



EMPLOYMENT TRIBUNALS

Claimant: Miss L Lawrence

Respondent: Bristol Community Health CIC (in liquidation)

Heard at: Bristol

On: 25 February 2021

Before: Employment Judge Oliver

Representation

Claimant: In person

Respondent: Julian Hoskins, counsel (on behalf of the liquidator)

RESERVED JUDGMENT ON A PRELIMINARY HEARING

The claim for unfair dismissal is struck out as the claimant did not have two years' continuous service at the time of dismissal.

The claim for race discrimination is struck out as it was presented out of time and it would not be just and equitable to extend time.

REASONS

Issues

1. This is a claim for unfair dismissal and race discrimination.
2. The case was initially listed for a Case Management Preliminary Hearing to be heard by telephone. On 25 January 2021 the respondent made an application to strike out the claims on the grounds that the claimant does not have the two years' service required to make an unfair dismissal claim, and in any event the claims for unfair dismissal and race discrimination have been brought out of time. The hearing was converted to a Preliminary Hearing by video (Cloud Video Platform) to consider this application. Judgment was reserved in order to allow the claimant to provide additional documentary evidence.
3. The issues are:
 - a. Should the claim for unfair dismissal be struck out because the claimant did not have two years' continuous service?
 - b. Was the claim for unfair dismissal made to the Tribunal within three

months (plus any early conciliation (“EC”) extension)? If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit? If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

- c. Was the claim for race discrimination made to the Tribunal within three months (plus any EC extension) of the act or omission to which the complaint relates? If not, was there conduct extending over a period? If so, was the claim made to the Tribunal within three months (plus and EC extension) of the end of that period? If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

Evidence

4. I heard evidence from the claimant at the hearing. I also heard submissions from both parties.

5. I decided that the claimant should be permitted to provide some further documentary evidence before I made my final decision. The claimant was representing herself and was not aware of the need to produce evidence as no directions had been made asking her to do so. I made directions that the claimant had a further five weeks to provide the following:

- a. A copy of her contract as a Bank Health Visitor with Bristol Community Health CIC from November 2017 to April 2019 or, if this cannot be located, written confirmation that she has been unable to locate the contract.
- b. Any medical evidence she wishes to rely on relating to the period from 24 December 2019 to 12 July 2020 in support of her argument that she was too unwell to submit her claim within time.

6. The respondent was permitted to provide written submissions on this additional evidence.

7. The claimant provided some copy letters relating to her bank and permanent engagements, but did not provide a copy of her actual contract/terms and conditions as Bank Health Visitor. The claimant also provided extracts from her medical records between June 2019 and 31 December 2019. She explained in a covering email that there had been delays because some handwritten medical information is still missing due to her having being seen by different locum GPs, only some of the electronic notes had been found, and her current GP practice is still in the process of locating information.

Facts

8. The claimant worked for Bristol Community Health CIC (“BCH”) as a health visitor. In her ET1 she gives her dates of employment as 12 July 2017 to 24 December 2019. In her grounds of claim the claimant says she started work as a Bank Health Visitor in November 2017 and transferred to a substantive post on 30 April 2018.

9. The claim complains about the claimant’s treatment during her employment

and her dismissal.

10. The respondent says that the claimant started work as an employee on 30 April 2018. The claimant's evidence was that her contract as a bank worker was with BCH, and she was employed by them until she transferred to a new contract with the respondent for 30 hours a week. Under the bank contract she did not work set hours. She was called on to work shifts as needed. She did not have to accept work if it was offered to her. For quite a long period of time she was not offered any work, and she then asked moved onto the new contract with BCH after this was suggested to her by someone she knew.

11. I have seen a copy of the claimant's letter of appointment with "Bristol Community Health Bank" as a "Bank Health Visitor" dated 12 July 2017. I have also seen a copy of the claimant's letter of permanent appointment with BCH, which is undated. I have not been provided with the full terms and conditions for either of these appointments. However, the letter of appointment as a Bank Health Visitor states the following,

"The framework of terms and conditions we will ask you to sign once all clearances are in place, are an agreement for the provision of bank services. There is no obligation on behalf of Bristol Community Health CIC to offer you work and equally you are not obliged to accept the offer of work from our Bank Office. In order to be considered for work assignments, you will need to make the Bank Office aware of your current availability and update them of any future changes to this. They will assess what assignments would be suitable for you based on your skills and experience as evidenced from your application and interview, and add you to a relevant distribution list. This will generate email and text notifications to be sent to you as and when suitable work assignments become available. On completion of any bank work you have undertaken, you will be required to complete an electronic time sheet via our online e-Pay system, specifying the hours you have worked on a weekly basis."

12. The claimant was dismissed on 24 December 2019. She contacted Acas on 21 February 2020. The EC certificate was issued on 7 March 2020. Her claim was issued on 12 June 2020.

