



EMPLOYMENT TRIBUNALS

Claimant: Ms B Tucker

Respondent: Rail Safety & Standards Board Limited

Heard via Cloud Video Platform (London Central) On: 13 January 2022

Before: Employment Judge Davidson

Representation

Claimant: Mr E Kemp, Counsel

Respondent: Ms C McCann, Counsel

JUDGMENT

The tribunal finds that it was reasonably practicable for the claimant's unfair dismissal and money claims to be presented within the statutory time limit. In the alternative the tribunal finds that the claimant's complaints were not presented within such further period as the tribunal considers reasonable.

The tribunal further finds that it would not be just and equitable to extend the time limit in respect of the discrimination claim.

It is therefore the judgment of the tribunal that the tribunal does not have jurisdiction to hear the claims brought by the claimant in these proceedings.

REASONS

Issues

1. The issue for the preliminary hearing was whether the claimant's claim should be accepted out of time. Her claims are for unfair dismissal, money and for pregnancy discrimination.
2. In relation to the unfair dismissal and money claims the test is whether the claimant can show that it was not reasonably practicable to present her ET1 on or before 16 October 2019 and, if was not reasonably practicable, did she subsequently present it within such further period as the tribunal considers reasonable?

3. In relation to the pregnancy discrimination claim, having failed to present her ET1 within time, has the claimant persuaded the tribunal that she presented her claim within such other period as the tribunal thinks 'just and equitable'?

Facts

4. The claimant was employed by the respondent as a Senior Project Manager from 1 October 2007 until the termination of her employment by reason of redundancy on 17 July 2018. She contacted ACAS for early conciliation on 18 April 2019 and the ACAS EC certificate was issued on 18 May 2019. She submitted her claim on 8 March 2021.
5. In 2018, the claimant returned from her first maternity leave. She requested flexible working, which was refused. She was represented by her union during the flexible working request process.
6. In February 2019, the respondent started a redundancy process. The proposal was to reduce the number of Senior Project Managers from ten to six. Jane Dobson, Dean Parry and Kate Stonebridge (Department Heads) carried out an assessment of all ten individuals on 18-20 February 2019. The claimant scored 8th out of 10.
7. On 4 March 2019, the claimant informed Arvind Khoda in HR that she was pregnant and asked him to keep the information confidential. He did not inform the Department Heads who were carrying out the redundancy assessments.
8. The claimant was notified of her redundancy on 18 March 2019 and was given four months' notice. On 20 March 2019, the claimant went on sick leave for 'stress' and did not return to work before the expiry of her notice period.
9. On 25 March she appealed against her dismissal, challenging the assessments of her performance. She did not allege pregnancy discrimination. The appeal was considered by the Director of Projects. The appeal manager accepted that one element of the scoring matrix was assessed incorrectly and the claimant's score was revised but this made no difference to the outcome. Her appeal was therefore rejected.
10. On 18 April 2019, she started early conciliation, claiming that she was dismissed due to her pregnancy. Her last day of work was 17 July 2019. She received a termination payment of approximately £35,000, equivalent to nearly a year's net pay.
11. The claimant relies on a number of medical issues which arose during her pregnancy as an explanation for her not being able to submit her application on time. The claimant has supplied her medical notes from the period of her pregnancy. In a number of instances, these notes do not support the claimant's description of her pregnancy complications and nothing in the medical notes explains why the claimant would not be able to fill out an online form during this period.
12. Examples of conditions exaggerated by the claimant in her witness statement are:
 - 12.1. Having a low lying placenta – the medical notes show that this was investigated when suspected, and the investigation result was that the placenta was 'high, anterior';

- 12.2. There is nothing in the notes to suggested headaches, extreme tiredness and a racing heart. On the contrary, the claimant reports feeling well in the notes.
- 12.3. The claimant states that she was admitted to hospital on numerous occasions in addition to her routine appointments. The notes show that she was admitted overnight on two occasions.
13. The claimant gave birth to her son on 16 October 2019 which was the day the primary limitation period expired.
14. She alleges that she was unable to lodge her claim for the following 17 months due to sleep deprivation, lack of time and financial worries. She describes having no support in looking after her two children but confirmed that she lives with her partner, the father of her children who worked from home during lockdown. She also accepted that she had received a sum roughly equivalent to a year's net pay on termination.
15. She has not supplied any medical evidence to show that she complained to her GP of the chronic lack of sleep and tiredness she describes although she confirmed she was making regular visits to her GP relating to her blood pressure.
16. She also relies on the impact of the COVID lockdown due to her fears for her health arising from the virus due to her asthma. She accepts that she was not classified as a vulnerable person at this time but she describes feeling anxious.

