



EMPLOYMENT TRIBUNALS

Claimants: (1) Ms A Sequeira
(2) Mr C Schafer

Respondents: (1) JJD Logistics Limited
(2) DHL (Express) Limited

At a preliminary hearing held on 27 August 2020 by CVP

Before: Employment Judge Pritchard

Representation

Claimants: Ms L Simak, counsel
First Respondent: Ms C Ashiru, counsel
Second Respondent: Mr N Singer, counsel

RESERVED JUDGMENT

- 1 The First Claimant did not present his claim for unfair dismissal, notice pay and holiday pay within the statutory time limit and he has failed to show that it was not reasonably practicable for him to have done so. The Tribunal does not have jurisdiction to consider his claim against the First or Second Respondent and his claim is accordingly dismissed.
- 2 The Second Claimant did not present her claim for unfair dismissal, notice pay and holiday pay within the statutory time limit and she has failed to show that it was not reasonably practicable for her to have done so. The Tribunal does not have jurisdiction to consider her claim against the First or Second Respondent and her claim is accordingly dismissed.
- 3 The Second Claimant did not present her claim for sex discrimination within the statutory time limit and she has failed to show that it is just and equitable to extend time. The Tribunal does not have jurisdiction to consider her claim against the First and Second Respondents and her claim is accordingly dismissed.

REASONS

Issues

1. At a preliminary hearing on 11 March 2020 Employment Judge Truscott QC ordered that the following issues should be considered at an open preliminary hearing:

“...whether the claims have been lodged within the statutory time limit and if not whether it was reasonably practicable for them to be so presented or whether it is just and equitable for the claims to proceed”

2. The Claimants were ordered to exchange written statements on the issue of time limits and whether it was not reasonably practicable to submit their claim in time and whether it would be just and equitable to allow their claim to proceed. In that statement the Claimants state that the Second Claimant was unable to bring her claim because she was suffering from depression and the First Respondent had responsibility for her. The Claimant chose not to give evidence to the Tribunal and therefore the content of their statement could not be tested under cross examination.

Findings of fact

3. The First Respondent provides delivery services for the Second Respondent pursuant to a service agreement, the terms of which require, among other things, the First Respondent to have sole responsibility for contracting with its personnel, the First Respondent acknowledging that its personnel are neither employees nor workers of the Second Respondent.
4. The Claimants are husband and wife. Their employment/engagement was ended by the First Respondent on 23 August 2019.
5. In September 2019, the Claimants went to Brazil with their family. At some stage, the date is unclear, the Second Claimant started to take a natural herbal remedy called Ucalm for slightly low mood and mild anxiety.
6. On 15 October 2019, the Second Claimant consulted her GP by way of a telephone appointment for low mood. The Second Claimant's GP did not prescribe any medication but referred her to talking therapies and Social Prescribing. The Second Claimant was unable to attend an appointment with her GP on 21 October 2019 because of traffic issues. The reason for that appointment is unknown but the records show that the Second Claimant did not consult her GP again until July 2020 which was in relation to a different health issue.
7. The First Respondent undertook family duties, such as taking the children to and from school.

8. With regard to his claim against the First Respondent, the First Claimant contacted ACAS on 18 November 2019 (Day A), the certificate being issued on 18 December 2019 (Day B). With regard to his claim against the Second Respondent, the First Claimant contacted ACAS on 21 November 2019 (Day A), the certificate being issued on 21 December 2019 (Day B).
9. With regard to her claim against the First Respondent, the Second Claimant contacted ACAS on 19 November 2019 (Day A), the certificate being issued on 19 December 2019 (Day B). With regard to her claim against the Second Respondent, the Second Claimant contacted ACAS on 21 November 2019 (Day A), the certificate being issued on 21 December 2019 (Day B).
10. The Claimants sought legal advice from solicitors in February 2020.
11. By way of ET1 claim forms presented on 11 February 2020 by their solicitors, the Claimants each bring claims for unfair dismissal, sex discrimination, notice pay and holiday pay. The First Claimant is not however complaining of sex discrimination as confirmed by Ms Simak at the preliminary hearing.
12. The First Respondent resists the claims and denies that the Claimants were employees; rather, they were self-employed contractors.
13. The Second Respondent resists the claims and denies that the Claimants were employees or contract workers; rather, they were employed by the First Respondent.
14. On 30 June 2020, the Second Claimant attended an appointment at the Oval Medical Centre. She presented with having had sadness and low mood for six months because she had lost her job, loss of motivation, loss of patience with her child, stopped working at home, cooking or taking care of her children, and that she had consulted a doctor in Brazil. The Second Claimant was diagnosed as suffering from depression and she was prescribed medication.
15. On 23 July 2020, Dr Jardim of the Oval Medical Centre reported that the Second Claimant suffered from "Depression, Stress and Anxiety since 6 months because she lost her job".

