EMPLOYMENT TRIBUNALS

Claimant: **Mrs Zaneta Siwak**

Respondent: **Nottingham University Hospitals NHS Trust**

Heard at: **Nottingham (via CVP)**

On: **20 May 2021**

Before: **Employment Judge Ahmed (sitting alone)**

Representation
Claimant: **In person**
Respondent: **Mr Patrick Keith of Counsel**

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimants complaint of unfair dismissal has been presented out of time. It was reasonably practicable for the complaint to have been presented in time. Accordingly, the complaint of unfair dismissal is struck out.

2. The application to amend the claim to include a complaint of disability discrimination and pregnancy and maternity discrimination is refused.

REASONS

1. This was a preliminary hearing to determine firstly, whether the Claimant's complaint of unfair dismissal should be struck out as having been presented out of time and, if the claim was not struck out, to determine whether the Claimant should have leave to amend the claim to add complaints of disability discrimination and maternity/pregnancy discrimination. The Claimant has also made an application for specific discovery of documents. The Tribunal had indicated to the parties prior to the hearing that it was not necessary to consider that application until the first two matters had been dealt with.

2. The Claimant was employed by the Respondent Trust as a Maternity Support Worker from 6 March 2017. She was dismissed for gross misconduct on 5 July 2019. It is unnecessary to set out the reasons for her dismissal here.

3. The Claimant was dismissed summarily without notice. There is no dispute that the effective date of determination was 5 July 2019.

4. The Claimant began ACAS early conciliation on 11 October 2019 ('Day A').

5. The ACAS early conciliation certificate was issued on 25 November 2019 ('Day B').

6. The ET1 Claim Form bringing a complaint of unfair dismissal only was presented on 27 December 2019.

7. In support of the application to extend time the Claimant has provided a 4 page document headed 'Late Employment Tribunal Submission and Explanation'. Attached to it are particulars of the pregnancy and maternity discrimination allegations and the disability discrimination allegations in the relation to the amend application. I propose to deal with the Claimant's reasons for extending time in the sections below.

8. At this preliminary hearing neither party gave evidence but instead relied upon written and oral submissions. Mr Keith also provided written skeleton arguments in support.

THE LAW

9. Section 111 of the Employment Rights Act 1996 ("ERA 1996") so far as is relevant states:

> ***"****(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."*

10. The onus as to why it was reasonably practicable to present a claim on time is upon the Claimant (see: **Porter v Bandridge (**1978) ICR 943).

11. Where the primary time limit for bringing a claim has already expired, starting early conciliation does not extend the time limit (see: **Pearce v Bank of America**

Merrill Lynch and others UKEAT0067/19/LA).

12. **In Wall's Meat Co Ltd v Khan** [1978] IRLR 503, the Court of Appeal (per Brandon LJ) said (at para 44):

"The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

13. The position in relation to using skilled advisers was set out in **Dedman v British Building and Engineering Appliances Ltd** [1973] IRLR 381. In that case the Court of Appeal (per Lord Denning MR) stated (at paras 17–18): …

"What is practicable "in the circumstances"? If in the circumstances the man knew or was put on inquiry as to his rights, and as to the time limit, then it was "practicable" for him to have presented his complaint within the four weeks, and he ought to have done so. But if he did not know, and there was nothing to put him on inquiry, then it was "not practicable" and he should be excused. But what is the position if he goes to skilled advisers and they make a mistake? The English court has taken the view that the man must abide by their mistake. … If a man engages skilled advisers to act for him — and they mistake the time limit and present it too late — he is out. His remedy is against them."

CONCLUSIONS

14. The clock for the three-month time limit for unfair dismissal claims starts ticking from the effective date of termination, which in this case was 5 July 2019. The Claimant therefore had until 4 October 2019 to bring her complaint in time.

15. For reasons which are not clear the Claimant did not begin ACAS early conciliation until 11 October 2019, which was outside the three-month time limit. The Claimant had earlier submitted a fairly lengthy appeal letter on 18 July 2019. There is no suggestion the Claimant was awaiting the outcome of the appeal before presenting her claim. The appeal was not determined until 8 January 2020. The Claimant was therefore clearly not awaiting the outcome of the appeal before presenting her claim

16. The claim has therefore been presented outside the primary time limit of three months which expired on 4 October 2019. I have gone on to consider whether it was reasonably practicable for the Claimant to bring her claim in time.

17. The Claimant has not provided any reasonable explanation for the delay in the period 5 July 2019 to 4 October 2019. The Claimant has failed to provide any satisfactory explanation as to why she delayed starting early conciliation until 11 October 2019. Had she done so, she would undoubtedly have had the benefit of the extensions of time the early conciliation provisions grant. As the primarily limitation

period did not expire between Day A and Day B the Claimant is not entitled to rely on any early conciliation extension provision in her favour. Her claim is therefore twelve weeks late.

