



EMPLOYMENT TRIBUNALS

Claimant: Miss A Williams

**Respondents: (1) Navolio Limited
(2) Poultry Opco Limited TA The Ned**

Heard at: London Central (Fox Court)

On: 12 March 2020

Before Judge: Mrs A Isaacson

Representation

Claimant: In person

First Respondent: Ms K Zakrzewska

Second Respondent: Mr J Fidler

JUDGMENT

The Judgment of the Tribunal is as follows:

- 1. The claimant was at the material time a disabled person as defined by section 6 of the Equality Act 2010 (“EqA”).**
- 2. The claimant’s claims against the second respondent were out of time but it was not reasonably practicable for the claimant’s claim under the Working Time Regulations 1998 (“WTR”) to be brought in time and the claimant then presented her claim within a reasonable period thereafter and it was just and equitable to extend time in relation to the claimant’s disability claim.**
- 3. The claimant’s claim that the respondent failed to provide her with a rest break under the WTR is struck out on the basis that it has no reasonable prospects of success.**
- 4. The respondents’ applications for deposit orders fail.**

REASONS

The Issues

1. The issues before the Tribunal were:
 - 1.1 Is the claimant disabled within the definition of disability for the purposes of section 6 of the EqA?
 - 1.2 Are the claimant's claims against the second respondent in time? If not, in relation to the disability discrimination claims is it just and equitable to extend time? In relation to the working time claim relating to rest breaks was it reasonably practicable to present the claim in time and if not, was the claim presented within a reasonable period thereafter?
 - 1.3 Should any of the remaining claims be struck out on the basis they have no reasonable prospects of success?
 - 1.4 Do any of the claims have little reasonable prospects of success and should be subject to a deposit order as a condition of continuing the claims?

The law

2. The time limit for presenting a claim for presenting a claim under WTR is within three months. The Tribunal is able to consider complaints presented out of time only if it is satisfied (1) that it was not reasonably practicable for a complaint to be presented before the end of the relevant 3 months period, and (2) if so, that it was presented within such further period as it considers reasonable. The burden lies on the claimant at both stages of the test.
3. It is a question of fact in each case whether it was reasonably practicable to present a claim in time. There may be various relevant factors including the claimant's knowledge of the facts giving rise to their claim and their knowledge of their rights to claim and the enforcement of those rights.
4. Mere ignorance of the time limit for bringing a claim for unfair dismissal does not of itself amount to reasonable impracticability, especially where the employee is aware of their right to bring a claim. The question is, was the claimant's ignorance reasonable?
5. Where an employee has knowledge of their right to claim unfair dismissal there is an obligation on them to seek information or advice about enforcement of those rights.
6. If a solicitor is at fault the Tribunal will usually consider that it was reasonably practicable for the claim to have been presented in time however if the fault is of another advisor such as ACAS and if the claimant

may have been misled about the time limits or misinformed then this may amount to impracticability.

7. A claimant's illness maybe relevant to the question of reasonable practicability and a Tribunal is prepared to exercise leniency in such situations but the Tribunal still needs to decide whether it was reasonably practicable for the claimant to have presented his claim in time.
8. The existence of an ongoing internal appeal is not by itself sufficient to justify a finding of fact that it was not reasonably practicable to present a complaint in time to the Tribunal.
9. Section 123 of the Equality Act 2010 ("EqA") provides that a claim may not be brought after the end of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable.
10. The Tribunal has wide discretion in determining whether or not it is just and equitable to extend time and it is a wider discretion than for unfair dismissal. It should consider everything that it thinks is relevant. However, time limits should be strictly applied and the exercise of the discretion is the exception rather than the rule. There is no presumption that the Tribunal should exercise its discretion.
11. The Tribunal is not legally required to but may consider the check list set out in section 33 of the Limitation Act 1980 in considering whether to exercise its discretion:
 - a) the length and reason for the delay;
 - b) the extent to which the cogency of the evidence is likely to be affected by the delay;
 - c) the extent to which the party sued had cooperated with any requests for information;
 - d) the promptness which the claimant acted once he knew the facts giving rise to the cause of action; and
 - e) the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.
12. The Tribunal will consider whether a fair trial is still possible and the prejudice to the respondent.
13. Rule 39 of the Employment Tribunals Rules of Procedure provides:
 - (1) *Where at a preliminary hearing (under rule 53) the tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
 - (2) *The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*

- (3) *The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*
- (4) *If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response has been presented, as set out in rule 21.*
- (5) *If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order-*
 - (a) *the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*
 - (b) *the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the tribunal orders), otherwise the deposit shall be refunded.*
- (6) *If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."*

14. Rule 39 of the ET Rules provides for the making of a deposit order if the Tribunal considers that the allegations have little reasonable prospect of success.

15. The Tribunal must make enquiries of the Claimant's ability to pay a deposit order and explain the consequences of the deposit order to the Claimant as set out in rule 39 (5).