Applicable law

Time limits for claims of unfair dismissal, unpaid wages, holiday pay and notice pay

16. By section 111(2) of the Employment Rights Act 1996 a Tribunal shall not consider a complaint for unfair dismissal unless it is presented to a Tribunal:
 - (a) before the end of the period of 3 months beginning with the effective date of termination; or
 - (b) 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 have been presented before the end of that period of 3 months

17. For unpaid wages claims, holiday pay claims and notice pay claims, section 23(2) of the Employment Rights Act 1996, Regulation 30(2) of the Working Time Regulations 1998 and Article 7 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 make similar provision, the time limit running from the date of deduction (or non-payment) of wages, the date payment should have been made, and the last day of employment.
18. These time limits are extended under the ACAS Early Conciliation regime such that:
 - 18.1. Day A is the day the worker concerned complies with the requirement to contact ACAS before instituting proceedings;
 - 18.2. Day B is the day on which the worker concerned receives the certificate issued by ACAS;
 - 18.3. When working out when the time limit expires the period beginning with day after Day A and ending with Day B is not to be counted;
 - 18.4. If the time would expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
19. The burden of proof in showing that it was not reasonably practicable to present the claim in time rests upon the Claimant; see Porter v Bandridge Ltd [1978] ICR 943 CA. If the Claimant does succeed in doing so then the Tribunal must also be satisfied that the time in which the claim was in fact presented was in itself reasonable.
20. In Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 CA May LJ referred to the test as being in effect one of “reasonable feasibility” (in other words somewhere between the physical possibility and pure reasonableness).
21. In Asda Stores Ltd v Kauser EAT 0165/07 Lady Smith described the reasonably practicable test as follows: “the relevant test is not simply looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done”.
22. In Norbert Dentressangle Logistics v Hutton 2013 UKEAT/11 the Claimant demonstrated that he was not functioning properly at the time of submitting his claim six weeks late, suffering from night sweats, anxiety and inability to take daily care of himself. The Tribunal concluded that it had not been reasonably practicable for him to present his claim within the time limit and that it had been presented within a reasonable period thereafter. This was despite the fact that the Claimant had been able to correspond by email during the relevant period.
23. In Shultz v Esso [1999] IRLR 488 CA it was held that where illness is relied on, although its effects had to be assessed in relation to the overall period of limitation, the weight to be attached to a period of disabling illness varied according to whether it occurred in the earlier weeks or the far more critical

weeks leading up to the expiry of the time limit.

24. In Chouafi v London United Busways Limited [2006] EWCA Civ 689, the claimant was suffering from severe depression, hospitalised as an in-patient for the majority of the limitation period, latterly as a day patient. The Tribunal determined that his claim had been presented outside the statutory time limit because, although the Claimant's doctor had expressed his opinion that the claimant's depressive disorder was of such a degree in longevity as to preclude him against seeking legal advice within the time limit, there was no factual evidence as to the claimant's condition or state of mind following his discharge from hospital when he was an outpatient. Court of Appeal declined to interfere with the Tribunal's determination.
25. The Tribunal was also provided with the following authorities: Trevelyan (Birmingham) Limited v Norton [1991] ICR 488; Nolan v Balfour Beatty Engineering Services 2011 WL 4966385; Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470; and Northamptonshire County Council v Entwistle UKEAT/0540/09.

Time limits for claims of sex discrimination and other claims under the Equality Act 2010

26. Section 123(1) of the Equality Act 2010 provides that 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 Tribunal thinks just and equitable.
27. This time limit is similarly extended under the ACAS Early Conciliation regime.
28. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.
29. In British Transport Police v Norman UKEAT/0348/14 the Employment Appeal Tribunal ruled that having found that the claimant had not provided an explanation for the primary time limit being missed or the length of time after this to bring the claim, the Tribunal's reasoning was based upon assumptions made in the claimant's favour. Given that he bore the burden of proof on these questions, this was not a permissible approach and the Tribunal's decision that it was just and equitable to extend time was thereby rendered unsafe.
30. In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay; the extent to which the cogency of evidence is likely to be affected by

the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered. See: Department of Constitutional Affairs v Jones [2008] IRLR 128 CA; Southwark London Borough Council v Afolabi 2003 ICR 800 CA. It was said in Aberawe Bro Morgannwg v Morgan [2018] EWCA Civ 640 CA that factors which are almost always relevant are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing it or inhibiting it from investigating the claim while matters were fresh).

