



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Owen

Respondent: The Huntercombe Group Limited

Heard at: London South Croydon by CVP and telephone

On: 17 May 2021

Before: Employment Judge Sage

Representation

Claimant: Mr Owen the Claimant's husband

Respondent: Mr Gooder solicitor

JUDGMENT having been sent to the parties on **17 May 2021** 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

Requested by the Claimant.

1. This hearing has been listed to consider whether the Claimant's claim was presented in time. The claims include unfair dismissal, pregnancy and maternity discrimination.
2. The case was listed for a CVP hearing but the connection was poor and the screen kept freezing. The decision was made to transfer the hearing to the telephone at 3pm. This was an agreed approach and no objections were raised at the time.
3. The Tribunal had before it a bundle of documents, including directions for this hearing at pages 30-31 which included a direction for the Claimant to produce a statement setting out when she learned of the circumstances giving rise to the claim in as much detail as possible. The Claimant produced a witness statement that was headed 'Witness statement – Timeline of events' which was in the form of an excel spreadsheet. There was also a second document headed 'Witness statement – When and how I learned of the circumstances giving rise to the claim: summary'. This document was part statement and part submission made by the Claimant's representative

as it was confirmed that pages 3 – 10 had been written by him and not the Claimant.

The Issues

4. The issues for this hearing were as follows:
 - a. When was the Claimant aware of the circumstances that led her to conclude that she had a claim against the Respondent;
 - b. Was it reasonably practicable to present her claim within the statutory period of three months, if not
 - c. Was it presented within such further period as was reasonable and
 - d. In respect of the claim for discrimination, was the claim put in within 3 months of the date to which the complaint relates or 'such other period as the Tribunal thinks just and equitable'.

Findings of Fact

5. The Claimant's evidence in chief in her timeline of events showed that at the time she was made redundant, she was not aware that her position would continue. She had been told by Dr Barlow that her role would cease on the appointment of a Band 5 physiotherapist. The Band 5 was due to start on the 28 June 2019 (pages 32-33 of the bundle). At the date of termination the Claimant had no cause to believe that her role was not redundant and she was prepared to accept on the facts known to her at the time that her role was redundant and her dismissal was therefore fair. The Claimant therefore accepted her redundancy payment and did not challenge the fairness of the dismissal.
6. The Claimant's evidence as to when she became aware of the facts that caused her to believe that her role was not redundant and therefore her dismissal potentially unfair was unclear. In her timeline of events she stated that on the 11 December "*Witness Andrea Teoc (rehab assistant) leaves Huntercombe, Hothfield. She later confirms that the post of Physiotherapy Assistant was still active when she left, and was being performed by Bethany Hatcher*". The Claimant did not specify in this statement when she was told this by Ms Teoc. The timeline then went on to state that the Claimant '*became aware*' that her job was 'still active' on the 4 July 2020 and she contacted ACAS on the 8 July and presented her claim the next day. The Claimant's document headed 'Witness statement' only referred to the date of the 4 July 2020 which is when she stated that she was '*made aware*' that her role was still active after receiving a notification on LinkedIn. The Claimant made no mention of the 11 December or of any contact or communication from Ms Teoc in this document.
7. In cross examination the Claimant confirmed that she felt (although could not be sure) that she was not offered the role of Band 5 physiotherapist because she was pregnant. She confirmed that she told Dr Bristow on the 18 February 2019 of her pregnancy, however the timeline showed that Dr Barlow had been aware of the Claimant's desire to start a family at the earlier date of the 24 August 2018.
8. The Claimant confirmed in cross examination that at the date of termination she was not aware that her role was continuing.

