Case no: 2602737/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms L Whitehall	v	Ulverscroft Group Limited

RECORD OF A PRELIMINARY HEARING HELD BY CLOUD VIDEO PLATFORM

Heard at: **Midlands (East) Region by Cloud Video Platform**

On: **Tuesday 4 May 2021**

Before: **Employment Judge P Britton (sitting alone)**

Appearances

For the Claimant: **Ms T Hand of Counsel**
For the Respondent: **Mr S Keene of Counsel**

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

The Employment Tribunal Judge gave judgment as follows:-

1. The claim for failure to pay notice pay is dismissed upon withdrawal.

2. I find it is just and equitable to extend time in relation to the claim for age discrimination.

3. Case Management Orders accompany.

REASONS

1. This claim today is before me at the direction of Employment Judge C Camp who sat at a telephone case management hearing on 8 October 2020

(see Bp 23 onward)[1]. He dismissed the claim for unfair dismissal for want of qualifying service.

2. He observed that the Claimant's claim for breach of contract (failure to pay notice pay) was misconceived as she had been paid the same and invited the Claimant to make objections to his proposal to strike out by 26 October 2020. The Claimant did not reply. I note it was an unless order. However the Claimant has through her Counsel today conceded that that claim is not viable. Thus, I dismiss it upon withdrawal.

3. The remaining claim, which is one of age discrimination, Employment Judge Camp observed to be out of time. Therefore, he directed there be this Preliminary Hearing to determine whether it is just and equitable to extend time.

4. During the hearing today Counsel for the Claimant has not submitted as such that the claim is in time. I will deal with that point when I come to my findings.

5. On the basis that the claim is out of time section 123 (of the Equality Act 2010 (the EqA) applies. Thus (a) the claim must have been presented to the tribunal within three months of in this case the final event relied upon, namely the act of termination of the employment, or;

(b) such other period as the Tribunal thinks just and equitable**.**

6. I of course start from the premise that the time limits are there to be observed strictly. Therefore, to extend time is the exception rather than the rule. Thus, the burden of proof is upon the Claimant to persuade me that it is just and equitable to extend time. As to the determination of what is just and equitable, the jurisprudence as to which I am most grateful for the skeleton argument of Mr Keene and which succinctly and accurately sets out the same, is for my purposes encapsulated in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** per Underhill LJ – citation A2/2020/0025 Court of Appeal. Thus, having revisited the authorities on said topic he makes clear that the proper approach of the Tribunal is to consider all the circumstances of the case with particular focus on the length and reasons for the delay and the balance of prejudice.

7. In reaching my decision I have read the witness statement of the Claimant and heard her sworn evidence under questioning. I have been taken to the bundle. Finally I have heard submissions. For the purposes of this decision I make the following findings of fact.

Findings of fact

8. The Claimant was invited on the 23 March 2020 by Mark Merrill the Sales Manager of the Respondent to take part in a Skype discussion on 24 March 2020. She had no forewarning of what was to come. At the meeting she was dismissed it being said that her performance was unsatisfactory. She was aged 62 at the time. A letter confirming the dismissal followed dated 27 March 2020 (Bp 39-40). The first paragraph read:

[1] Bp=bundle page.

> *"Following your discussion with Mark Merrill on Tuesday 24 March 2020 I write to confirm the company's decision to terminate your employment effective* ***31 March 2020***[2]*…"*

And at the fourth paragraph:

> *"You will already have received payment up to and including 31 March 2020. You will not be required to work your 4 weeks' notice period; therefore this will be paid to you in lieu directly into your bank account in the normal way on 15 April 2020 together with 5.5 days accrued holiday. Your P45 will be sent to you shortly after this date. You are entitled to keep your car for the 4 weeks and Mark will be in contact with you regarding its return together with the company's laptop, phone and credit card."*

9. Part of the Claimant's case is that she believed that she was therefore being dismissed on notice. Thus, the employment would end on 30 April 2020. I have read the submissions of Mr Keene on this point. From an objective standpoint I have no doubt whatsoever that the letter is clear, unequivocal and unambiguous. The employment is ending with immediate effect on 31 March 2020. The Claimant is going to be paid in lieu her notice entitlement in the next payroll run on 15 April 2020. As to the retention of the company car, we were of course by now into lockdown. The car was not needed because all the employees had been sent home for the purposes of working. Thus, Mr Merrill did not see it as a priority to collect it immediately given the restrictions on travel. I can see the logic in that decision. But in the mind of the Claimant, it reinforced here belief that the employment was still continuing in terms of a notice period. I think from what I saw today that the Claimant had, at least at the material time, a genuine misunderstanding of what is meant by the words payment in lieu of notice. That is a different thing from an objective appraisal of what the letter meant. But before me she accepted in questioning from Mr Keene that she knew that in lieu meant instead of. So on this issue the situation is equivocal.

10. So moving forward I find that the effective date of termination was 30 June 2020. At that stage early conciliation was not started. Thus, s140B of the EqA cannot ride to the rescue and extend time for the duration of the certificate. The claim was presented on the 14 July 2020. Thus on presentation it was two weeks out of time.

