



EMPLOYMENT TRIBUNALS

Claimant: Miss L Thomas
Respondent: Devon County Council
Heard at: Bristol **On: 21 October 2020**
Before: Employment Judge Midgley

Appearances

For the Claimant: In person
For the Respondents: Mr A Yendole, Solicitor

JUDGMENT having been sent to the parties on 21 October 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claim

1. By a claim form presented on 15 April 2020 the claimant, who was born on 2 June 1964, presented complaints of constructive unfair dismissal and harassment under the Equality Act 2010 in respect of the protected characteristics of disability and sexual orientation.
2. Subsequently, on 28 April 2002, the claimant provided further information of her claim in a letter to the Tribunal. In that letter she identified that she suffered from anxiety and depression and dyslexia and she expressed that she believed that some of the conduct that was directed towards her by those with whom she worked related to those conditions.
3. On 28 May 2020, the respondent presented a response defending all of the claims in which it raised the issue that the claims had been presented significantly out of time as the claimant's employment with Devon County Council had begun on 7 September 2001 and ended on 19 October 2010. The claimant had been employed at all times, as I understand it, as a Catering Assistant.

4. The claim was therefore presented approximately ten years outside the statutory limitation period.

The Issues

5. In consequence the matter was set down for a preliminary hearing before me today at which I have to decide firstly whether the claims were presented within time (and I pause to observe that the claimant very candidly and fairly accepts they are presented significantly out of time) and secondly, if they were, whether I should exercise my discretion to extend the time limits to permit the claims to proceed.
6. That requires me to consider whether it was reasonably practicable for the claim of constructive unfair dismissal to be presented within the primary limitation period and, if not, whether it was presented within a reasonable period thereafter.
7. Secondly, in relation to the harassment complaint under the Equality Act, I have to determine whether it would be just and equitable to extend time in order to permit the claim to proceed.

Procedure, Hearing and Evidence

8. For the purpose of the hearing today I had the benefit of Tribunal file containing the claim form and the claimant's many letters that she has written to the Tribunal in relation to her claims, the response and a bundle containing only the Catering Transferring Agreement dated 31 August 2011 by which the catering service was transferred from the respondent, Devon County Council, to Devon North Limited on 31 August 2011.
9. I heard evidence on affirmation from Miss Thomas who candidly answered my questions and I heard oral submissions from Mr Yendole for the respondent and concise oral arguments from Miss Thomas herself.

Relevant Background

10. I make the following findings of fact on the balance of probabilities in the basis or the written and oral evidence before me.
11. The claimant was employed by the respondent between 7 September 2001 and 19 October 2010 as a Catering Assistant. She worked in various schools on appointment and on allocation by the County Council. The complaints that she makes in these proceedings relate to comments that were made to her by three other employees of Devon County Council at the time, Jackie Burnham, Caroline Lock and Rachel Wright. They also worked in the kitchens either as catering assistants or in other roles.
12. The claimant's complaints against those three ladies include what can only be described as the most deplorable conduct towards the claimant in terms of comments about her personal hygiene, her son's sexuality and other matters that have no place in this day and age. The effect of those matters was that on or about 19 October the claimant decided that she could no

longer endure the comments and she resigned. She was told that she was going to be dismissed for making racist comments which she tells me, and I accept for the purposes of this hearing, that she had not made.

