



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss Natasha Weed

v

BP Express Shopping Limited

Heard at: Cambridge

On: 29 January 2020

Before: Employment Judge Finlay

Appearances

For the Claimant: Mr A Francis, Lay representative

For the Respondent: Mr J Bryan, Counsel

JUDGMENT on PRELIMINARY HEARING

The Judgment of the Tribunal is that the Claimant's claim is struck out on the basis that the Employment Tribunal does not have jurisdiction to hear it.

REASONS

1. This Preliminary Hearing was listed to consider whether the Employment Tribunal has jurisdiction to hear the Claimant's complaints, or any of them, or whether they are out of time.
2. The Claimant was represented by Mr Francis, a lay representative and the Respondent by Mr Bryan of Counsel. I heard evidence from the Claimant who had provided two witness statements. The Respondent had produced a bundle of documents running to just over 93 pages, to which was added the Claimant's representative's covering letter sent with the claim form to the Tribunal in May 2019.
3. The Claimant was making a complaint of unfair dismissal. She claimed that even if the reason for her dismissal was her conduct as asserted by the Respondent, the dismissal was nevertheless unfair under Section 98 of the Employment Rights Act 1996. She also claimed that the reason or principal reason for her dismissal was related to her pregnancy thereby bringing her within the ambit of Section 99 ERA. In addition, the Claimant was also

making separate complaints of discrimination against the Respondent. In essence, she alleged that the Respondent had treated her unfavourably because of her pregnancy – complaints under Section 18 of the Equality Act 2010.

4. Those complaints under s.18 were clarified by Mr Francis as follows, in chronological order. They relate to the Claimant's manager at the time, Mr DH:
 - 4.1 that at the end of July 2018, DH stated to the Claimant in front of colleagues that her pregnancy was "*inconvenient*";
 - 4.2 that on two dates in September 2018, DH sent the Claimant home for no reason;
 - 4.3 that on or about 10 October 2018, DH refused a request by the Claimant to change her shift pattern;
 - 4.4 that on or around 3 November 2018, DH persuaded a colleague, AB, to embellish or exaggerate a letter of complaint about the Claimant's actions on 3 November 2018. It should be noted that this letter of complaint led to the disciplinary process which itself led to the dismissal of the Claimant on 20 November 2018; and
 - 4.5 that DH failed to carry out a pregnancy risk assessment. Mr Francis confirmed that in the Claimant's view, this should have been done by 15 November 2018.

5. During the discussion, Mr Francis suggested that the Claimant was also complaining that DH had not only "put up" a colleague (AB) to embellish / exaggerate her letter of complaint against the Claimant, but that he had also been instrumental in persuading the dismissing manager, AS, to dismiss the Claimant. However, such a complaint does not appear within the claim form and there was no application to amend the claim form before me or made on the day. I agreed with Mr Bryan that this was not a minor change or explanation of an existing claim, but was a potential substantive change which would require leave. I also agreed with Mr Bryan that I could only consider the claim as it was before me today. The issue was important because it potentially affected the date upon which time would run in respect of the s.18 complaints.

6. A number of dates were agreed between the parties, as follows:
 - 6.1 the date of termination of the Claimant's employment and the effective date of termination was 20 November 2018;
 - 6.2 the appeal outcome was sent to her on 22 January 2019;
 - 6.3 the Claimant contacted Acas (Day A) on 18 February 2019;
 - 6.4 Acas issued its Early Conciliation Certificate (Day B) on 18 March 2019; and
 - 6.5 the claim form was presented to the Employment Tribunal on 16 May 2019.

7. It was also not in dispute that the Claimant gave birth to twins on 12 March 2019.
8. The claim form was posted to the Employment Tribunal by Mr Francis. There is no date on the covering letter, but the Claimant gave sworn evidence to the effect that the letter was sent on 14 May 2019 and I accept that evidence.

The Law

9. The time limits for a complaint of unfair dismissal (whether under s.98 or s.99) are dealt with under Section 111 ERA. Sub-section (2) provides that an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
10. In this case, it was common ground that the claim form, allowing for the extension of time under the Early Conciliation regime, was presented 28 days late. Whether or not time should be “extended” is a two stage test. Firstly, the Tribunal needs to consider whether it was reasonably practicable for the claim to have been presented in time. Secondly, and assuming that it was not reasonably practicable, the Tribunal then goes on to consider whether time should be extended for such a period as it considers reasonable.
11. Although the Employment Tribunal is encouraged to give a “liberal” construction in favour of the employee, the onus of proving that it was not reasonably practicable for the Claimant to have presented the claim in time is on the Claimant.
12. Time limits in relation to complaints of discrimination are dealt with by s.123 of the Equality Act 2010. This provides that proceedings may not be brought after the end of the period of three 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”. Sub-section (3) provides that “conduct extending over a period” is to be treated as done at the end of the period.
13. The Tribunal has a wide discretion in determining what, if any, period of extension is “just and equitable”. However, the burden is on the Claimant to show that the time should be extended and there is no presumption in favour of extending time. On the contrary, extension is the exception not

the rule and the Employment Tribunal should not extend time unless the Claimant convinces the Tribunal that it is just and equitable to do so.