13. The claimant was asked why she issued her claim when she did. She explained that she did not have capacity to do so earlier. She was unwell both mentally and physically, and at times she was suicidal. She was heavily medicated, spent most of her time sleeping, and at times did not even know her own name or where she lived and had to be looked after by her children. She improved a bit in February 2020 and was able to contact Acas after her RCN representative advised she needed to do so. She said she then had a relapse and was not coping, and she made a suicide attempt. After more counselling she got a bit better and was able to submit her claim in June.

14. She could not remember whether she was advised by either her RCN representative or Acas about the three month time limit for bringing a claim. During this time she says that was being told various things but they did not register with her as she was so unwell. She did not have any support from the RCN after February.

15. The medical evidence provided by the claimant shows that she was signed off work for a lengthy period of time between June and December 2019 with “low mood” and that she was referred to the mental health team. Unfortunately, there is no evidence relating to the period after her dismissal on 24 December 2019, except for a note on 31 December that emails were sent to an outside agency.

16. The respondent liquidator is now in difficulties with preparing to defend the case. BCH ceased trading on 31 March, and went into members voluntary liquidation on 1 July 2020. The liquidation is now well advanced and the last items are being closed off. The liquidator does not have access to relevant documents and witnesses.

17. I clarified with the claimant at the hearing which allegations in her claim are relied on as acts of race discrimination. Her claim refers to an appeal which took place after her dismissal. She does not agree that the appeal was dealt with fairly. However, she confirms that she is not alleging that the appeal outcome and the way the appeal was dealt with was an act of race discrimination. The last act of race discrimination relied on is therefore the dismissal on 24 December 2019.

Applicable law

18. **Unfair dismissal – two years’ service.** Under section 108(1) of the Employment Rights Act 1996 (“ERA”), a claim for unfair dismissal can only be made by an employee who has two years’ continuous service on the effective date of termination.

19. This requires continuous service as an employee. Under section 230(1) ERA, an employee is defined as: “*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*”. This is assessed according to a multiple test, which looks at the factors of personal service, control, and other factors consistent with a contract of service (***Ready Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance*** [1968] 2 QB 497). The three key factors which are commonly referred to as the “irreducible minimum” are personal service, control, and mutuality of obligation. The requirement for mutuality of obligation means the obligation on an employer to provide work and the obligation on an individual to accept that work. Where there is no such overall obligation in a contract, this can provide a framework for a series of short contracts which arise each time the parties offer and accept a specific work assignment (***Carmichael v National Power*** [2000] IRLR 43 (HL)).

20. **Time limits.** Starting with ***Unfair dismissal***, under section 111(2) ERA, a claim for unfair dismissal must be presented within a period of three months starting with the effective date of termination. Time can be extended where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period (section 111(2)(b) ERA), in which case the claim must have been presented within such further period as the Tribunal considers reasonable.

21. The three-month time limit is automatically extended by Acas early conciliation, where Acas has been contacted before the original time limit has expired (section 207B ERA). Contacting Acas “stops the clock” on the time limit

for the period between Day A (when the claimant first contacts Acas) and day B (when Acas issues the early conciliation certificate). If the original time limit expires during the EC period, or within one month after the end of the EC period, the time limit is extended to one month after day B.

22. **Discrimination.** Under section 123 of the Equality Act 2010 (“EA”), complaints of direct discrimination or harassment, “*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 employment tribunal thinks just and equitable.*” Under section 123(3), conduct extending over a period is to be treated as done at the end of the period. The burden is on the claimant to show that it is just and equitable to extend time.

23. The tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980 (***British Coal Corporation v Keeble*** [1997] IRLR 336). Factors relevant to the prejudice that each party would suffer if an extension were refused include:

- 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 they knew of the possibility of taking action.
- e. The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

24. In the recent case of ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23, the Court of Appeal cautioned against tribunals rigidly adhering to the checklist of potentially relevant factors in the Limitation Act and advised against the adoption of a mechanistic approach. The Tribunal should assess all the factors in the case which it considered relevant to whether it was just and equitable to extend time, including the length of, and reasons for, the delay.

Conclusions

25. ***Should the claim for unfair dismissal be struck out because the claimant did not have two years' continuous service?*** I find that it should. The claimant did not have two years' continuous service as an employee with BCH. She became a permanent employee of BCH on 30 April 2018. Prior to this, she worked as a Bank Health Visitor. Based on the oral evidence and the contractual documents I have seen, I find that she was not continuously employed by BCH when she worked as a Bank Health Visitor. There was no mutuality of obligation between assignments. This is clear from the letter of appointment, which states, “*There is no obligation on behalf of Bristol Community Health CIC to offer you work and equally you are not obliged to accept the offer of work from our Bank Office.*” The claimant's oral evidence at the hearing also confirmed that she did not work fixed hours, and did not have to accept work if it was offered to her.

26. This means that the Tribunal does not have jurisdiction to consider the claim

for unfair dismissal, and there is no need to consider whether this claim was brought within time.