13. The claimant has suffered historically from anxiety and depression. First, some years ago following her father's death. Subsequently she has continued to suffer from symptoms of anxiety and depression, albeit that she required medication to manage its symptoms.
14. Following her resignation the claimant went to see her GP, Dr Goodwin at St Thomas Surgery, a lady who has treated the claimant for many years, and during the course of what was a candid discussion about the effects of work, Miss Thomas was told by her GP that she could bring a complaint to the Employment Tribunal in relation to the manner in which she had been treated by the three individuals to whom I have referred. The claimant reflected on that advice but concluded that, in circumstances where it would be the three ladies' words against hers, her case was hopeless.
15. Subsequently, in approximately 2018/2019, the claimant went to visit the Citizens Advice Bureau. She was told at that time that the applicable time limit was three months and, given that at that stage some nine months had elapsed, that her claim was significantly out of time. She therefore made the decision that she would not present the claim.
16. Subsequently, in late 2019 she revisited the Citizens Advice Bureau and saw a different advisor who told her that what she had endured should not have occurred and encouraged her to present the claim. It took the claimant approximately four or five months from that event to present the claim. During that period the claimant had been taking medication to manage her anxiety and depression, albeit with the support of her son she was able initially to go shopping, and subsequently to contribute in a meaningful way to society by assisting with community projects.
17. She has not suggested to me that the effect of anxiety or depression was that she was simply incapable of addressing the events of the past or indeed of completing a form in relation to them in order to present her complaints.
18. The claimant also consulted with ACAS. The dates on which she first consulted ACAS and the date of the ACAS Certificate is not material to the decision given that they occurred significantly after the date of resignation and the claimant therefore cannot benefit from any extension of time as a consequence of the early conciliation provisions.

The Relevant Law

19. Section 111 of the Employment Rights Act provides as follows:
 - (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
 - (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

- (a) before the end of the period of three 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 be presented before the end of that period of three months.
20. When a claimant seeks to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, the test to be applied is simply to ask: "had the man just cause or excuse for not presenting his complaint within the prescribed time?" (see Wall's Meat Co v Khan [1978] IRLR 499 per Lord Denning, quoting himself in Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53, CA).
21. Four general rules apply to that test:
- a. the onus of proving that presentation in time was not reasonably practicable rests on the claimant. 'That imposes a duty upon him to show precisely why it was that he did not present his complaint' — Porter v Bandridge Ltd [1978] ICR 943, CA.
 - b. S.111(2) ERA 1996 (and its equivalents in other applicable legislation) should be given a 'liberal construction in favour of the employee' (Dedman).
 - c. what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide.. As Lord Justice Shaw put it in Wall's Meat Co Ltd v Khan: 'The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive'
 - d. the tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltagi [2007] All ER (D) 303 EAT);
22. In Palmer and anor v Southend-on-Sea Borough Council [1984] ICR 372, CA, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in Asda Stores Ltd v Kauser EAT0165/07 explained it in the following words: 'the relevant test is not simply a matter of 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'.
23. Subsequently in London Underground Ltd v Noel [1999] IRLR 621, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so."

As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability ... the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

24. To this end the factors the Tribunal should consider, as identified in Palmer are: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) 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.
25. The objective consideration requires that tribunals should have regard to all the circumstances of a case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred (see Nolan v Balfour Beatty Engineering Services EAT 0109/11)
26. Section 123(1) of the Equality Act contains the primary time limit for claims brought pursuant to the Equality Act. It provides as follows.
 - (1) Proceedings on a complaint within Section 120 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 if the Employment Tribunal thinks is just and equitable.
 - (3) "for the purposes of this section conducting extending over a period is to be treated as done at the end of the period.
27. That means in this case that events that occurred prior to the last day of employment can be treated as having occurred on the last day because they form part of a conduct extending over a period.
28. While employment tribunals have a wide discretion to allow an extension of time under the 'just and equitable' test in S.123, it does not necessarily follow that exercise of the discretion is a foregone conclusion in a discrimination case. Indeed, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA, that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.' The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit.
29. These comments were endorsed in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: "In particular, there is no principle of law which dictates how generously or

sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.”

30. Before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was (Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan).
31. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable - Pathan v South London Islamic Centre EAT 0312/13.
32. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: (a) the length of and reasons 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 co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action (see British Coal Corpn v Keeble [1997] IRLR 336, at para 8).
33. However, although, in the context of the 'just and equitable' formula, these factors will frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (Southwark London Borough v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220 at para 33, per Peter Gibson LJ).
34. In Department of Constitutional Affairs v Jones 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to

extend time. However, a claimant's failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice.

35. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other: Pathan v South London Islamic Centre EAT 0312/13 and also Szmidt v AC Produce Imports Ltd UKEAT 0291/14.
36. It is always necessary for tribunals, when exercising their discretion, to identify the cause of the claimant's failure to bring the claim in time (Accurist Watches Ltd v Wadher UKEAT/0102/09, [2009] All ER (D) 189 (Apr)). In Wadher Underhill J stated that, whilst it is always good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form.
37. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents.

Discussion and Conclusions

Constructive dismissal claim

(1) The substantial cause of the claimant's failure to comply with the time limit.

38. The substantial cause of the claimant's failure to comply with the statutory time limit was, as Miss Thomas candidly told me, her belief that the claim was a very difficult one in circumstances where there were four witnesses who would be giving evidence against her.
39. At the time that she was told that she could present a claim by her doctor, Dr Goodwin, she was not incapacitated by her depression to the extent that she could not have completed the claim form and she did not suggest that that was the case. The overarching reason that she did not present the claim was her belief that the claim would not succeed because of the difficulties of overcoming the evidence of four witnesses.

(2) Whether there was any physical impediment preventing compliance, such as illness, or a postal strike.

40. Whilst the anxiety and depression presented some form of impediment in that they made it more difficult for Miss Thomas to leave her home and to engage with the issues of the past that caused her trouble, again, they did not prevent her from presenting the claim. It is a credit to claimant that she did not suggest that she was unable to address the matters of the past or to make a complaint because of those matters alone, but rather as I have already indicated

because of her concerns that where there were four individuals to give evidence against her, the claim would not succeed.

(3) Whether, and if so when, the claimant knew of her rights.

41. The claimant knew of her rights two weeks after the events in question and her resignation. She was told of them by Dr Goodwin as I have found.

(4) Whether the employer had misrepresented any relevant matter to the claimant

42. This is not a case where there is any argument as to failure to disclose or misinformation in relation to the identities of those involved or anything of that nature.

(5) Whether the claimant had been advised by anyone and the nature of the advice she received.

43. She received advice firstly from her GP as to the facts of her rights and the location on which she would need to exercise them and subsequently from the Citizens Advice Bureau in relation to the time limits that apply. Albeit there was further delay which isn't explained between first being told of the three month time limit and subsequently the claim being issued approximately nine months or so later.

44. Having considered all of those matters I must decide whether it was reasonable feasible for the claim to have been presented within time.

45. Firstly, I address the question of the claimant's ignorance of time limits. In the circumstances, given that Miss Thomas suffers from dyslexia and her own particular circumstances, given her lack of education, I find that the ignorance of the time limit up to the point when she was told that she could present a claim to the Tribunal by Dr Goodwin was reasonable. Thereafter it was not because enquiries could have been made earlier with the Citizens Advice Bureau or others as to the time limits that applied to her right to bring such a claim.

46. For the reasons that I have given, in particular, given that she knew of her rights to bring a claim of constructive unfair and the forum within which to present such a claim within two weeks of her resignation, and that she had the support of her son, I have concluded that it was reasonably feasible for Miss Thomas to speak to Citizens Advice Bureau at an earlier stage and therefore issue the claim far closer to the limitation period than the ten years that has since elapsed.

47. As I have found the primary reason for her not doing so was her fear that she would not be believed, rather than that it was not feasible for her to present the claim within a reasonable period. The Tribunal has sympathy with that, although of course, we deal with cases on a daily basis where a claimant gives evidence alone and the respondents call two or three witnesses and we uphold the claim. We are used to forming assessments of credibility.

48. For those reasons, therefore, I find that it was reasonably practicable to present the claim in time and the Tribunal doesn't have jurisdiction to hear the claim for constructive unfair dismissal.

Discrimination claim

The reason for the delay in the presentation of the claim

49. The reason that the claimant failed to present the claim in time is because of her fear that the claim would be hopeless because she would be outgunned in terms of witness evidence, rather than because she did not know of the right to bring her claims or of the time limits applicable to those rights.

