EMPLOYMENT TRIBUNALS

Claimant: L

Respondent: The Nail & Beauty Zone Ltd

Heard at: Manchester Employment Tribunal by CVP

On: 22 October 2021

Before: Employment Judge Cookson

Representation
For the claimant: in person supported by Ms S Digpal
For the respondent: Mr Lumsden (director)

JUDGMENT having been sent to the parties on 8 November 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

Background

1. At this open preliminary hearing I had to consider if the claimant's claims for indirect sex discrimination had been presented in time under s123 Equality Act 2010 ("EqA") and for less favourable treatment claim presented in time for purposes of Reg 8 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("PWR") had been brought within the relevant times limits and, if not, whether I find it is just and equitable to allow these claims to proceed.

2. The claimant in this claim worked for the respondent as a spa therapist. The claimant was dismissed with effect from either 26 June 2020 (date given in claim form) or 31 July 2020 (date given in response form). The claimant commenced Early Conciliation on 29 March 2021 and ACAS issued an Early Conciliation certificate on 13 April 2021.

3. The claim was presented on 13 April 2021.

4. At a preliminary hearing on 15 July 2021 Employment Judge Dunlop identified that the claimant was bringing claims for indirect sex discrimination under the EqA and because she says that was the subject to a detriment under the PWR. The claimant also identified that she wishes to amend her claim to bring a claim for disability discrimination but that is subject to an application to amend. There was not time for me to determine that application at the hearing to and this case is listed for further preliminary hearing to determine that and deal with other case management matters.

5. It was explained to me that the claimant was being supported today by Ms S Digpal. The claimant reports that she is dyslexic and it was highlighted to me that she may need adjustments in light of that[1]. She has been a victim of domestic abuse and experiences significant anxiety. Ms Digpal was there to provide support and encouragement to help the claimant manage her anxiety. In managing this hearing, I have been mindful of relevant guidance in the Equal Treatment Bench Book and made adjustments to the conduct of this hearing, in particular recognising the need to ensure the claimant was asked short and straightforward questions and the need to address the questions relating to domestic abuse with appropriate sensitivity especially when there is no reason at all to doubt what the claimant says about that.

6. I received evidence orally and in a written statement from the claimant. I received an unindexed bundle of documents from the respondents, although the lack of an index and time constraints made it difficult for us to refer to that in the course of the hearing. I received oral submissions for the respondent and the claimant.

7. It was clear that the respondent wished to give evidence and make submissions on the merits of the claimant's claims. I declined to allow that evidence to be given. My reason for that was this. These are claims which, if I allowed them to proceed, would be determined by a full tribunal based on a full assessment of the evidence. I was not being presented with all of the evidence in relation to the claims and if I were to make findings on the merits of these claims there is a risk that I could make findings inconsistent with the full evidence and which could embarrass the panel at the final hearing. I explained this to the parties and that I would determine whether it was just and equitable to extend time based on evidence of the length of and reason for the delay in submitting the claim, what the claimant had known about bringing a claim and balancing the prejudice to the parties arising from the

[1] If the claimant requires any adjustments in relation to judgments, orders or other correspondence from the tribunal she can explain to us what would be helpful

delay and any other relevant factors but not on the basis of evidence about the merits of the claim itself. In addition, the respondent had not produced a witness statement for the evidence it wanted to call despite the order made by Employment Judge Dunlop (order 4.2 in Part 2 case management orders) and therefore the claimant faced a substantial disadvantage because she had no advance notice of the evidence the respondent proposed to call. To allow the respondent to call that evidence would mean the parties were not on an equal footing. That was relevant in circumstances where Mr Lumsden had failed to explain why the evidence he wished to call, which I could not identify in advance because of the lack of a statement, was relevant to the issues to be determined today as identified above.

Findings of fact

8. I have made my findings of fact in this hearing on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have made findings on matters which are relevant to the issues which I needed to determine rather than all matters in dispute between the parties (and reflecting that the fact the respondent challenged the claimant's evidence but did not call evidence of its own).