14. The Tribunal should consider all relevant factors when exercising its discretion, including, where relevant,
 - 14.1 the prejudice that each party may suffer if the extension is refused;
 - 14.2 the length of and reasons for the delay;
 - 14.3 the extent to which the cogency of evidence is affected by the delay;
 - 14.4 the extent to which the party sued had co-operated with requests for information;
 - 14.5 the promptness with which the Claimant acted when she knew of the possibility of taking action; and
 - 14.6 the steps taken by the Claimant to obtain appropriate professional advice.

The Evidence

15. Having heard the evidence of the Claimant, I make the following findings of fact.
16. The Claimant contacted Acas on 18 February 2019. At that time, she and/or her representative were aware of the primary time limit of three months. She believed that the time to contact Acas expired on 20 February 2019, whereas, in relation to the unfair dismissal complaint at least, it actually expired on 19 February 2019, but in any event, she was in time in relation to the unfair dismissal complaint.
17. As stated above, the Claimant gave birth to twins on 12 March 2019. There were complications and she remained in hospital for a further six days or so. She was told that once leaving hospital she would not be able to walk or run due to the complications and would need to remain in a restful position. She interpreted this as being that she had to stay in bed. She did not say whether she had been advised that she could not walk or run for any specific period but confirmed that she was able to go out and register the births of her children shortly before they were six weeks old. She must therefore have registered their births on or before 22 April 2019.
18. In effect, the Claimant was stating that she was so incapacitated that it was not reasonably practicable for her to present her claim by the due date. The problem for the Tribunal, however, is that I was not provided with any medical evidence in support of this contention. Indeed, the letter from her representative to the Tribunal enclosing the claim form tells a slightly different story. It states:

“Miss Weed gave birth to twins five weeks ago, these are her first children and she is a single Mum, her life has been a huge learning curve and

chaos the last month and we can only apologise that it was this week we finally managed to get together and complete the paperwork”.

19. Notably, there is no mention of any medical issues within that letter.
20. The Claimant met with her representative in the first week of May. 6 May 2019 was a Sunday and I therefore find that she met with him on or before that date. There was then a further period of ten days before the claim was presented to the Tribunal on 16 May 2019. It is apparent that the Claimant and/or her representative was aware that her claim had been presented out of time. Indeed, I find that the Claimant was aware of this personally by early May at the latest.

Conclusions

21. The Employment Tribunal does not have jurisdiction to hear the complaints of unfair dismissal unless it was not reasonably practicable for her to have presented the claim in time and the Tribunal considers reasonable to extend time to 16 May 2019, a period of 28 days.
22. Even allowing for a liberal construction, the Claimant has not convinced me that it was not reasonably practicable to present her claim before 18 April 2019. Whilst I fully accept that any pregnancy and giving birth, let alone giving birth to twins with complications, is bound to be debilitating and incapacitating for a period of time, the Claimant has not provided any medical evidence to support her argument that she was effectively completely incapacitated.
23. Even if I am wrong about this and it was not reasonably practicable for the Claimant to have been presented in time, I consider that the period of 28 days from 18 April 2019 to 16 May 2019 is not a reasonable period for time to be extended. The Claimant and/or her representative were aware that she was already out of time and she was clearly not completely incapacitated by 22 April 2019. It does not seem to me that it is reasonable to extend time until 16 May 2019. I consider that it is unlikely to have taken long for the Claimant to complete the claim form which was based on facts well rehearsed in her grievance and her appeal against dismissal. In short, the Claimant has not given a satisfactory reason for the delay in bringing the proceedings even had she been incapacitated up until 22 April 2019.
24. As stated above, the test is different for claims of discrimination although the reasons for and length of the delay remain relevant. Turning to the issue of prejudice, there is clearly prejudice to any Respondent in these circumstances if it is obliged to defend a claim which otherwise it would not have to do. However, this is not a case in which there is any “forensic” prejudice to the Respondent and no suggestion that the cogency of the

evidence had been affected by the delay whether for 28 days or three months.

25. Looking then at the extent to which the Claimant acted promptly, it is fair to say that she waited until late in the day before contacting Acas. As stated above, she had also not been prompt in presenting the claim even though she was aware that she was out of time.
26. The Claimant has also not sought professional advice, relying instead on a lay representative.
27. For these reasons, I consider the balance of these factors favours the Respondent and that it would not be just and equitable to extend time to allow the complaints of discrimination to proceed.
28. The Tribunal therefore does not have jurisdiction to hear the complaints raised by the Claimant.

Employment Judge Finlay

Dated 11 February 2020

Sent to the parties on: 17/02/2020

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For the Tribunal Office