



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs C Conde

AND

Respondent

Cornwallis Care Services Ltd
Trading as Addison Park Centre

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON**
Hybrid Hearing – Interpreter attended by Video

2 August 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person, assisted by Mrs M McGuire, Friend
For the Respondent: Did Not Attend

The Tribunal was assisted by a Filipino (Tagalog) Interpreter Mr A Sanchez

JUDGMENT

The judgment of the tribunal is that the claimant's claims of unfair dismissal and for breach of contract were presented out of time and are hereby dismissed.

REASONS

1. In this case the claimant Mrs Cristina Conde claims that she has been unfairly dismissed, has been directly discriminated against on the grounds of race, and also brings a claim of breach of contract in respect of her lost notice pay. The respondent contends that the reason for the dismissal was gross misconduct, that the dismissal was fair, that there was no discrimination, and that the claimant was not entitled to notice pay on a summary dismissal.
2. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims were presented in time. Unfortunately, Mr Clarkson, the respondent's managing director, suffered a bereavement over the weekend and was unable to attend. I decided to proceed to determine whether the claimant's claims for unfair dismissal and for breach of contract were presented within time because this would not require any evidence from the respondent. However, whether it would be just and equitable to extend time for the discrimination claim is something which the respondent should have the opportunity to

- address, particularly regarding the balance of prejudice, and for this reason I postponed that element of today's hearing. A case management order of today's date deals with relisting the discrimination claim.
3. I have heard from the claimant, and I have heard from Mrs McGuire on behalf of the claimant. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
 4. The respondent company Cornwallis Care Services Limited is a care provider and the claimant was employed as a Senior Care Assistant at the respondent's premises Addison Park Care Home in Callington in Cornwall. The claimant's continuous period of employment commenced on 24 October 2013, and she moved to the Callington premises in December 2016. An incident took place between the claimant and a resident JB on 20 April 2018 which led to the claimant's dismissal. In short, another employee namely Jemma Scott reported that when JB was demonstrating challenging behaviour, the claimant pushed a plastic nappy sack in JB's face and then put a pillow across her face. The claimant has always denied these allegations.
 5. This was reported during the following week and on 29 April 2018 the claimant was suspended on full pay. This was confirmed by Mr Anstis of the respondent in a letter to the claimant on 30 April 2018. The respondent informed the Police and the relevant care authorities. The Police requested that the respondent should not carry out its own investigation. On 8 June 2018 Mr Anstis wrote to the claimant confirming that the Police were taking no further action and that the respondent could now proceed with its own investigation, and that the claimant was required to attend an investigation meeting.
 6. Meanwhile the claimant had attended a Police interview and had been advised by a criminal defence solicitor, namely Mr Spencer. Mr Spencer wrote to the claimant on 27 June 2018 informing her that the Police had decided not to prosecute, and he informed the claimant that he could not advise on her employment position, but he suggested that she should seek advice from an employment lawyer.
 7. In fact, the claimant had access to advice and representation from her trade union Unison. The respondent held an investigation meeting on 14 June 2018 at which Mrs Palmer of Unison represented the claimant. The matter proceeded to a formal disciplinary hearing on 6 July 2018. This had been rearranged to accommodate Mrs Palmer, but at short notice she was unable to attend and the claimant and Mrs Palmer confirmed that the meeting could go ahead and the claimant was accompanied by a companion namely Lisa Phillips.
 8. The respondent decided to dismiss the claimant summarily, and this was confirmed by letter dated 16 July 2018 from the operations director Mrs Varney. The effective date of termination of the claimant's employment was 16 July 2018.
 9. Mrs Palmer of Unison then advised the claimant on an appeal against the dismissal, and she helped the claimant to prepare the appeal letter. The appeal hearing took place on 16 August 2018, and it was chaired by Mr Stuart Clarkson the respondent's Managing Director. By letter dated 28 August 2018 Mr Clarkson confirmed that the claimant's appeal was unsuccessful, and that her dismissal stood.
 10. It seems that Unison declined to support the claimant further, and at some stage after her dismissal she sought advice from Citizens Advice. The claimant was unable to confirm exactly when that happened, or what advice she had received.
 11. Some months later the claimant decided to issue these proceedings. The claimant commenced the Early Conciliation process with ACAS (Day A) on 25 March 2019. The Early Conciliation Certificate was issued on 2 April 2019 (Day B). The claimant issued these proceedings on 29 April 2019.
 12. Other than suggesting that she felt stressed after her dismissal, the claimant was unable to explain why she had failed to issue these proceedings within the original three months' time limit. The claimant was also unable to explain while she waited a further five months or so before making contact with ACAS and issuing these proceedings.
 13. Having established the above facts, I now apply the law.
 14. The relevant statute is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal

- unless it is presented before the end of the period of three months beginning with the effective date of termination, or 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.
15. There are similar time limit provisions relating to the claimant's claim for breach of contract, which are contained in article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order").
 16. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
 17. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned 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 or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) 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. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
 18. I have been referred to and have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; and Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT;.
 19. In this case the claimant's effective date of termination of employment was 16 July 2018. The normal three months' time limit therefore expired at midnight on 15 October 2018. The claimant commenced the Early Conciliation process with ACAS (Day A) on 25 March 2019. The Early Conciliation Certificate was issued on 2 April 2019 (Day B). The claimant issued these proceedings on 29 April 2019. The claimant approached ACAS after the expiry of the initial three months' time limit, and for this reason she does not enjoy any extension of time under the Early Conciliation provisions.
 20. The claimant has been unable to explain that there are any grounds relied upon for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit. In addition, the claimant has been unable to explain the further delay between the expiry of the original three months' time limit, and date when she issued these proceedings some six months later.
 21. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
 22. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the

particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-

23. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
24. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
25. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability ... the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
26. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."
27. In this case it is clear that the claimant had access to a range of advice in the lead up to her dismissal, and in the time immediately afterwards. She had advice from a criminal law

specialist who suggested that she should seek employment law advice. She had advice and representation from her Unison trade union representative. At some stage she also had advice from Citizens Advice. In the absence of any satisfactory explanation as to why the claimant was unable to issue these proceedings within the initial three months' time limit, I conclude that it was reasonably practicable for the claimant to have issued these proceedings within that time limit. In addition, in the absence of any explanation with regard to the ongoing delay, even if it had not been reasonably practicable to have issued proceedings within the first three months, it cannot be said that the claimant issued these proceedings as soon as reasonably practicable thereafter.

28. For these reasons I conclude that the claimant's unfair dismissal and breach of contract claims were presented out of time and they are both hereby dismissed.
29. This does not affect the claimant's remaining claim for direct race discrimination, which is addressed in a case management order of today's date.
30. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 12; a concise identification of the relevant law is at paragraphs 14 to 18; how that law has been applied to those findings in order to decide the issues is at paragraphs 19 to 30.

Employment Judge N J Roper
Date: 02 August 2021

Judgment sent to Parties: 16 August 2021

FOR THE TRIBUNAL OFFICE