27. Was the claim for race discrimination made to the Tribunal within three months (plus any EC extension) of the act or omission to which the complaint relates? The dismissal was on 24 December 2019. This was the last act of discrimination in a series of acts complained of by the claimant in her claim. The initial time limit would have expired on 23 May 2020. This was extended to one month after the end of Acas early conciliation. The extended time limit expired on 7 April 2020. The claim was not made until 12 June 2020. This is more than two months after the extended time limit expired.

28. If not, was there conduct extending over a period? If so, was the claim made to the Tribunal within three months (plus and EC extension) of the end of that period? The respondent accepts that the acts described in the claim are potentially conduct extending over a period, ending with the dismissal on 24 December 2019. However, the dismissal itself is the last act relied on and is out of time, as explained in the previous paragraph.

29. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The claimant submits that she was too unwell to submit her claim any earlier. She gave oral evidence about how unwell she was between her dismissal on 24 December 2019 and when she submitted her claim in June 2020. However, despite having been given an additional opportunity to provide evidence, the claimant has not provided me with any medical evidence which shows the state of her health at this time. She has said that handwritten notes are missing and her current GP is in the process of locating her notes.

30. The respondent submits that the claimant has produced no material evidence to support her oral evidence at the hearing that she was too unwell to bring her claim. The respondent also submits that, on the balance of probabilities, it is simply not credible that notes could not be produced for the later period if they existed, as these are always recorded electronically whether by locums or permanent GPs.

31. The respondent submits that, if the claim had been submitted in time, it would have been served at around the time BCH ceased trading and before it actually went into liquidation. This would have made it easier to prepare documents and evidence for defending the claim. It is very difficult now that BCH is in liquidation for the respondent to produce a robust defence on the substantive merits of the case. The respondent says this delay has clearly prejudiced the respondent and should be taken into account in deciding whether it is just and equitable to extend time.

32. Having considered the matter very carefully, I have decided that it would not be just and equitable to extend time in this case.

33. The main issue is the length and the reasons for the delay. The delay in this case is considerable, being nearly two months. The claimant says this is because she was too unwell after her dismissal to bring her claim any earlier. Genuine incapacity due to illness can mean it is appropriate to exercise a discretion to extend time. However, I am not persuaded in this case that the claimant was incapable of bringing her claim for the whole of this period. It is for

the claimant to show this.

34. I note the claimant's oral evidence about the severity of her illness. I decided at the hearing that it would be fair to give the claimant more time to produce medical evidence in support of her case. But, despite having been given five weeks to produce medical evidence, she has not provided any GP notes or other medical reports about her condition for the period between her dismissal and 12 June 2020. The GP notes that she has provided are for an earlier period, and do not appear to refer to an illness of the severity described by the claimant. The claimant has explained she has found it difficult to obtain her GP notes, but I also note the respondent's submission that all GP notes are recorded electronically. I find it implausible that locum GPs seen by the claimant would have taken only handwritten notes and not recorded these on the electronic system. The claimant referred at the hearing to receiving counselling, but she has not provided any evidence from counsellors or anyone else in the mental health team that she was referred to.

35. I also note that the claimant was receiving support from the RCN, and was able to take part in the Acas early conciliation process in February 2020. She says that she was well enough to do this for a brief period, but then became too unwell again. However, again, there is no medical evidence to support this. In the absence of medical evidence, it seems implausible that the claimant was well enough to take this step but then too unwell to bring a claim for close to a further four months.

36. The claimant could not recall if the RCN had advised her on time limits. I find it likely that they would have done so, particularly as they were supporting her at the time she was advised to contact Acas. I accept that the claimant may have found it difficult to take in information as she was unwell. However, she was able to follow the advice to contact Acas. Again, there is no medical evidence to support the claimant's argument that she was too unwell to understand advice about time limits.

37. For the avoidance of doubt, I do accept that the claimant was unwell during this period. However, she has not shown me that she was too unwell to bring her claim any earlier than she did.

38. I have also taken into account the extent to which the cogency of the evidence is likely to be affected by the delay, in the context of BCH being in liquidation. This is a relatively unusual situation because BCH is in the final stages of liquidation. The respondent has been particularly prejudiced by the two-month delay because it is no longer in a position to obtain evidence through documents and witness statements, and so defend the case effectively. If the claim had been issued within time, BCH would only just have finished trading. The respondent would have been on notice of the claim. It would have been much easier for the respondent to obtain the required evidence at that point and accommodate the need to defend the claim. The delay will therefore cause the respondent very significant prejudice if the claim is allowed to proceed. It is effectively in a position where it is unable to defend the claim, as it does not have any evidence about what happened.

39. Having taken the above matters into account, I therefore find that the claim for race discrimination was not made within a further period that the Tribunal

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thinks is just and equitable. In the circumstances, I am not persuaded on the evidence that the claimant was medically incapable of bringing her claim any earlier, and the prejudice to the respondent caused by the delay is considerable.

40. This means that the Tribunal does not have jurisdiction to consider the claim for race discrimination and it should be struck out.

Employment Judge Oliver

Date: 19 April 2021

Reserved Judgment and Reasons sent to the Parties: 28 April 2021

FOR THE TRIBUNAL OFFICE