9. The Claimant was asked in cross examination when she became aware that her role was continuing and had not been made redundant and she replied that *“colleagues of mine told me that after I had left on maternity leave that Bethany Hatcher started working on the physiotherapy team”*. She was asked who told her this and when was she told and she replied that it was Andrea Teoc who told her *“recently”*. She also stated that another colleague Adrianna confirmed this. She was then asked specifically the date that she found out that her role was continuing on a permanent basis and she replied *“11 December Andrea confirmed to me and on the 1 July 2020 I found that my role had not been made redundant”*. The Claimant was then asked when she became aware of an advert placed on LinkedIn in September 2019 (page 36 of the bundle) and she replied that she became aware of this on the 9 April 2020 as she then saw the profile of Ms McKinnon on page 38 of the bundle on the 4 July 2020.
10. The Claimant confirmed that she had access to the internet at all times but told the Tribunal that she was not looking at LinkedIn during her maternity leave (which she spent in Romania). She confirmed that nothing physically prevented her from presenting her claim.
11. In re-examination the Claimant said that she became aware that the position was still ‘open’ on the 4 July 2020 but the date of the 11 December was when Andrea left the Respondent but Andrea ‘later confirmed’ that the post of physiotherapist was still ongoing.

Closing submissions – of the Respondent.

12. The Claimant’s explanation was that she did not know of the circumstances of the unfair or discriminatory dismissal until after the time limit expired. The Claimant was clear that she did not see the September job advert or the LinkedIn post until July 2020, despite this the Claimant had knowledge of the substance of the claim before 2020.
13. The Claimant asserted that there was no real process in November 2018 and she alleged that the dismissal was procedurally unfair in June 2019, when her contract was terminated. The Claimant said she felt she was right for the Band 5 role and the Respondent was aware she was pregnant at the time. The Respondent says that the Claimant did not secure the Band 5 role because she was insufficiently qualified. She was aware of all the facts that led to the termination of the contract.
14. The Claimant was also aware that her role was continuing, she was aware that the Band 3 role was continuing in December 2019. She could have commenced proceedings in June or December 2019. The Respondent accepts that the Claimant did not see the LinkedIn profile until 2020 but there was evidence of the discriminatory dismissal at the latest by 11 December 2019.

15. The respondent says that it was reasonably practicable to present her claim in time and her delay was unreasonable. The Tribunal should not extend time.
16. The same applies to the claim of discrimination, the late discovery of evidence can extend the deadline and she was aware of all the facts either in June or December 2019.

Closing submissions of the Claimant.

17. The Claimant did not know of the facts, she knew she was doing a Band 3 role and was aware that Ms Hatcher had been appointed to do her role for a few weeks until the Band 5 was appointed. However she was not aware that her Band 3 role would go on until the end of the year and beyond. Had we known that we would have contacted ACAS.
18. We were prepared to accept (the redundancy) and move on. If you became aware of something and then find out the role is still active that changes matters and the Claimant only became aware of this on the 4 July 2020.
19. On the 11 December this is simply the date on which Andrea had a conversation. We asked her whether Ms Hatcher was still there and she said she was and was a physiotherapy assistant. This was a conversation in April 2020. We only became aware of this on the 4 July. There was no reasonably practicable way of knowing this. It was invisible to her. The Claimant had no reason to go back or to have any conversations with anyone from the Respondent. It was not reasonable for the Claimant to know that.
20. We think that there should be a sufficient allowance to move forward and to not be time barred.

The Law

Employment Rights Act 1996 section 111

Complaints to employment tribunal

- (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.

Equality Act 2010 Section 123

Time limits

(1) Proceedings on a complaint within section 120 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.

Decision.