11. Although the letter objectively is as I have stated it to be, I take into account the subjective mindset of the Claimant in terms of evaluating her explanation and in terms of the context of all the circumstances of this case and applying the just and equitable test. I start with the standpoint that I have no doubt whatsoever from her demeanour today, that she was shocked to be dismissed with no forewarning and she was worried for her finances. Insofar as it assists me there is then a WhatsApp trail starting the next day. Over the next few days she was making overtures as to whether the Respect would allow her to remain on Furlough for a period of 3 months rather that the dismissal come into effect. She also was pleading that they change the reason

[2] My emphasis.

for the dismissal to redundancy rather than capability as she was concerned to the impact for her in a difficult labour market and also the potential that the reason could effect her ability to claim State benefits with the then risk that she might lose her house if she could not afford to finance it. The Respondent rejected all her requests.

12. Also, the Claimant was already dealing with the most difficult of circumstances. Her former husband of some twenty years to whom she was still very close was by now in hospital suffering from Coronavirus. His condition deteriorated. Sadly he died on 4 April 202. Again, from her demeanour today and what she put in her witness statement and indeed her ET1, I have no doubt that this had a severe impact upon her. Afterall she could not go and comfort her former husband in hospital during those last weeks because of lockdown and the restrictions on hospital visits. More important there are two sons of that relationship. Both, I think I am correct in saying in their twenties, who were clearly devoted to their father. The impact upon them was colossal. Both came to return to live with her in her home. She clearly cared for them. One of them was in a state of considerable depression. I have no reason to doubt her. Couple that with the shock of being dismissed and her financial worries and the fact that she also herself was seeking counselling for her grief, and contemplation of what to do in terms of bringing a claim to the Employment Tribunal very much went on the back burner.

13. What it means is that I find there was this considerable impediment on her mental processes occurring during this period and which meant that she did not really give any thought to what to do in relation to her dismissal. I think there was a sense of false security also in that she received a P45 which now gave her leaving date as 15 April rather than of course 31 March. That was unfortunate. Bear in mind the fragility of her mindset.

14. So, in that context I find that the Claimant did not really give any thought to the prospect of proceeding against her former employer. She did not do any research as she made plain in her statement. She had all these other things on her mind and therefore was of course just about coping with extremely difficult circumstances, and therefore I find that understandable. As it is a friend of hers who clearly had a friend in a respected firm of lawyers in London, namely RSW, on or about 2 July 2020 suggested she might phone that friend and she gave her the personal mobile phone number of that solicitor. The Claimant contacted her on Saturday 4 July. This was only ever a telephone pro bono conference essentially at the behest of the friend. The Claimant therefore did not send any documents through to the solicitor. That solicitor also did not see the dismissal letter. But the Claimant told her inter alia about the P45, and on that limited knowledge which the solicitor had she therefore advised that even if the Claimant thought there was a 4 week notice period, given the P45 leaving date there was in terms of presenting the claim a 3 month deadline of 14 July for presentation and of course prior thereto she would need to contact ACAS for a conciliation certificate. The solicitor advised her that she should first however send a grievance to the Respondent. I obviously cannot explore the mindset of the solicitor, but it may well be that she had in mind the provisions at section 207B of TULCRA 1996 which relates to the utilisation of the grievance procedure, and which potentially could have a detrimental effect if a person wins in Tribunal in terms of a possible reduction of any award to reflect not first

pursuing a grievance. Now Mr Keene is quite right to point out that that provision is capable of an interpretation that it is not necessary to bring a grievance prior to presenting a claim. But on the other hand perhaps out of an abundance of caution the solicitor was so advising although I can only speculate. In any event, pursuant to that advice the Claimant sent a grievance to the Respondent on 6 July: so the Monday after the consultation (Bp 41-42). She set out that she wished to raise a grievance based upon age discrimination in terms of the dismissal, and she also explained how to be dismissed had come as a shock out of nowhere "furthermore I have been in mourning following the death of my sons' father due to Covid19".

15. She then set out why she thought the dismissal was unfair and asked for 3 months' wages as compensation as a minimum otherwise "no choice but to take this matter further with ACAS".

16. The final paragraph referred to the advice she had had from RSW Law and that: "I should let you know I have no choice but to protect my position with an early conciliation via ACAS". She gave a deadline by which she required a response prior thereto which was 11 July 2020. On 13 July she received an answer from the Respondent to the effect that they would not engage in a grievance process. Therefore, she immediately went to ACAS that day and got a certificate and issued her proceedings to the Tribunal on 14 July.

17. So, we have an out of time period given my first findings of about 2 weeks.

Conclusion

18. Given those findings, albeit the Respondent is of course prejudiced in the sense that it is faced with the expense of defending the claim but otherwise can deploy its evidence as is obvious from the Response (ET3), I find that it is just and equitable in all the circumstances to extend time. Thus, the Claim will proceed.

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Employment Judge P Britton
Date: 26 May 2021

JUDGMENT SENT TO THE PARTIES ON

27 May 2021
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FOR THE TRIBUNAL OFFICE