EMPLOYMENT TRIBUNALS

Claimant: Mrs D Walker

Respondent: Boots Management Services Limited

PRELIMINARY HEARING

Heard at: Midlands (West) (in public; by Skype) **On:** 10 June 2020

Before: Employment Judge Camp

Appearances
For the claimant: in person
For the respondent: Mr A Graham, solicitor

REASONS

1. This is the written version of the reasons given orally at the hearing for the decision that the claimant's claims were presented within the relevant time limits, written reasons having been requested by the respondent's solicitor at the hearing.

2. This is a preliminary hearing to deal with time limits. The claimant, Mrs Walker, was employed as a pharmacy dispensing assistant by the respondent, Boots Management Services Limited, from, I believe, 16 July 2007 until 10 May 2019. Her employment terminated by reason of redundancy – or, at least, the respondent alleges it terminated by reason of redundancy.

3. The claimant has MS. She believes that her dismissal was unfair and also that there was disability discrimination involved in her dismissal, and possibly in the matters leading up to it[1]. Having spoken, as she put it, to one of her "MS friends", she thought about bringing a Tribunal claim and contacted ACAS.

4. The early conciliation process began on 20 July 2019 and ended on 20 August 2019. The ACAS early conciliation certificate named the respondent as "Boots UK Limited". The claimant presented her claim form on 10 September 2019. In the claim form she named the respondent, correctly as I understand it, as "Boots Management Services Limited". That was the name given on the claimant's dismissal letter and also on the latest version of her statement of employment particulars.

[1] Later on in the hearing, it was confirmed that all of the claim relates only to dismissal.

5. Because of the difference in name between "Boots Management Services Limited" and "Boots UK Limited", the claim form was referred to an Employment Judge. It was Employment Judge Cookson who dealt with it. She decided that the difference between the names was too great for the claim to be valid and she directed that it should be rejected pursuant to rule 12(1)(f) of the Employment Tribunals Rules of Procedure.

6. I am not sure that I would have made the same decision as Employment Judge Cookson in relation to that, but I cannot say that her decision was wrong. In any event, regardless of my views on the correctness of Employment Judge Cookson's decision, that is water under the bridge, as it were. Her decision has not been appealed to the Employment Appeal Tribunal and it stands.

7. The letter rejecting the claim was not sent out until 24 September 2019. Because of the dates of early conciliation and the effective date of termination, any claim, whether for unfair dismissal or for discrimination in relation to dismissal, would be subject to a primary time limit expiring on 20 September 2019 – one month and one day after the end date of early conciliation.

8. If the claim form had been referred to Employment Judge Cookson immediately after presentation, and if she had then been able to deal with it quickly, it would have been rejected and the claimant might have been able to correct the defect and apply for reconsideration before 20 September 2019. If that had been done, all would have been well. Unfortunately for the claimant, that is not what happened.

9. The rejection letter was sent out on 24 September 2019. It seems to have been sent out by post. The claimant specified in her claim form that she should be contacted by email, but one of the peculiarities of the administrative protocols within the Employment Tribunals is that things relating to claim forms are sent out by post regardless of whether the claimant has expressed a preference for email communication on the front of the claim form.[2] It being sent out by post would have added further delay.

10. It's not clear when the claimant received the rejection letter, and I don't think she can remember precisely, but she responded by email to the rejection of her claim on the 30 September 2019. Her email asked, "*How can I get this decision reconsidered?*". She sent a further, more detailed, email actually making some kind of formal application for reconsideration of the decision to reject her claim on 2 October 2019. That application was referred to a different Employment Judge, Employment Judge Harding. Her decision was that the rejection of the claim should be revoked and that the claim should be accepted. She also decided that the decision to reject was correct and that the defect that had caused it to be rejected – namely the difference in name – had been rectified with effect on 2 October 2019, meaning the claim form was deemed presented on that date, in accordance with rule 13(4) of the Employment Tribunals Rules of Procedure.

[2] For the Tribunal to do this is moreover, in my view, a breach of rule 86(2).

11. It probably doesn't matter whether I agree or disagree with Employment Judge Harding's decision, which has not been challenged, but, for what it's worth, I think that had I been in her position, I would have made the same decision as her. This is because, although I possibly wouldn't have made the same decision as Employment Judge Cookson, it can't be said that Employment Judge Cookson made an error of law when she directed that the difference in names between Boots UK Limited and Boots Management Services Limited was too great for the claim to be accepted.

12. At the same time, Employment Judge Harding directed that this preliminary hearing should take place: a preliminary hearing to deal with time limits.

13. As I have already said, for the claimant's claims – discrimination and unfair dismissal – the date by which the claim form should have been presented for time limits purposes was 20 September 2019. It was deemed presented on 2 October 2019: 12 days late. The claim having been presented outside of the primary time limit, what I have to deal with at this hearing is:

    13.1 in relation to unfair dismissal, am I satisfied that it was "*not reasonably practicable*" for the claim to be presented within the primary time limit and if it was not reasonably practicable, was the claim presented within a further reasonable period, in accordance with section 111(2)(b) of the Employment Rights Act 1996 ("ERA")?

