EMPLOYMENT TRIBUNALS

Claimant	Ms Danielle French		
Respondent	Health-On-Line Company UK Limited		
Heard at	Southampton (by video)	**On**	11 December 2020
Before	Employment Judge Fowell		
Representation			
Claimant	Ms D Gilbert instructed by Frettens LLP Solicitors		
Respondent	Ms M Sangster instructed by Burness Paull LLP Solicitors		

JUDGMENT ON A PRELIMINARY ISSUE

Each of the complaints was presented in time.

REASONS

Introduction

1. These written reasons are given at the request of the respondent. They follow an oral judgment on time limit issues, all of which were resolved in favour of the claimant, Ms French, at a video hearing on 11 December 2020.
2. Ms French brings complaints of constructive dismissal and disability discrimination, specifically of:
    a) discrimination arising from dismissal under s.15 Equality Act 2010 (EqA),
    b) failure to make reasonable adjustments under s.21, and
    c) harassment under section 26.
3. I will deal first with the unfair dismissal complaint which was, she admits, presented a day late, just after midnight on the day in question, for which she blames IT issues and a panic attack.

4. By way of background. Ms French worked for the respondent company from July 2014 as a Senior Sales Consultant. During her employment she suffered with anxiety, resulting in some time off work. Her claim is that the company failed to make reasonable adjustments to alleviate its effects and that negative comments about her attendance were made by her line manager. This is said to have taken place at a return to work meeting on 21 May 2019 and the comments were to the effect that it was no longer sustainable for her to work for the company with a mental illness. She resigned ten days later, on 31 May 2019, by email, giving one month's notice. Her effective date of termination was therefore **28 June 2019**.

The relevant test

5. The general rule is that a claim of unfair dismissal must be presented before the end of the period of three months beginning with the effective date of termination of employment. However, if the Tribunal is satisfied that it was not reasonably practicable for the claim to be presented in that time, it can still consider the claim provided it is satisfied that it has been presented within a further reasonable period (Section 111(2) of the Employment Rights Act 1996 (the ERA)).

6. The time limit for bringing a claim is extended by section 207B ERA to facilitate the parties engaging in early conciliation (EC) before the claim is presented. The relevant parts of that section read as follows:

> (2) In this section –
>
> (a) Day A is the day on which the complainant …. complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
>
> (b) Day B is the day on which the complainant …. receives …. the certificate issued under subsection (4) of that section.
>
> (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
>
> (4) If a time limit set by a relevant provision would (if not extended by this subsection) 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.

The Facts

7. The agreed facts are as follows. On **24 September 2019** Ms French contacted ACAS (Day A) to commence early conciliation, within the normal three-month window. Early conciliation ended on **18 October 2019** (Day B)**.** Hence, section 207B(4) of that Act extended the time for presenting a claim by a further month and so the primary time limit expired on **18 November 2019.** That date is agreed. However, as already mentioned, the deadline was missed, and it arrived electronically two minutes after midnight.

8. Ms French gave evidence about the late submission of the form. She said that she knew about the deadline, and was attempting the send the form off that evening when her internet went down at home. She then suffered a panic attack and asked a friend to help her, but even so they were just too late. In submitting the form (ET1) online she included mention of the fact that it was late, so there was no attempt at concealment.

9. Some questions were put to her about this account but I was not asked to disbelieve it and I saw no reason to do so. I therefore accept that this was the reason, or combination of reasons, for the missed deadline. The only remaining question is whether in those circumstances it was reasonably practicable for to have submitted the claim of unfair dismissal on time.

Applying the reasonably practicable test

10. The leading case on late claims in such circumstances **Consignia plc (formerly the Post Office) v Sealy** 2002 ICR 1193, although it was not referred to me. In that case the Court of Appeal reviewed the previous cases which, they held, established three general propositions:

    a) where a claimant has done something that, in the normal course of events, would have resulted in his or her claim being presented within the relevant time period, but owing to some unforeseen circumstance this did not happen, it will have been not reasonably practicable for the claimant to have presented the claim in time;

    b) if the condition mentioned above is satisfied, it does not matter why the claimant waited until the last moment;

    c) the question whether the condition has been satisfied is a question of fact to be determined by the tribunal on the evidence before it.