9. The claimant was dismissed in late July 2020. I note there is dispute between the parties about this and it is not necessary for me to make a finding about when the precise date was at this hearing. The dismissal happened during an extremely difficult time for the claimant. For a long period of time before the pandemic lockdown began in March 2020 the claimant had been subjected to domestic abuse by her husband. Things had come to a head in 2019 and a letter from a support worker at Manchester Women's Aid attached to her statement refers to the need for her to flee her husband in March 2020 for both her physical and mental wellbeing. She had to be rehomed by Manchester Council and was receiving support from both her children's school and Women's Aid, a charity in Manchester, as well as the police. The claimant had also received support from her colleagues at the respondent at the time and expressed her gratitude for that in the course of her evidence.

10. The advent of lockdown saw an escalation in matters for her at home. There was an incident with her ex-husband which required police intervention. The claimant needed more support at a time when her children's school was less able to provide it for her as the schools closed because of the lockdown. She began experiencing panic attacks and was prescribed diazepam by her GP. Her dismissal some four months later contributed to her anxiety. I do not make any finding of causation here in any legal sense, but I accept that losing her job created further financial difficulties when she was also dealing with

home schooling her children and dealing with the situation with her ex-husband, her rehoming and the anxiety and difficulty that all of this had caused for her children.

11. At the time of her dismissal the claimant had asked for a personal explanation for her selection for redundancy because she felt the information provided to her was very general in nature and did not explain why she had been selected for redundancy and others had not. She did not feel she had received that explanation, although the respondent disputed that, but at the time of her dismissal felt she had too much to deal with to pursue that. Her children required additional support and counselling because of what had happened at home earlier in the year and during a time which had, after all, put a huge strain on many families not in the claimant's circumstances. I accept that this was a difficult and troubled time for the claimant and her children during which the claimant had prioritised her children and her mental health.

12. It was not until the following March 2021 that the claimant felt able to engage with what happened to her the previous summer. Her children had been able to go back to school and she felt well enough to follow up with her former manager. She texted the manager for clarification as follows

Can I please have in writing why I was made redundant please?
I want to know for my own pieces of mind in writing why I was made redundant and I was made redundant fairly.

I do remember having a overall letter sent but not a personal one of the reason why I was made redundant.

I do recall you saying, over the phone because my Nails and Waxing wasn't up to pure spa standard?

Can I also have the original letter that was sent to me please again.

I wasn't in the best mindset when I was made redundant.

Knowing the other girls still had their jobs, makes me question why was I let go.
Having it in writing and personally knowing why was the chosen one to be made redundant might make it clearer for me to understand.

13. The email reply from her manager on 24 March 2021 referred to how "flexible with work days" the claimant could be as being a factor in her redundancy. The claimant says that she felt that there was something wrong with that because it was because she worked part time and had child care responsibilities which was the reason for her working at time and on the advice of her siblings she made contact with Citizen's Advice Bureau and the

EHRC. She contacted ACAS on 29 March 2021 but had to wait for an appointment with them on 13 April 2021 to obtain the early conciliation certificate which enabled her to lodge her claim. She lodged her claim on the same day she received the ACAS certificate.

Time limits in discrimination claims

14. In discrimination claims and claims under the PWR I must apply a rather different test to the strict test applied to whether a claim has brought in time in unfair dismissal and other cases where the test is of "reasonable practicability". Under s123 of the Equality Act 2010 a claim must be submitted within 3 months starting with the date of the act to which the complaints relate, or such other period as the employment tribunal thinks is just and equitable".

15. There is guidance in the *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 as to how I should approach this issue. In that case, Leggatt LJ said as follows: -

    "It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980, the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998.

    That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)".

16. That means that the exercise of this broad discretion involves the multi-factual approach, taking into account all the circumstances of the case in which no single factor is determinative or the starting point. In addition to the length and reason for the delay, the extent to which the weight of the evidence is

likely to be affected by the delay, the merits, and balance of prejudice; other factors which may be relevant include the promptness with which a claimant acted once he or she knew of factors giving rise to the course of action and the steps taken by the claimant to obtain the appropriate legal advice once the possibility of taking action is known.

17. I have also taken into account the judgment of the Court of Appeal in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576 which reminds me that when Tribunals consider their discretion to consider a claim on the amount of time on just and equitable grounds, “there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule”. However, I have also reminded myself that this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable — *Pathan v South London Islamic Centre* EAT 0312/13.

