EMPLOYMENT TRIBUNALS

Claimant: **Ms R Keighley**

Respondent: **The Edinburgh Woollen Mill Limited**

Heard at: **Leeds** **On: 13 February 2020**

Before: **Employment Judge Shulman**

Representation

Claimant: In person (supported by Mr R Turner)
Respondent: Miss A Quigley Counsel

RESERVED JUDGMENT

1. The Claimant accepting that she was out of time, both in respect of the harassment and failure to make reasonable adjustments claims, the Tribunal does not extend time in either case on the ground that it is not just and equitable to do so.
2. The claim for unfair dismissal is hereby struck out on the ground that it has no reasonable prospect of success.

REASONS

Introduction

1. This is a case in which consideration is being given as to whether or not the Claimant's claims for harassment and failure to make reasonable adjustments are out of time and if they are whether time should be extended ground that it is just and equitable to do so. It is also a case where consideration is being given to whether or not the Claimant's claim for unfair dismissal should be struck out or a deposit order made on the ground that there is no reasonable prospect of success (in the case of strike out) or little reasonable prospect of success (in the case of a deposit order).

Issues

2. During the course of the hearing the Claimant accepted that her claims for harassment and failure to make reasonable adjustments were out of time and the sole issue, therefore, in relation to each of those claims is whether or not time should be extended for such other period as the Employment Tribunal thinks just and equitable. So far as the claim for unfair dismissal is concerned the questions are whether the claim has no reasonable prospect of success or little reasonable prospect of success.

The law

3. The Tribunal has to have regard to the following provisions of the law in relation to matters of time:

   Section 123(1) Equality Act 2010 (EA). "…..Proceedings on a 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 employment tribunal thinks just and equitable".

   Section 123(4) EA. "In the absence or evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

   (a) when P does an act inconsistent with doing it, or

   (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it".

4. The discretion given to tribunals to extend time in discrimination claims on the grounds of justice and equity is a wide one (see **Trusthouse Forte (UK) v Halstead** EAT 203/86).

5. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640 Court of Appeal (Abertawe) it was decided that a tribunal may consider the list of factors specified in section 33(3) Limitation Act 1980 (LA) but a tribunal is not required to do so. Two factors are almost always relevant when considering whether to extend time, that is length of and reasons for delay and whether the delay has prejudiced the respondent.

6. For completeness section 33(3) LA specifies factors to be considered as being:

   - Length of and reasons for delay by the claimant.
   - Effect of delay on the evidence.
   - Conduct of the respondent after issue.
   - Duration of the disability after issue.
   - Extent to which the claimant acted promptly and reasonably once the claimant knew he might have a claim.
   - Steps taken by the claimant to take advice and its nature.

7. The onus is on the Claimant to convince a Tribunal that it is just and equitable to extend time.

8. It is important for the Claimant to provide an explanation for the delay. Where no explanation is provided it is open to the tribunal to come to a conclusion to refuse an extension (see **Habinteg Housing Association Limited v Holleron** EAT 0274/14), but the exercise of discretion does involve a multifactorial approach. At the very least the delay must be explained (see **Edomabi v La Retraite RC Girls School** EAT 0180/16) and there must be a good reason for the delay and what the nature of it is (see Abertawe).
9. A wholly understandable misconception of the law can be a reason for extending time – see **Hawkins v Ball and Anor** [1996] IRLR 258 EAT.
10. Discretion may be exercised from the date when it was considered to be that from which a claimant could reasonably have become aware of her right to present a worthwhile complaint – **P v S and Anor** [1996] ICR 795 EAT.
11. However ignorance must be reasonable – see **Perth and Kinross Council v Townsley** EAT 0010/10.
12. Consideration must be given in the case of failure to make reasonable adjustments to the fact that the claimant may not realise that the start date has occurred – see **Hull City Council v Matuszowicz** [2009] ICR 1170 Court of Appeal.
13. The Tribunal reserved its decision because it wished to consider the authorities on extending time, the ones which the Tribunal regards as relevant being set out above. It gave the parties the opportunity to consider those authorities before making its decision but the parties declined to take this opportunity up.
14. Referring to the strike out and deposit order, the provisions can be found in the Employment Tribunals Rules of Procedure (Rules).
15. Strike out is dealt with in Rule 37(1), giving the tribunal power to strike out all or any part of a claim on the grounds that it has no reasonable prospect of success.
16. Deposit orders are dealt with in Rule 39(1), and can be made where the tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success and in making such an order by Rule 39(2) the tribunal shall make reasonable enquiries into the paying party's ability to pay a deposit.
17. With regard to unfair dismissal, section 95(1)(c) Employment Relations Act 1996 says that "F*or the purpose of this Part an employee is dismissed by his employer if (and subject to subsection (2) … only if) –….. (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct)"*.