11. It is hardly necessary to say more, since the first two propositions apply squarely on the present facts. In essence, where there is a last-minute hitch, which is not the fault of the claimant, the lateness may be excused. It need hardly be said that in these circumstances, the second limb of the test is met, and the claim was presented in a reasonable period of time after the deadline (two minutes).

12. The same result obtained in the decision of the Employment Appeal Tribunal in **Electronic Security Systems Ltd v Avdic** [2005] IRLR 671. That case concerned an email sent on time but which arrived late, and the issue was whether arrived in the “ordinary course” of email transmission. (Many previous cases had been concerned with the ordinary course of post.) The Employment Appeal Tribunal (EAT) emphasised the need for the claimant to show that the claim form would ordinarily have arrived in time, and for there to be some unforeseen circumstance, but the Tribunal held that there was a reasonable expectation that and email would arrive within perhaps half an hour or up to an hour later, not about eight hours in that case, and so the late arrival had been unforeseeable.

13. The cases relied on by the respondent in this case included **Beasley v National Grid Electricity Transmissions** [2008] EWCA Civ 742] where the Court of Appeal said that the question was whether getting the claim in on time had been reasonably practicable, and there were no grey area for complaints which were 'only a bit out of time.' The context however was that the claimant attempted to submit his claim by e-mail at *11:44 pm* on the last day but mistyped the e-mail address. The e-mail was returned undelivered one minute later. He sent a test e-mail to the correct address at three minutes to midnight, before sending the claim form at midnight. It was registered as received by the tribunal 88 seconds later. The EAT upheld the Tribunal's decision that the claim form was late and that it had been reasonably practicable for Mr Beasley to submit it on time.

14. That is not at odds with the previous guidance in the ***Advic*** case, or ***Consignia.*** Firstly, applying ***Advic***, there was no expectation that an email would arrive on time when sent so late, and secondly, the claimant was at fault in mis-typing the address, just like someone who puts the wrong address on the envelope.

15. I was also referred to **Miller v Community Links Trust Ltd** UKEAT/0486/07, in which the claimant's representative pressed their 'submit' button to send an electronic ET1 to the Tribunal at 1 second to midnight, 23.59.59, on the last day for a claim to be presented. It was received at eight seconds past midnight, 00.00.08, it was 9 seconds out of time. As it had been reasonably practicable for the claim to have been presented in time, the claim was rejected by the Tribunal. Again, there is nothing in those facts to contradict the previous authorities and so I conclude in this case that it was not reasonably practicable for Ms French to submit the unfair dismissal complaint on time.

The Disability Discrimination Claim

16. Turning to the discrimination claim, there is a preliminary point, which is whether a constructive dismissal (i.e. a decision to resign) can itself be regarded as an act of discrimination, or whether time starts to run from the employer's breach or breaches of contract which led to the decision to resign. That issue was considered by the Court of Appeal in **Nottinghamshire County Council v Gaynor Meikle** [2004] EWCA Civ 859, considering the identical provisions of the previous Sex Discrimination Act 1975. Keene LJ held at paragraph 52:

> "When those provisions are read as a whole it seems clear to me that "the act complained" of in such a case of constructive dismissal is the unlawful dismissal (section 6(2)(b)), which is constituted by the termination of the employee's employment by her act in circumstances where she was entitled to terminate it (section 82 (1A)). ***In other words, the act complained of is the constructive dismissal*** which takes place when she accepts the repudiation by her employer… To hold that time runs from the breach rather than the termination of the contract of employment could negate the clear inclusion of constructive dismissal within "dismissal" in sex discrimination cases. [Emphasis added]

17. This view was based partly on policy reasons, including the need for simplicity. Otherwise there would be a difference in the date for presenting claims depending on whether the employee was actually dismissed or resigned in response to discriminatory treatment. One would run from the last day of employment and the other would not.

18. The position has now been made expressly clear in the Equality Act at s.39(7) which provides that a dismissal includes the termination of employment by an act of the employee: "(including giving notice) in circumstances such that B [the employee] is entitled, because of A's conduct, to terminate the contract without notice." This is the same definition as that given for constructive dismissal in the ERA.