Conclusions

18. I accept that at the time of her dismissal and in the months followed, the claimant found it very difficult to formulate a legal claim and present that to the Employment Tribunal because she was a victim of domestic abuse which had caused her mental health problems and she had young children in need of support and counselling. I will be clear. The claimant would not have satisfied me that it was not reasonably practicable for her to have presented her claim in time, the evidence does not warrant that finding. However that is not the test which I must apply here. I accept that the claimant had good and understandable reasons for delay in bringing her claim caused by her mental health and her need to concentrate on dealing with her personal situation and the needs of her children during the months following her dismissal. The reason for the delay is not determinative, it is just one of the things that I might take into account.

19. In his submissions in relation to prejudice to the respondent, Mr Lumsden suggested that because the respondent thought the three month time limit had expired when the manager was approached and sent her email it is prejudicial to the respondent because the claimant relies on that email in her claim. He also suggested that it is not just and equitable to extend time because the claimant somehow took advantage of the manager by approaching her in a friendly way. I do not find those to be attractive

arguments. The discovery of the new facts, for example of what might have been the “true” reason for a dismissal which:

a. could not reasonably have been known earlier during the statutory time limit period,
b. the employee reasonably and genuinely believed to be crucial to the case and to amount to grounds for a claim,
c. and where the acquisition of this knowledge was crucial to the decision to bring the claim,

is a reason why time may extended in cases where the more strict time limit applies for the vast majority of claims under the Employment Rights Act 1996.

20. The claimant says that she was told that for the first time that how “flexible with work days” she could be was factor in her selection for redundancy on 24 March 2021. The fact that her text to the manager asks for a personal explanation and a copy of a letter if one had been sent suggests that even if a letter had already been sent the claimant had not seen it. The claimant says that until then she thought the reasons for her selection were related to covid and performance. Mr Lumsden seemed to me to suggest that the claimant had acted in an underhand way when she texted the manager and this is relevant to the exercise of my discretion but, if that was his intention, I do not accept that. The claimant did not put any words into the manager’s mouth about her flexibility. She simply asked her a question. I see nothing improper in her text. The claimant may have caught the manager off guard, but I cannot anything in the claimant’s text which makes it unjust or inequitable for the manager’s response to be considered by a tribunal.

21. I appreciate that Mr Lumsden does not accept that the contents of the email from the manager should be understood in the way the claimant asserts. He both suggested that information had been provided to “soften” the real reasons and that the passage of time had impacted on recall leading to misunderstandings, presumably on the part of the manager. What is meant by that email and why the manager said what she did about the reasons for the claimant’s selection for redundancy are disputed matters to be properly explored in evidence and the facts determined by a full tribunal panel, but I see no reason why that cannot be done in this case. I have made no findings about the truth or accuracy of what the claimant says about that email.

22. Mr Lumsden also suggested that the claimant should have sought further information and raised questions about her dismissal earlier. I accept however for the reasons already set out, that the claimant had good reasons why she had not done that. A claimant is not compelled to bring a grievance before lodging a claim so it would not be right for me to find that her failure to do so was somehow a bar to bringing her claim. This is in fact just another

way of saying the respondent does not accept that the claimant had a good enough excuse for not acting earlier.

23. I accept that it was the managers' email on 24 March 2021 that prompted the claimant to believe she had a claim and to contact ACAS as the necessary first step in the litigation process for bringing a tribunal claim. The claimant received the email from her manager on 24 March 2021 and she contacted ACAS on 29 March, after seeking advice. She acted promptly at that time and it appears from her claim that it is the contents of the email which had promoted her to act.

24. Mr Lumsden referred in vague terms to memories fading over time but no specific reason why the cogency of evidence in this case has been affected was put forward nor, for example, have key witnesses now left the business. Indeed, as noted, Mr Lumsden wanted to call the manager who sent the email to give evidence before me although no witness statement had been provided for her. Whilst I acknowledge that there is undoubtedly some prejudice to the respondent if I exercise my discretion, in this case I find that the balance of prejudice falls in the claimant's favour. She believes that she does have a claim based on information she did not receive until 24 March 2020. The claimant has established to my satisfaction that it this is one of those uncommon cases where it would be just and equitable for time to be extended so that her claim can be considered.

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Employment Judge Cookson

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Date 25 November 2021

REASONS SENT TO THE PARTIES ON

22 February 2022

FOR THE TRIBUNAL OFFICE