31. As identified in Miller v Ministry of Justice UKEAT/003/004/15 at paragraph 12, there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.
32. If a Claimant advances no case to support an extension of time, he is not entitled to one. However, even if there is no good reason for the delay, it might still be just and equitable to extend time. See for example: Rathakrishnan v Pizza Express Restaurants Ltd UKEAT 0073/15.

Conclusion

33. It was common ground that the last day from which the applicable time limit could run in respect of any claim was 23 August 2019. Having regard to the extensions of time under the ACAS Early Conciliation regime, the claims were presented between 21 and 24 days after the expiry of the time limit.

Reasonable practicability

34. With regard to the First Claimant, the sole reason he gives for not presenting his claim in time is that he had responsibility for the Second Claimant. He was nevertheless able to care for the Second Claimant, carry out household duties and contact ACAS within the primary time limit. There was no evidence to suggest either Claimant was reasonably ignorant of the applicable time limits, misled as to time limits, or that they were unaware of the right to present their complaints. The evidence comes nowhere near persuading the Tribunal that it was not reasonably practicable for the First Claimant to have presented his claim in time. It was reasonable to have expected him to have done so.
35. With regard to the Second Claimant, the Claimants' statement states:

... the Second Claimant was struggling with low moods in the immediate aftermath dismissal. This rendered her unable to cope with day to day events.

The Second Claimant had been suffering from depression and is prescribed

Sertraline, a selective serotonin reuptake inhibitor and antidepressant.

36. The Second Claimant has failed to provide any detailed evidence as to why or how her low moods rendered her unable to cope with day to day events and, importantly, she has failed to show why or how her low moods meant it was not reasonably feasible for her to have presented her claim in time or sought legal advice within the time limit. The Tribunal notes that the Second Claimant did not consult her GP until over seven weeks after her dismissal and did not seek further medical assistance until five months after the expiry of the time limit which was over 10 months after her dismissal.
37. Dr Jardim's report of 23 July 2020 setting out his retrospective diagnosis shows that the Second Claimant first suffered with depression from the end of January 2020 and the Tribunal must assess its effects with weight attached to these more critical weeks leading up to the expiry of the time limit. However, the Second Claimant has failed to show the effects of her depression, its severity, why it made it not reasonably feasible to have presented her claim in time and/or why she did not seek legal advice within the limitation period. With regard to the Claimant's statement that she had been prescribed medication, that was some five months after the expiry of the time limit and has little or no relevance to issues in this case.
38. The Claimants' statement does nothing more than invite the Tribunal to make assumptions about the effects of the Second Claimant's mental condition. As in Chouafi, there was insufficient factual evidence as to the Second Claimant's state of mind from which the Tribunal can draw conclusions.
39. The Second Claimant has failed to show that it was not reasonably practicable for her to have presented her claim within the statutory time limit.

Just and equitable

40. The Tribunal recognises that it has a broader discretion under this test than the reasonable practicability test. The Tribunal is mindful of the guidance set out in Keeble and the case law set out above.
41. The Second Claimant has presented insufficient detailed evidence such that the Tribunal can determine why the Second Claimant did not present her sex discrimination claim under in time or why she did not seek legal advice sooner. The Second Claimant has provided no evidence at all as to why she presented her claim when she did after the expiry of the time limit. As above, the Tribunal is being asked to make assumptions on scant evidence.
42. If the claim is not allowed to proceed, the Second Claimant will have lost the right to bring her sex discrimination claim. The Tribunal accepts the Claimants' submission that there is a prevailing public policy that an allegation of discrimination, particularly by a large employer, should be investigated and considered by the Tribunal.
43. If the claim is allowed to proceed, the Respondents will suffer the prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence. As to the effect of the delay on the cogency of the evidence,

it was submitted on behalf of the First Respondent that because the Second Claimant's claim remains insufficiently particularised the Respondents have not had the benefit of knowing the details of the claim and investigating accordingly shortly after the expiry of the time limit. If the Second Claimant's claim is allowed to proceed, there is a risk that the cogency of evidence about matters alleged to have taken place over one year ago might be adversely affected.

44. In the Tribunal's view, the balance of prejudice falls in the Respondents' favour. The Second Claimant has failed to show that it is just and equitable to extend time.

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Pritchard

Date: 1 September 2020