    13.2 in relation to the disability discrimination claims that the claimant is making, would it be "*just and equitable*" to extend time, in accordance with section 123(1)(b) of the Equality Act 2010 ("EQA")?

14. I can see from looking in the Tribunal file that Employment Judge Harding told the Tribunal administration that she was making further directions for the preparation of a file of documents – a bundle – and for witness statements. Unfortunately, the administration did not put that into practice. However, that hasn't in the event caused particular problems at this hearing. This hearing is taking place electronically, using Skype for Business. We have had some technical difficulties, but we have been able to get through them and I think the hearing has proceeded reasonably satisfactorily.

15. There is a file of documents. I don't think there is anything in particular missing from it. Certainly, nobody has suggested that there is. Mrs Walker, the claimant, who is a litigant in person, has given evidence on oath. Without objection from the respondent, I asked her some questions – examined her in chief. She hadn't prepared a witness statement because she had received no order requiring her to prepare one. I also gave the respondent's solicitor, Mr Graham, an opportunity to cross-examine her and he did so.

16. As to the law, in considering the issue of reasonable practicability under the ERA, I note that:

    - what I am determining is a question of fact;

- "*to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done … [one should] ask colloquially and untrammelled by too much legal logic – "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"…*" Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945;

- I must answer the above question "*against the background of the surrounding circumstances and the aim to be achieved*" – Schultz v Esso Petroleum Ltd [1999] 3 All ER 338 – and take into account all relevant circumstances, which may include: the manner of, and reason for, the dismissal; whether the employer's conciliation machinery had been used; the substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time (see Palmer and Saunders);

- if the claimant is ignorant of his rights and/or of the relevant time limits, this is a relevant consideration but is far from conclusive. "*The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him.*" Wall's Meat Co Ltd v Khan [1979] ICR 52, CA.

17. In considering whether or not to exercise my discretion under EQA section 123, I remind myself that: all the circumstances must be taken into account, usually including (suitably adapted so they make sense in an employment law context) the factors (a) to (f) set out in section 33(3) of the Limitation Act 1980 ("section 33"); an important, but not necessarily determinative, factor is likely to be the balance of prejudice; time limits are there to be obeyed; it is for the claimant to persuade the tribunal that it is just and equitable to extend time; if the claimant is ignorant of time limits this does not in and of itself justify extending time.

18. In submissions, Mr Graham for the respondent reminded me, and I accept that there is case law to this effect, that extending time under EQA section 123 should be the exception not the rule. That doesn't, of course, mean that there have to be exceptional circumstances before time is extended. It merely emphasises the point that the burden is on the claimant to show that it is just and equitable to extend time; that there is no presumption in favour of extending time (quite the reverse).

19. In summary in relation to EQA section 123, I have sought to apply the law in relation to this as summarised in paragraphs 9 to 16 of the EAT's decision in Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283.

20. How is all that to be applied in this case?

21. The first thing I need to think about in relation to any question about extending time limits in any case where I have the power to extend time is: why was the claim not presented in time? It seems to me that there is one reason, and one reason only, why, in practice, this claim was not presented in time: the claimant put a different name for the respondent on the claim form from the name of the prospective respondent that was on the early conciliation certificate. So: why did that happen?

22. I don't think it can seriously be suggested that the claimant named the respondent differently in the claim form for any reason other than that she did not know that she needed to use the same name. If she had had that knowledge, I am sure she would have applied it. She didn't know it and that's why she didn't do it. The question is, then: why did she not know this?

23. What I am assessing is whether the claimant was reasonably ignorant of the need to use the same name for the respondent in the claim form as the name of the prospective respondent on the early conciliation certificate, so as to make it, in the particular circumstances of this case, not reasonably practicable for her to name that prospective respondent in the claim form. The particular circumstances of this case include the fact that the name of the prospective respondent on the certificate was wrong, i.e. it was not the name of the claimant's former employer, and that the name of the respondent in the claim form was right.

24. It has been suggested on the respondent's behalf that the question for me is: was it not reasonably practicable for the claimant to find out the correct name of her employer before she operated the early conciliation certificate machinery? I disagree. The reason her claim was presented late – in other words, the reason her claim was rejected – was not because she failed to use the correct name during early conciliation. Instead, it was because she didn't re-use in the claim form the wrong name she had used in early conciliation. Had she used the wrong name in the claim form, that would have been absolutely fine, her claim would have been accepted, and she would have had no time limits difficulties.

25. The cause of the claim being rejected and therefore being deemed out-of-time was, then, the claimant's lack of knowledge of the need to use the same name in

the claim form as was on her early conciliation certificate. Was she reasonably ignorant of that, is the question that I need to ask myself. I think she was.