21. Turning first to the claim for unfair dismissal, the test for whether a claim has been presented in time is whether it has been presented within 3 months of the effective date of termination (28 June 2019). It is not in dispute that this claim is out of time. The test requires me to consider whether it was reasonably practicable for the Claimant to present the claim within three months and I conclude that it was not. The Claimant's evidence and closing submissions were clear that had her role been redundant, she was happy to accept that decision and walk away. At the effective date of termination, she accepted that her role would terminate on the appointment of a band 5 physiotherapist and the termination of her contract would coincide with the Band 5 role commencing. She also accepted that at the time, her role was redundant.
22. It is accepted that the Claimant was unaware at the date of termination that the person appointed on a temporary basis to cover her role would continue in post after the termination. The evidence that corroborated that the role had not ceased or diminished, as explained to her at the time, but was in fact continuing on a permanent basis was material to the Claimant changing her mind and concluding that her dismissal may be unfair and discriminatory. As these facts had not been known to the Claimant at the time and there was no way in which she could have been aware of them, I conclude that it was not reasonably practicable for her to present her claim within three months of the effective date of termination.
23. The second part of the test in respect of her unfair dismissal claim is whether the Claimant presented her claim within such period as was reasonable.
24. The Claimant's evidence of when she discovered the material facts in relation to her Band 3 role continuing permanently was not entirely clear. There was evidence in her timeline of events to the 11 December which was when Ms Teoc left the Respondent organisation and she 'later' informed the Claimant that Ms Hatcher was still in the role. When she was asked in cross examination when she found out and who told her she replied that Ms Teoc told her on the 11 December and after that she found out the role was continuing. It was important to establish when and how the Claimant became aware of the facts she now relies upon in pursuit of her claim and it is clear that she was aware either in December 2019 or at the latest in

April 2020, when it was stated by the Claimant's representative that they had a conversation in April 2020 with Ms Teoc.

25. Giving the Claimant the benefit of doubt I conclude that she became aware that her position continued on a permanent basis and was not redundant in April 2020. This information caused the Claimant to conclude that she had a viable claim. There was no evidence to suggest that the Claimant took action expeditiously to present her claim. As she was aware of the fact that her role was continuing on a permanent basis at this time, she should have taken swift action to present her claim within days of becoming aware of these facts.
26. There was no evidence to suggest that she took any action to pursue her claim in May or June 2020. The Claimant accepted that she had access to the internet at all times and would have been to conduct some research to check the facts and then to present an online claim. She did not present her claim until the 9 July 2021 which was some three months after becoming aware of the facts that made her claim viable. The issue is therefore whether she presented her claim within such further period as was reasonable and I conclude that she did not. It would have been reasonable to present the claim within days of becoming aware of this new information or at least to conduct enquiries to see if the facts were correct but the Claimant provided no reason for failing to take any action in the intervening months. I conclude therefore that the claim for unfair dismissal is out of time.
27. Turning to the claim for pregnancy and maternity discrimination, the test on time limits in discrimination is slightly different. A Claimant must present a claim within three months of the act complained of or such further period as is just and equitable. It has been confirmed that the act complained of is dismissal. The Claimant has shown that at the date her role was made redundant, the Respondent was aware of her pregnancy (and they had been so aware at the start of the redundancy process). The Claimant was aware that the dismissal was procedurally defective but was not aware that her role continued on a permanent basis after she left. I conclude that she discovered this in April 2020. The Claimant was not aware of this fact at the date of termination and therefore it was not possible therefore for her to present a claim within three months of dismissal. It is therefore for me to decide whether she presented her claim within such further period that is just and equitable.
28. I have considered the reason and the length of delay and conclude that the delay was due to the Claimant being unaware of the new relevant facts in the case. It has been found as a fact that she became aware of those facts in April 2020. I have also considered the balance of prejudice and conclude that if time is not extended the Claimant will be unable to pursue her claim for discrimination. This is balanced against the Respondent who will have to defend a claim for discrimination, but save for that, they will suffer no additional prejudice should the claim be allowed to proceed. This is a claim that is limited to the consideration of the process and procedure adopted when deciding to terminate the Claimant's contract at a time when they were aware of her pregnancy. There are few documents in this case and is not dependent upon the recollections of the parties as the evidence as to the

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process followed and the evidence that was taken into account when declaring the Claimant's post to be redundant at the time will be supported by documentary evidence. I conclude therefore that the balance of prejudice should be decided in favour of the Claimant. There are important policy reasons why claims of discrimination should be heard. I therefore conclude that it is just and equitable to extend time.

29. The claim for discrimination can proceed to a full hearing.

Employment Judge **Sage**

Date: 18 June 2021