18. The Claimant relies upon two factors as the causes of delay. Firstly, her lack of legal knowledge as to time limits and secondly because of her mental health issues, including the adverse effects of taking medication.

19. I shall deal with the health issues first. The Claimant has provided some information which appears in the bundle as to the side effects of certain medication which she was taking at the time. The Claimant has not called any expert evidence on the issue nor is there any letter or report from a medical specialist to suggest that her health or the prescribed medication might have affected the Claimant's ability to bring a claim in the primary limitation period. Indeed, none of the side effects mentioned would suggest that it was not reasonably practicable for the Claimant to have been able to present her claim in time. In particular I note that the Claimant was able to write a long and detailed submission in relation to her appeal on 18 July 2019 (when she would have been in time) which would have required more time and effort than completing the ET1 claim form or starting early conciliation. The Claimant says that documentation was completed by her partner. I do not think that there is any merit in that argument - if the Claimants' partner was completing other documentation on the Claimant's behalf he could have also completed the ET1 claim form for her too.

20. In any event, when the Claimant first set out her reasons for the delay in an email 12 June 2020 (after the first case management hearing on 27 May 2020) the Claimant did not ascribe her reasons for the delay to mental health or side effects brought on by medication as reasons but rather blamed the Respondent for delaying the early conciliation process. It seems to me that this argument has no substance.

21. I now turn to the question whether the Claimant was either unaware or did not receive adequate advice about bringing a claim in time.

22. It is clear from the ET1 that the Claimant appears to have had *some* legal advice when she states:

> "I do also have legal representation, however, the earlier stage of Tribunal I would like to handle myself"

23. The Claimant expanded upon that today to say that the only advice she had received was free advice. Even free advice however is likely to have put the Claimant on notice of time limits.

24. It is not clear when the Claimant first sought advice but if she did and she was not informed of time limits then her remedy is against the advisor, if at all, as the aforementioned passage from **Dedman** makes clear.

25. In an email of 6 December 2019 the Claimant referred to having a solicitor but if she did engage a solicitor there is no explanation as to why the Claim was not lodged for another 21 days.

26. For those reasons I am satisfied that it is not appropriate to exercise the discretion to extend time on the grounds that it is was not reasonably practicable to bring the claim in time.

27. Although unnecessary given the decision on the time limits, I have nevertheless gone on to consider the application to amend.

Amendment application

28. The allegations the Claimant seeks to add of maternity and pregnancy discrimination go back to the time when the Claimant fell pregnant in 2017 and to matters in 2018 during the protected period.

29. The proposed complaints of disability discrimination are of discrimination arising from disability and a failure to make reasonable adjustments. They appear to relate to matters in January 2019 and thereafter. The allegations are not clear and would certainly require more detailed particularisation. They appear to relate to the investigation and steps taken to consider an alternative role after the misconduct had been identified.

30. The relevant guidance as to granting amendments is set out in the case of **Selkent Bus Company v Moore** (1996) IRLR 661and in the **Presidential Guidance**, the latter being a layman's explanation of the legal principles in **Selkent**.

31. In **Selkent**, the Employment Appeal Tribunal made it clear that the Tribunal should take into account all the circumstances, balancing the injustice and hardship of allowing the amendment against the injustice of and hardship of refusing it. In determining that issue Tribunal should take into account the nature of the amendment, the applicability of time limits and the timing and manner of the application.

32. By any standards these are substantial proposed additions to the existing claim by seeking to add two types of discrimination complaints. It is not a re-labelling exercise.

33. In relation to the applicability of time limits the claims would certainly now be out of time if a fresh claim was lodged. The allegations of maternity discrimination go back to 2017-2018.

34. The application to amend was made in August 2020, almost a year after the Claimant was dismissed. Many of the allegations relate to individual incidents which whilst significant to the Claimant are unlikely to be remembered by others. Thus, the delay will clearly affect the cogency of the evidence. The vast majority of the proposed allegations are not likely to be capable of determination by documents . Fading memories are therefore likely to significantly prejudice the Respondent.

35. If the Claimant had indeed believed that there had been disability discrimination it is difficult to understand why this was not included in her ET1, particularly as all the Claimant would need to have done at that stage was to tick the relevant box. The fact

that Claimant was unaware of her rights under the Equality Act 2010 does not provide a satisfactory explanation.

36. The balance of hardship to the Respondent is therefore greater and having regard to all the circumstances the application to amend, if necessary, is refused.

Employment Judge Ahmed

Date: 15 June 2021

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.

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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