26. The law in this area is counterintuitive. Only somebody reasonably experienced in Employment Tribunal practice and procedure would realise that if you had used the wrong name during early conciliation, you had to use the same wrong name in the claim form, even though it was wrong and you knew it was wrong. Any lay-person would think that that was a little crazy, at least in a case like this one where the claimant's message – the fact that she was proposing to bring a Tribunal claim against the respondent – had got through to the respondent during early conciliation even though she had conciliated using the wrong company name. (There is no suggestion that the correct part of Boots – the part that was the claimant's employer – was unaware of early conciliation, nor that any other problem was caused to the respondent by the claimant conciliating against the wrong company or by her naming the right company in the claim form). Why would the claimant or any other litigant in person think that they might have to use the wrong name in the claim form, even though they knew by that point what the right name was? They would only think that if they had been told that by someone, such as a lawyer or ACAS.

27. The claimant had been in contact with ACAS. It was not suggested to her in cross-examination that ACAS told her she had to use the same name, even though it was the wrong name. I have no doubt that had ACAS told her this, she would have done as ACAS suggested. There is no evidence that anyone gave the claimant this information. And the answer to the question, "why didn't she check?" is that this was, if I can be forgiven for using the expression, one of Donald Rumsfeld's "unknown unknowns". To put it another way: if you have no reason to think there might be a problem, you don't check to see whether there is one. Why would the claimant think that there was any problem with using the correct name of her former employer in the claim form just because she had used a slightly different Boots company name during early conciliation?

28. A warning about the need to use the same names for the parties in a claim form as the names of the prospective parties on the early conciliation certificate is something that probably ought to be put on the early conciliation certificate, or on other paperwork that is issued by ACAS with a certificate, but it isn't. At least, it hasn't been suggested to me that it is, and so far as I am aware from my own knowledge it isn't.

29. In any event, on the basis of the evidence before me, I am entirely satisfied both that the claimant was ignorant of the need to name the wrong company in the claim form because she had named the wrong one during ACAS early conciliation, and that her ignorance of this was reasonable. As that was the cause of her claim being rejected and therefore being deemed presented out of time, there was an impediment, namely a state of mind consisting of her ignorance of the need to name the wrong company in the claim form, to her presenting her claim form in accordance with the Rules; and this made it not reasonably practicable for the claim to be presented in time.

30. Looking at whether the claim form was presented within a reasonable period after 20 September 2019, I am satisfied that the claimant acted reasonably (and reasonably quickly) once she knew there was a problem, and that she corrected the defect, and so was deemed to have re-presented her claim form, within a reasonable period of time.

31. In conclusion, I have decided that the Tribunal does have jurisdiction to deal with the claimant's unfair dismissal claim, in accordance with ERA section 111(2)(b).

32. Turning to the disability discrimination claim, I think that in the particular circumstances of this case, it would be grossly unjust if I did not extend time. The difference between "Boots UK Limited" and "Boots Management Services Limited" is not something which affects the respondent or the Tribunal one iota. It is simply a technical rule which means that the Tribunal was (on the basis of Employment Judge Cookson's decision that there was a significant difference between those two names) obliged to reject the claim.

33. I have already said that if the Tribunal had moved speedily – indeed, in accordance with its internal administrative targets, as I understand them – processed the claim form within 7 days of it being presented and then emailed the claimant as she had requested instead of posting a letter to her, she might well have been able to put things right within the primary time limit.

34. Looking at the factors in section 33(3) [of the Limitation Act 1980], applied so that they make sense in an Employment Tribunal context:

    34.1 (a) [length of and reasons for the delay] – the delay was just 12 days and was for the reasons I have just explained;

    34.2 (b) [effect of the delay on the cogency of evidence] – a delay of that kind would have zero effect on the cogency of the evidence;

    34.3 (c) and (d) are not relevant on the particular facts of this case;

    34.4 in relation to (e) – whether the claimant acted promptly and reasonably once she knew that she might have a claim against the respondent – again, that doesn't really apply here because she did act promptly, in that she did make her claim in time and it was only deemed to be out of time for technical reasons.

35. An explanation for the claim being late has been provided and it is a satisfactory one: the claimant was, reasonably, ignorant of the technical rules around having to name the same respondent as was named during early conciliation, even if the name used was wrong.

36. In terms of the balance of prejudice, there is zero prejudice to the respondent. The respondent's solicitor reminded me in submissions that prejudice is irrelevant to the question of reasonable practicability. He is right about that, and I have not taken prejudice into account in relation to that, but it is relevant to the "*just and equitable*" discretion to extend time.

37. If I were not to allow the claim to proceed, the respondent would merely lose the windfall of not having to deal with this claim on its merits, and loss of a windfall is not prejudice. There would be manifest prejudice to the claimant in that she would lose what seems to be a valid claim. I cannot comment on the merits, except to say that, on the face of the claim form, the claim is not obviously misconceived, or anything like that.[3]

38. In all the circumstances, the discrimination proceedings were brought after the end of the period of 3 months starting with the date of the act to which the claim relates, but within such other period as I think just and equitable. The Tribunal therefore has jurisdiction to deal with them in accordance with EQA section 123(1)(b).

Employment Judge camp

24 June 2020

[3] In the second part of the hearing, which dealt with case management, the respondent did not advance the argument that the claim had little or no reasonable prospects of success and that there should be a further preliminary hearing to consider striking out the claim or making a deposit order. The case was, without objection, simply listed for trial.