Determination of the issues

Unfair dismissal and money claims – reasonably practicable test

17. The primary three month period ended on 16 October 2019, the day the claimant gave birth to her son. I accept that it would not have been reasonably practicable for the claimant to present her claim on the last day of the primary limitation period, or even within the last couple of weeks, given the impending birth of her child and the birth itself.
18. However, it is clear that, with the exception of contacting ACAS in April 2019, the claimant had taken no steps to start a tribunal claim. The reason that she did not submit a claim on 16 October 2019 was not the fact that she was in labour – she had not prepared a claim to submit. Her inability to lodge the claim on 16 October 2019 was not due to an unforeseen event. She had known since 4 March 2019 that she would be having a baby at about that time. Although it is acknowledged in *Schultz v Esso Petroleum [1999] IRLR 488* that litigants tend to focus their minds on lodging a claim in the later stages of the limitation period, this case is different in that the claimant was given notice of termination in March 2019, with her effective date of termination being 17 July 2019. She had contacted ACAS in April 2019 and was in a position at an early stage (effectively six months before the expiry of the limitation period) to decide whether to present a claim. She was also aware all along that end of the limitation period would coincide with her due date.
19. I note that the claimant had drafted and submitted her grounds of appeal against her redundancy. The appeal document could have formed the basis of her particulars of claim, which would have made the process of submitting a claim less onerous.

20. I do not accept that the medical issues which arose during the pregnancy were sufficient to prevent any preparatory steps from being taken. I find that the claimant has exaggerated the severity of the issues she relies on and the medical evidence does not always support her account. Even if I accept the claimant's account at face value, she has not shown why these conditions would prevent her from preparing or filing a claim.
21. It is fair to say that many claimants suffer from stressful situations and, in my view, it is not sufficient simply to assert this. If the claimant wishes to rely on this, she must show how it affected her ability to comply with time limits. I note the authority of *Asda Stores Ltd v Kauser* UKEAT/0165/07 which holds that stress cannot be compared to illness or incapacity and that there would need to be more to establish a mental impediment.
22. I remind myself that time limits are strict and the reasonably practicable test is a high hurdle. I find that the claimant has failed to show that it would not have been reasonably practicable to file her claim within the three month limitation period.
- 23. Unfair dismissal and money claims – further reasonable period test*
24. If I am wrong about that, I go on to consider whether the further period of 17 months is reasonable. The test in respect of the further period is 'reasonable' rather than 'reasonably practicable'. I find that the claimant has failed to show why it was reasonable for her to wait as long as she did. She has not provided any medical evidence to support her reasons.
25. If the situation of sleep deprivation is as bad as she now claims, it is unlikely that she would be attending regularly for GP visits and not mention it. I conclude from this that she has exaggerated the sleep deprivation, which (as with virtually all parents of a new baby) she no doubt suffered but she has not convinced me that this explains her failure to submit a claim earlier than 17 months after the limitation period expired.
26. The claimant relies on the lockdown as exacerbating the situation but does not explain why she could not file the claim after the easing of lockdown or in the pre-lockdown period.
27. She has not provided any evidence, either medical or witness evidence from anyone (for example, her partner) to explain why lockdown affected her ability to deal with her claim or the other matters she relies on.
28. She eventually sought advice from a legally qualified friend (whom she knew throughout this period) and she has failed to explain adequately why she could not have sought this advice at an earlier stage.
29. I therefore find that the claimant has not satisfied me that she presented the claim within a further reasonable period.

Pregnancy discrimination – just and equitable test

30. Even though the 'just and equitable' test is different, the primary time limit is still to be regarded as a strict starting point.
31. In considering whether to exercise my discretion to extend time, I have considered the length of and the reasons for the delay. The length of the delay is 17 months (or

approximately two years if time runs from the decision to dismiss) which is a significant period, particularly in the context of a primary time limit of three months.

32. As for the reasons given, I repeat my findings set out above in relation to the further period for the unfair dismissal claim and do not find the reasons compelling.
33. I must also consider whether the cogency of the evidence will be affected. I find that the cogency of evidence will undoubtedly be affected by the delay, particularly as some of the aspects of the claim date back to 2018 and the remainder of the claim relates to 2019. Any hearing of this case would be in late 2022 or early 2023. Two of the respondent's witnesses no longer work for the respondent.
34. The claimant contends that this is a document based case and witness evidence is not central. Although I cannot give a definitive view on the merits on the information available to me, it is apparent from the documents I have seen that the selection of the claimant for redundancy took place before her pregnancy. It was finalised after she notified HR of the pregnancy but the information was not shared with the decision makers. This does not suggest that the merits of the claim are with the claimant.
35. There is clearly prejudice to both parties if the decision goes against them. The respondent is prejudiced if an out of time claim is accepted. The claimant is prejudiced by not having the chance to have her claim heard. However, it was the claimant who failed to comply with the time limit or to lodge her claim until a significant further period had elapsed.
36. I have taken these factors into account but my primary reason for not exercising discretion to extend time is that I find that the length of the delay is excessive and the reasons offered do not provide an adequate explanation.

Employment Judge Davidson
Date 20 January 2022

JUDGMENT SENT TO THE PARTIES ON
20/01/2022.

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.