The effect on the cogency of the evidence

50. I turn then to the impact of the cogency upon the evidence and here, it seems to me there are significant issues in terms of the ability for there to be a fair trial.
51. The relevant circumstances are as I have indicated in my findings. The claimant was employed by Devon County Council to provide catering services at various schools. The individuals against whom the complaints of discrimination are made were employed in the same kitchen as the claimant, but on 31 August 2011 the County Council outsourced the catering function to Devon North Limited. Amongst those listed in the schedule of transferring employees is Mrs J M Burnham (Mrs Jackie Burnham) and Mrs C A Lock (Mrs Caroline Lock) two of the individuals against whom the claimant makes complaint.
52. It follows that they have not been employed by the respondent since the beginning of September in 2011; some nine years and three months ago. The respondent's difficulties are further compounded because they cannot trace the witnesses to try and brief them because the respondent has destroyed its records of its employees in accordance with the Data Protection Act. It therefore cannot even identify from an old system where Mrs Lock and Mrs Burnham lived in 2011 let alone where they live now and how they might be contacted.
53. Indeed, although it is of less significant prejudice to the respondent but it still has an affect, they have no records even of the claimant's employment, those records also having been destroyed in accordance with the Data Protection Act.
54. The respondent is thus in a position where it would be unable to identify the witnesses who it would need to take statements from in order to understand whether it could respond to the claim, let alone to secure their attendance at court to give evidence at any future hearing at which a Tribunal was asked to decide whether the events occurred as Miss Thomas suggests.
55. As I have already indicated, the nature of the comments and conduct of which the three ladies is accused is of a sort which is deplorable in a modern society. The County Council would be vicariously liable for those acts and would be required to pay a significant award for injury to feelings if the claim

were to succeed. However, it cannot trace the witnesses that it would need to call to answer the allegations, and given that nearly 10 years have elapsed since the events in question, it is highly likely that the witnesses' ability to recall events with accuracy or clarity would be greatly adversely effected. That is the effect on the cogency of the evidence were the claims to be permitted, and it is significant.

The promptness with which the claimant acted once she knew of the matters giving rise to her claims.

56. The claimant knew of the matters that gave rise to her claims at the date of her resignation in October, she knew of the jurisdiction within which to present those claims probably within two or three weeks of that in November 2010 and, for the reasons that I have already addressed, despite knowing of those matters, she did not act promptly to present the claim due to her very human and understandable fear that she simply would not be believed because there were four people to give evidence against her.

The steps taken to obtain professional advice once the claimant knew of the possibility of taking action.

57. Again, there was a significant period of delay between Dr Goodwin informing Miss Thomas that she could present the claim and Miss Thomas seeking advice from the Citizens Advice Bureau. Although I am sure that her anxiety and depression had some impact upon that, in the circumstances where fortunately Miss Thomas continues to have the support of her son, it seems to me that since her son was able to support her in going shopping, he could equally have supported her in going to the Citizens Advice Bureau.

The balance of prejudice.

58. That is the balance of prejudice to the respondent if I extend time by exercising my discretion and the balance of prejudice to Miss Thomas if I decline it.
59. Obviously if I decline to exercise my discretion the claimant loses the right to bring a claim in respect of events that occurred some ten years ago. It seems clear to me that Miss Thomas is driven to a limited extent by a desire for closure in relation to these matters. She wants to call to account those individuals who treated her appallingly and she would lose that ability.
60. Conversely, the prejudice to the respondent is that it would be forced to defend a claim in circumstances where it is most unlikely to be able to locate the witnesses it would need to give evidence or even to take instructions to make a concession or to admit the claims in question. That is an overwhelming prejudice. It is one thing if memories fade slightly because of the passage of time, it is another not to know even whether you can defend a case or whether you should admit the allegations and concede it.

Conclusions

61. Consequently, I have concluded that the balance of prejudice and the other factors mean that I should not exercise my discretion to extend time in relation

to the complaints of harassment on the grounds of disability or sexual orientation (as Miss Thomas has identified them).

62. The claims are therefore dismissed.

Employment Judge Midgley

Date 17 December 2020

REASONS SENT TO THE PARTIES ON

.....29 December 2020.....

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FOR THE TRIBUNAL OFFICE

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