19. However, the respondent submitted that I should not disregard this when considering time limit issues because the constructive dismissal was not listed among the acts of discrimination at the previous preliminary hearing. This appears to me to be no more than an oversight, to be corrected rather than insisted on, particularly since Ms French was not represented at that hearing.

20. The Court of Appeal held recently in **Marion Mervyn v BW Controls Ltd** [2020] EWCA Civ 393 that it is good practice for the Tribunal at the start of a substantive hearing to check whether any list of issues previously drawn up properly reflects the issues in dispute. It is submitted on behalf of Ms French that that is the correct approach, and I agree. No point was taken about this in the skeleton argument submitted for the respondent, the main focus being that other aspects of the claim, such as the failure to make reasonable adjustments were out of time.

21. It follows that the dismissal itself was in law an act of discrimination, and occurred on 28 June 2019. So, for the purposes of the complaint of discrimination arising from disability, that was the last act, and so the ET1 was also one day late, or at least two minutes late.

22. By s.123(1) EA a complaint has to be brought:

    "(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 employment tribunal thinks just and equitable.***"

23. Mr Sangster for the respondent reminds me of the strictures of the Court of Appeal in **Robertson v Bexley Community Centre** [2003] EWCA Civ 576, at paragraph 25, per Lord Justice Auld:

> "It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify 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 discretion is the exception rather than the rule."

24. The question of what is just and equitable is however a balancing exercise, weighing, broadly speaking, the prejudice caused to each party, always recognising the importance that attaches to such time limits. In **Miller v Ministry of Justice** UKEAT/0003/15 (15 March 2016, unreported) Laing J identified two types of prejudice which a respondent may suffer if the limitation period is extended: the prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence; and the 'forensic prejudice' which may be suffered if the limitation period is extended by many months or years, caused by such things as fading memories, loss of documents and losing touch with witnesses.

25. Here, this has to be viewed in circumstances where there is a valid and in-time unfair dismissal claim to defend. Many of the same issues will have to be considered, involving the same witnesses and documentation, albeit with different legal tests and consequences. Hence, the prejudice to the respondent is much less in those circumstances. It also has to be recognised that the delay was only of a single day, and so no measurable 'forensic prejudice' has resulted.

26. In **British Coal Corporation v Keeble** [1997] IRLR 336 the EAT noted that the just and equitable test was very similar to the test applied by the civil courts under s.33 of the Limitation Act 1980 in considering whether it was equitable to allow a late claim to proceed, and encouraged Tribunals to consider the list of factors in that section, i.e:

    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 cooperated with any requests for information;

    d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

    e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

27. The first of these has already been considered and has not in any sense blameworthy. The second concerns the forensic prejudice, which is nil. The third is not applicable. The fourth has some small effect as the claimant could have acted earlier, as does the fifth, although legal advice may not be practicable in a non-costs jurisdiction. In short, none of these factors has any real application in

the context of a two minute delay.[1] I conclude that it would be just and equitable to allow the complaint under section 15 to proceed.

28. That leaves the other complaints of harassment and of failure to make reasonable adjustments. I will deal with these briefly. It seems to me at least arguable at this stage that in both cases there was a continuing act or failure on the part of the respondent, accepting the factual basis of the claim for these purposes. I bear in mind that the claimant's case is that she resigned largely because of discriminatory remarks on 21 May 2019, ten days earlier. Similarly, if the failure to make reasonable adjustments was the cause of the absence, which led in turn to the frustrations of the respondent and the alleged comments, the same considerations apply. Overall, it would be wrong in principle to divide out some complaints of discrimination from others on time limit grounds, unless they were remote in time and do not form part of a series of acts. It is therefore just and equitable for the Tribunal to hear evidence on them all.

Employment Judge Fowell

Date: 28 January 2021

Judgment and Reasons sent to the Parties: 09 February 2021

FOR THE TRIBUNAL OFFICE

[1] Since the oral judgment in this matter the Court of Appeal in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 has disapproved this *Keeble* approach in any event.