Facts

(The Tribunal having carefully reviewed the documents and any oral evidence before it finds the following facts which are relevant to this hearing):

18. In June 2017 adjustments were removed by the Respondent and the Claimant specified the adjustments which she required and which she regarded as reasonable, which were were working upstairs in the shop in which she was employed, receiving assistance with the movement of heavy items and working in a warm environment.
19. On a day in December 2017 at a Christmas party the Claimant was referred to as lazy and was dissatisfied with the apology which she received from Ms Connolly, who made the comment in the first place.

20. There was general unhappiness so far as the Claimant was concerned and much of this stemmed from her disability which was fibromyalgia.

21. In April 2018 the Claimant suffered a bad relapse in her disability and consulted (on 5 April 2018) her doctor (Dr Keye). Dr Keye was well acquainted with the Claimant's condition and she advised the Claimant that the Claimant could not carry on "like this". Dr Keye asked the Claimant whether she had considered finding another job, because the Claimant's health was more important.

22. Before the Claimant went to see Dr Keye she did not consider handing in her notice to the Respondent.

23. Her next visit to Dr Keye was on 19 April 2019 and between those two dates she had not made any decision about her future with the Respondent.

24. On that occasion Dr Keye issued a further month's sick note for the Claimant. The Claimant told Dr Keye that she was going to take her advice and hand in her notice. The doctor said that the Claimant was doing the right thing.

25. After the Claimant left the surgery the Claimant wrote out her notice straightaway and delivered it (with Mr Turner) to manager of the shop.

26. The Claimant's notice was therefore given to the Respondent on 19 April 2018 to expire on 19 May 2018. The claim was issued on 6 August 2018.

27. With regard to section 123(4)EA time started to run in the case of a failure to make reasonable adjustments from June 2017 and started to run in relation to the harassment from December 2017. The Claimant did not issue proceedings until 6 August 2018.

28. Facts which are relevant to the just and equitable discretion that the Claimant gave in evidence are as follows:

29. The Claimant went on holiday in February 2018 and just left things.

30. At the point when it was the latest time to issue, namely, 22 March 2018, the Claimant stated that she was still in work and needed to work to pay her bills. She, therefore, made the choice between the need for money and making a claim.

31. In relation to the failure to make reasonable adjustments the Claimant says that she asked Ms Conolly to make them on 19 August 2017 and when she handed the keys to the shop back in October 2017. She met the manager and explained her condition in that she needed to go back to 22 hours a week (she was then working for 40 hours). She says that she asked again about failure to make reasonable adjustments.

32. She says that when she left the Respondent's employment she had no intention of going to the Tribunal. She just wanted to get better. Friends suggested that she should go to ACAS and she did that at the end of April or beginning of May.

33. She says that she was going through things in her mind up to 21 June 2018 and that she spoke to the doctor about it, who said it would be difficult to go to the Tribunal because of stress. She says that she was trying to get better and she did not know about time limits.

34. She did say that the doctor had raised with her the expression of reasonable adjustments over the telephone.

35. She said that she did not mean to make a claim in either August or October 2017 because she did not know about it.

36. She said she did not google ACAS but in the end she telephoned them.
37. She did not take steps to find out that her rights might be. She had a smart phone.
38. She didn't research any law at all.
39. She made the decision to claim just before she phoned ACAS and they said that they would look at the claim and then a Mr Jones from ACAS phoned back and that was when she decided to put the claim in which would be on or about 21 June 2018.

Determination of the issues

(After listening to the factual and legal submissions made by and on behalf of the respective parties):

40. Dealing with whether time should be extended in relation to the harassment and failure to make reasonable adjustment claims, the Tribunal has a wide discretion, taking into account the law set out above.
41. The Tribunal reaches the following conclusions:
42. Miss Quigley suggested that a reasonable time for cut off on the failure to make reasonable adjustment claim would be August 2017 and, having regard to the nature of the proposed adjustments, none of these required, for example, construction work or the bringing in of people and could have been done there and then and, therefore, the Tribunal's view is that August 2017 is a reasonable period, so that in that case the gap until the issue of proceedings is wide until issue.
43. In the case of the harassment claim the occurrence was in December 2017 and, therefore, there was eight or nine months until issue.
44. As to the reasons for the delay it seemed to be around the fact that the Claimant preferred the money from her employment to proceedings. Actually the Claimant could have done both. She could have issued proceedings for harassment and failure to make reasonable adjustments and stayed in work, although she says she was already unhappy and would have been unlikely to take that course of action and she undoubtedly did choose money.
45. She clearly did not get to grips with the questioning of issuing proceedings before she was well out of time, when she contacted ACAS, who registered her for early conciliation on 21 June 2018.
46. The question of prejudice in respect of the delay for the Respondent does not arise.
47. There seems to have been no effect of delay on the evidence.
48. Conduct of the Respondent after issue does not seem to be relevant.
49. There is no evidence that her disability changed after the relevant dates.
50. The Tribunal is not of the view that the Claimant acted promptly and reasonably, although it is fair to say that she might not have known that she had a claim.
51. The Claimant does not appear to have taken steps to take advice apart from her doctor, her friends and of course contacted ACAS.
52. The onus is on the Claimant to convince the Tribunal that it is just and equitable to extend time.
53. The Tribunal is of the view that the explanation for the delay is not in itself one that would justify extending time in accordance with justice and equity. The Tribunal found her explanation for the delay unconvincing.

54. The Claimant did not seem to misconceive the law. She effectively turned her back on it until she contacted ACAS.

55. The Tribunal is not convinced that the Claimant was reasonable in her lack of awareness of her right to present a worthwhile complaint, basically because her heart was not in it until it was too late. The same applies asking the question whether she realised that the start dates had occurred.

56. In all the circumstances in neither case (harassment or failure to make reasonable adjustments) is the Tribunal of the view that it is just and equitable to extend time and both claims are dismissed.

57. With regard to unfair dismissal the Claimant was informed at the hearing that her claim for unfair dismissal was struck out.

58. It is crystal clear, on the evidence, that the Claimant terminated the contract in which she was employed. This was as a result of advice given to her by her doctor and not because of the Respondent's conduct.

59. The Tribunal went into some detail as to the crucial period from the beginning of April 2018 and the effective date of termination, bearing in mind that this was not a last straw case. The Tribunal finds no evidence as to what breach, if any, the Respondent was responsible for. The Claimant was unable to give any such evidence which would amount to a fundamental breach of her contract of employment and gave important evidence as to visits to her doctor on 5 and 19 April 2018.

60. This should not belittle the unhappiness which the Claimant had to suffer. At the end of the day it must be the conduct of the Respondent which causes the Claimant to give her notice, which is not the case here. In all the circumstances the Claimant's claim for unfair dismissal is struck out.

61. Issues relating to a deposit order do not arise.

Employment Judge Shulman

Date 24 February 2020