16. The legal principles which the Tribunal should have regard to when considering making a deposit order are clearly set out in paragraphs 9 to 17 of the EAT case of Hemdan V Ishmail & another [2017] ICR 486.

17. A deposit order can be made in relation to each allegation but the Tribunal must consider proportionality as multiple deposit orders may result in a prohibitively high level of collective deposits.

18. Rule 37 in schedule 1 of the ETs (Constitution & Rules of Procedure) Regs 2013 (The ET Rules") provides that a Tribunal can at any stage of the proceedings strike out all or part of a claim on the grounds that it is scandalous or vexatious or has no reasonable prospects of success.

19. The EqA defines a "disabled person" as a person who has a disability. A person has a disability if she has a "physical or mental impairment" which has a substantial and long term adverse effect on her ability to carry out normal day to day activities. The burden of proof is on the claimant to show that she satisfies this definition.

The facts

Disability

20. The claimant gave evidence before the Tribunal and came across as an honest and reliable witness.
21. In relation to the question of disability the Tribunal finds, based on the documents before it and the evidence from the claimant, that the claimant is disabled.
22. In 1997 the claimant was involved in a car accident suffering a 90- degree dislocation of the right talus bone. She received two operations, a graft and fusion and a triple fusion. The claimant was then in a car accident and has had to have further operations and attended hospital for pain control.
23. The claimant has a valgus deformity which results in a flat foot so it doesn't bend and is fused on the talus bone and has a bracket. She suffers from constant pain which is managed by rest and elevation and taking 500mg of Naproxen each day. She has a limp and her foot turns inwards. The pain slows her down so getting up and moving takes longer and she wears boots that go above her ankle to support her.
24. The claimant also suffers from complex regional pain syndrome and has required injections into her back to control the pain. Although the claimant's accidents were many years ago the consequences of the accidents remain with her today.
25. It is clear to the Tribunal that the claimant is disabled as her movement is affected and without regular pain relief and anti-inflammatory tablets she would be in constant pain.

Time

26. The Tribunal finds that the claimant was in contact with ACAS as early as June/July 2019 about her grievance with the first respondent and was advised about the three months' time limit for bringing a Tribunal claim. However, she misunderstood that she couldn't present a claim in those three months before giving the first respondent an opportunity to resolve it internally.
27. On the 10 September 2019 the claimant contacted ACAS and spoke to a Rosemary. The Tribunal accepts the claimant's evidence that in this conversation with ACAS, and in previous conversations with ACAS, the claimant had explained the full situation about her being employed by an agency but that the alleged act of discrimination occurred at the Ned Hotel. When the claimant called ACAS on the 10 September 2019 the ACAS officer should have explained to the claimant that she was required to have two separate certificates for both potential respondents. The ACAS officer only issued one certificate for the first respondent. After hearing from the first respondent that the incident was nothing to do with them ACAS then spoke to the claimant and advised her to enter into early

conciliation with the second respondent. The claimant did so on the 19 September 2019.

28. The claimant is not legally represented and although she knew about her rights to bring a claim to the Tribunal and the three months' time limit, it is understandable that the claimant thought she had done everything she needed to do when she called ACAS within the three months time limit on the 10 September 2019 and had explained that the incident had occurred at the The Ned Hotel and not at the Agency. The Tribunal would have expected ACAS, having heard the facts from the claimant, to have told her that she needed to enter into early conciliation with both potential respondents on the 10 September 2019. Therefore, the Tribunal finds in these particular circumstances that it was not reasonably practicable for the claimant to have presented her claim in time against the second respondent and that she did then present her claim within a reasonable period thereafter.
29. The Tribunal also finds that it was just and equitable to extend time for her discrimination claim against the second respondent. The claimant had taken reasonable steps to present her claim in time. There was very little delay and a fair hearing was still possible. The prejudice of not allowing the claim to continue to the claimant outweighed the prejudice to the second respondent of allowing the claim to be heard.

Strike out

30. Based on the limited evidence before the Tribunal the claimant concluded that the claimant's discrimination claim would not be struck out for having no reasonable prospects of success. The claimant had sent an email regarding the alleged incident the very next day and was persuasive when giving evidence. The Tribunal is also mindful of not striking out discrimination claims unless they are plainly hopeless on the evidence.
31. When giving evidence the claimant admitted that on the night of the 11 June 2019 she was offered a 30 minutes rest break by the manager, to take after working 6 hours. Therefore, the claimant conceded that she was offered a rest break as required under the WTR. Consequently, the claimant's claim under the WTR has no reasonable prospects of success and is struck out.

Deposit order

32. Having heard the claimant's evidence in relation to the alleged incident on the 11 June 2019 and having seen the claimant's email of the following day the Tribunal refuses the respondents applications for a deposit order as the Tribunal does not accept that the discrimination claim has little reasonable prospects of success. The claim is arguable.

Employment Judge A Isaacson

Date : 12th March 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

16/3/2020

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FOR THE TRIBUNAL OFFICE