was going to be affected in this particular case, as the dismissal of the Claimant was not based on disputed factual evidence, and the only evidence that would be brought before the Tribunal would be that of the decision-maker to explain their particular thought processes. Similarly, I was not convinced that the steps taken by the Claimant to take advice were particularly relevant, due to the Claimant's inability to fund such advice. Thirdly, there had been no request for information from the Respondent so that factor was not relevant. The other two factors were, however, of clear relevance to me and those were: the length of, and reasons for, the delay; and the promptness with which the Claimant acted.

28. It was clear to me, from the evidence and the submissions, that the main aspect for me to consider was the delay in the submission of the claim for some 13 months, contended by the Claimant to be due to the impact on her of her borderline personality disorder condition and the other life events she experienced at that particular time. I noted however, that the consultant psychiatrist's report, with which the Claimant did not take issue, confirmed that the Claimant had been stable, at least during the three-month period of roughly May to July 2019.

29. I noted the impact of the other matters in the Claimant's life on her, in particular the family proceedings. Whilst those matters will have been bound to have been on her mind throughout the entire period, I noted that she had been only required to prepare for, and attend, hearings on some four occasions during the period from her dismissal through to the final hearing in October 2019. I also noted that the Claimant had been able to apply for jobs and, indeed, had been successful, at least initially, in three applications,

although those particular offers had been withdrawn due to the Claimant's convictions. I could certainly appreciate the Claimant's desire to focus on earning money, for obvious reasons, but the fact that she was able to make such applications struck me as meaning that the Claimant had been in a position where she could have taken steps to pursue her claims at an earlier stage, notably during the three-month period identified by the psychiatrist as being the period during which the Claimant's condition was stable.

30. I therefore concluded that it was likely that in the immediate aftermath of the dismissal, due to the Claimant's condition and the other matters that were going on in her life, she was not in a position to pursue her claims. However, once those matters had resolved themselves to a sufficient degree, which, taking into account the psychiatrist evidence I considered to be certainly by the period of May to July 2019, I considered that the Claimant had been in a reasonable position to progress matters at that stage. I therefore did not consider that the reasons advanced by the Claimant justified her considerable delay or that she acted sufficiently promptly in bringing her claims.

30. I considered that, by the period of May to July 2019, the Claimant's health and the other issues in her life did not impact upon her to the significant degree that they had at the earlier stage, and, in my view, it had been reasonable for the Claimant to have pursued the claim at a much earlier stage than she did. I did not therefore consider that it was just and equitable to extend time to allow at the disability discrimination claim to proceed.

31. Finally, with regard to the unfair dismissal claim and the stricter reasonable practicability test, my analysis above in relation to the disability discrimination claim, and my decision that it would not be just and equitable to extend time, applies. For those reasons, whilst I would consider that it may not have been reasonably practicable for the Claimant to have brought her claim within the required three-month period i.e. between May and August 2018, I did not consider that she brought the claim within a reasonable period thereafter. Again, the medical evidence, in the form of the psychiatric report, was compelling, and noted that, during the three-month period of May to July 2019 at least, the Claimant was "stable", which I took to mean that she had been in a position during that period to have progressed her claim. Consequently, I concluded that the Claimant had not submitted her claim within the required reasonable further period.

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Employment Judge S Jenkins

Dated: 23 January 2020

REASONS SENT TO THE PARTIES ON 30 January 2020
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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS