EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110920/2021 Preliminary Hearing at Edinburgh on 1 February 2022

Employment Judge: M A Macleod

Ms Dorota Polewiak	**Claimant** **In Person**
McSence Services Limited	**Respondent** **Represented by** **Ms K Stein** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims are dismissed for want of jurisdiction, being time-barred.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 19 August 2021, in which she complained that she had been discriminated against on the grounds of pregnancy or maternity, and that she had been unlawfully deprived of holiday pay.

2. The respondent submitted an ET3 response in which they resisted the claimant's claims.

3. A Preliminary Hearing was listed to take place on 1 February 2022 in order to determine whether the Tribunal has jurisdiction to hear the claimant's claims on the basis that they may have been presented out of time.

4. The claimant appeared on her own behalf, and the respondent was represented by Ms K Stein, advocate.

5. A joint bundle of productions was produced to the Tribunal, to which reference was made by the parties in the course of the hearing.

6. The claimant gave evidence on her own account. She had the benefit of the assistance of a Polish language interpreter, Ms Beata Kubikowska.

7. The Tribunal was able to find the following facts admitted or proved.

Findings in Fact

8. The claimant, whose date of birth is 21 June 1985, presented her claim to the Employment Tribunal on 19 August 2021.

9. She notified ACAS of her intention to make a claim to the Tribunal under the ACAS Early Conciliation Scheme on 10 August 2021, and received the Early Conciliation Certificate on 18 August 2021 (1).

10. The claimant commenced employment with the respondent on 4 February 2008. She was promoted to the position of area supervisor on 8 September 2017 (70), and was provided with an increase in pay with effect from 1 October 2018 (91).

11. The claimant became pregnant and her due date for the birth of her baby was 14 June 2019. She was therefore due to commence her maternity leave in June 2019. However, she gave birth early on 29 April 2019.

12. She returned to work following her maternity leave on or around 20 February 2020.

13. She submitted a grievance to her employers on 29 March 2021 (98). Her grievance related to two matters. Firstly, she complained that she had not received the correct amounts in relation to her holiday pay, which she said should be based on her basic contractual hours plus a calculation in respect of hours worked overtime. Her complaint was that she had not received any

extra holiday payments in relation to her overtime hours since she was promoted in September 2017.

14. Secondly, she complained that after informing her manager that she was 8 weeks pregnant she was asked to do many duties which a pregnant woman should not do, such as night shift work with a buffer machine where her hands had to be placed above her head for a long time. In addition, she maintained that she required to work during the first 2 weeks after giving birth, and when her son was in intensive care, but she was not paid for that work.

15. The grievance was investigated by Martha Convie, Service Manager, who met with the claimant on 31 May 2021. She issued a letter to the claimant confirming the outcome of the grievance (103). In that letter, she described the grievance as an "informal grievance". She concluded that "after a thorough investigation, you are correct that these things did happen, and we accept they shouldn't have happened, but unfortunately they did." She went on to say that the respondent would be paying wages and monetary amounts for the hours worked, together with holiday pay deductions up to two years.

16. She then advised the claimant that if the matter were not resolved, she could appeal to the Group Operations Manager.

17. The claimant was dissatisfied, and did appeal against the outcome. That appeal was heard by Alan Paterson, Operational Manager, and he did not uphold the appeal, issuing his decision on 28 June 2021 (105). He confirmed that the claimant had a further right of appeal to the Chief Executive.

18. The claimant did take up that right of appeal. This appeal was heard by David Maxwell, Chief Executive, and again the decision (107) issued on 10 August 2021 confirmed that the appeal was not upheld, for reasons set out therein.

19. After receiving that letter, the claimant contacted ACAS in order to precipitate the Early Conciliation process. When she received the Early Conciliation Certificate, on 18 August 2021, the claimant decided that she would present her claim to the Tribunal, and did so on 19 August 2021.

20. In the claim form (8), the claimant said that she did not know her rights and only found out about this when she spoke with a friend. She said that she understood the "time limit barrier" but that her employer had wrongly informed her about her rights, which delayed her finding out what those rights were.

21. On 2 November 2021, having appeared a Preliminary Hearing before the Tribunal, for the purpose of case management, the claimant submitted an email to the Tribunal (53) in which she set out the reasons for the late presentation of her claim.

22. Firstly, she said that from the premature birth of her baby until her return from maternity leave she was focused on the baby's survival and recovery. She said that he was hospitalised "many times" in Edinburgh due to virus infections about once a month. She found it to be a difficult time.

23. Secondly, she argued that she was not aware that the respondent's actions were against the law. She was not advised by her manager about her maternity leave rights but was requested to carry out work during her leave. She said that her manager told her that she could not be paid during maternity leave as she could thereby lose it.

24. Thirdly, when she returned to work in February 2020, she concentrated on adjusting to work again, balancing it with childcare responsibilities, and shortly thereafter she said that with the coronavirus pandemic spreading she had to concentrate on herself and her family's health and budget. She also said that the lawyers and advice centres were closed due to the pandemic, and as soon as she returned to work she raised her grievance before taking any action outwith the company. She was not advised by her employer that taking action would make a Tribunal claim more difficult.

25. Fourthly, she only realised that her employer was not properly paying her holiday pay when she changed her terms and conditions in February 2021.

26. She said that she did not think it was just and equitable that the respondent treated her as they did.

27. As at March 2021, the claimant was aware of Employment Tribunals, and that their purpose was to resolve problems between employers and employees. She understood that she had the right to take a claim to an Employment Tribunal but though that she had to raise a grievance and go through that process with her employer. She checked the respondent's handbook (141) and understood that that was the position suggested there.

28. She also considered that the Grievance Policy (89) required her to go through the process internally, but acknowledged that there was no mention there about the fact that she could or could not submit a Tribunal claim in the meantime. She contacted ACAS so as to obtain advice following the outcome of the second grievance appeal.

29. The reason she contacted ACAS was that she had checked the Government website which told her that she needed an ACAS reference number before she could present her claim to the Tribunal. She had not checked the website before that because she was "100% sure" that she had to follow the company procedure before presenting her claim to the Tribunal.

30. She produced her GP medical records for the relevant period (119). On 4 August 2020, there is an entry noting that a telephone consultation took place due to Covid-19. It was noted:

"main social stress factor relating to partner ex wife has strained sleep a very bigg (sic) issue, some weight loss and poor apetiteno thought suicide/self-harm feels shaking a lot, 15 month at home, premature but doing okay, not breastfeeding PMH: stress 5 years ago but resolved due to work situation. Meds – nil. SH: no illicit drugs, smoking but no in house as has child O/E answered call quickly, sounds a little upset and tearful,

speech a little slow but easy to form rapport with. Imp: anxiety/depression secondary to external stressors. Plan: discussed meds, short term sleep aid, mirtazapine, trazodone as help sleep, opted mirtazapine as positive weight and sleep impact, made aware not as anxiety treating, follow up booked 3 weeks, aware MHAS as has already contacted…"

31. She had further appointments with her GP on 27 August, 18 September and 20 October 2020. Her prescription was changed to fluoxetine which appeared to help her.

32. On 30 June 2021 she expressed concern to her GP about stress at work following her grievance about pay, and was signed not fit for work for 2 weeks. On 15 October 2021, a further telephone consultation confirmed that she was having stress at work, being called in for frequent meetings, and exhibiting physical symptoms of anxiety.

33. On 4 November 2021, the claimant had a telephone consultation with her GP about her ongoing issue at work, reporting that she felt worse rather than better. She was not reporting suicidal or self-harming thoughts, but the doctor prescribed paroxetine 20mg, and continued propranolol.

34. In her evidence, the claimant said that she was unable to focus on important matters while suffering from anxiety. She said she was trying to do her best to look after her baby, but she was very nervous about her own safety. She had been very concerned that after she was able to take the baby home, following a month in hospital after birth, she was unable to take him out for the next three months, and when she started to take him out, he would tend to contract infections. She was anxious about protecting him.

35. She said that she discovered that the respondent's actions were against the law in January 2021 when speaking to a friend who was shocked that she had to fulfil work obligations while she was on maternity leave. That was when she checked in the company handbook as to how to make a claim. She found out that there was a problem with her holiday pay when the respondent changed her terms and conditions in January 2021 and checked her new contract against her existing contract.

36. She discovered when she did that that her overtime should have been taken into account in the calculation of holiday pay.

37. The claimant was still being treated for anxiety as at the date of this Hearing.

Submissions

38. For the respondent, Ms Stein presented a skeleton argument whose terms she simply adopted. The claimant chose not to add anything to her evidence.

39. In the respondent's submission, it was clarified that the claimant's claims related to pregnancy or maternity discrimination contrary to sections 18 and 72 of the Equality Act 2010; pregnancy detriment under section 47C of the Employment Rights Act 1996 and Regulation 19 of the MPLR 1999; unlawful deduction of wages in respect of holiday pay contrary to the Working Time Regulations 1998, and unlawful deduction of wages in respect of overtime payments.

40. Ms Stein set out the appropriate legal test for the Tribunal to consider in determining whether it would be just and equitable to extend the time within which to present the claim for pregnancy or maternity discrimination, when the claim should have been presented no later than 3 months from the date of the allegedly unlawful act.

41. She submitted that the delay causes prejudice to the respondent, on the basis that they would be put to the time and expense of defending a claim which is prima facie time-barred, but also that there has been a long lapse of time during which the respondent was not aware that the claim would be raised. The balance of prejudice would fall upon the respondent.

42. It would have been reasonably practicable for the claimant to have lodged her claims under the Employment Rights Act 1996 within the statutory time limits. The claimant has set out a number of reasons why she was unaware of her rights: that she was advised incorrectly by her manager during her pregnancy, that she became aware of her outstanding holiday pay claim on

receipt of her renewed terms and conditions, that she was preoccupied with her baby's health from 29 April 2019 until the end of her maternity leave and that after the end of her maternity leave the country went into lockdown and lawyers and advice centres were closed.

43. Ms Stein submitted that when a claimant relies upon ignorance or mistakes the Tribunal requires to determine whether or not that ignorance or mistake was reasonable. The length of time here is too long to be reasonable. The explanations provided do not cover the lengthy period of time during which it would have been appropriate for her to have taken action to raise her Tribunal claim.

44. She concluded by arguing that the claimant has not provided a sufficient explanation for the claim having been presented so significantly out of time, and that the claims should therefore be struck out.

The Relevant Law

45. Section 48(3) of the Employment Rights Act 1996 sets out the time limits for presenting a claim under section 47C:

> *"An employment tribunal shall not consider a complaint under this section unless it is presented—*
>
> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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."*

46. What is reasonably practicable is essentially a question of fact and the onus of proving that presentation in time was not reasonably practicable rests on the claimant. "That imposes a duty upon him to show precisely why it was

that he did not present his complaint." (**Porter v Bandridge Ltd [1978] ICR 943**).

47. The best-known authority in this area is that of **Palmer & Saunders v Southend-on-Sea Borough Council 1984 IRLR 119**. The Court of Appeal concluded that "reasonably practicable" did not mean reasonable but "reasonably feasible". On the question of ignorance of the law, of the right to make a complaint to an Employment Tribunal and of the time limits in place for doing so, the case of **Porter (supra)** ruled, by a majority, that the correct test is not "whether the claimant knew of his or her rights, but whether he or she ought to have known of them." On ignorance of time limits, the case of **Trevelyans (Birmingham) Ltd v Norton EAT 175/90** states that when a claimant is aware of their right to make a claim to an employment tribunal, they should then seek advice as to how they should go about advancing that claim, and should therefore be aware of the time limits having sought that advice.

48. The Tribunal also took into account **Cambridge and Peterborough NHS Foundation Trust v Crouchman [2009] ICR 306** in which the discovery of new factual information should be taken into account by the Tribunal in determining this matter. However, it is to be noted that this will only assist the claimant in circumstances where he initially believes that he has no viable claim, but changes his mind when presented with new information. In that case, the appeal letter contained reference to crucial new facts which genuinely and reasonably led the claimant to believe that he had a viable claim.

49. Section 123(1) provides that:

"Proceedings on a complaint within section 120 may not be brought after the end of –

i. the period of three months starting with the date of the act to which the complaint relates, or

ii. such other period as the employment tribunal thinks just and equitable."

50. The Tribunal had regard to the authorities to which the respondent referred on the interpretation of "just and equitable" and the extent to which it would be appropriate to exercise its discretion under this section.

Discussion and Decision

51. In this case, there are two separate categories of claims made, in respect of which the legal tests are different in determining the Tribunal's jurisdiction to hear the claims.

52. The claimant's claim under the Equality Act 2010 relates to allegedly unlawful acts carried out during the claimant's maternity leave, which ended in January 2020, though she did not return to work until February, having taken annual leave to extend her time away from work.

53. The claim was not presented to the Tribunal until 19 August 2021, some 19 months later. Her claim is therefore significantly out of time, and it is for the Tribunal to determine whether or not it is just and equitable to allow the claim to proceed.

54. In the well known case of **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434**, the court confirmed that it is of importance to note that time limits are exercised strictly in employment and industrial cases. "When tribunals consider their discretion to consider a claim out 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 complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

55. **British Coal Corporation v Keeble [1997] IRLR 336** is authority for the proposition that the Tribunal should consider the prejudice which each party would suffer. Factors which the Tribunal require to consider are set out in that case, including the length and reason for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued had cooperated with any requests for information,

the promptness with which the plaintiff had acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

56. The length of the delay in this case is, as above, approximately 16 months (taking into consideration the three months permitted by the Act). The reason for the delay appears to be three-fold: that she believed she had to proceed through the grievance process before going to Tribunal; that her baby was unwell and this preoccupied her for some time, and continues to do so; and that she herself suffered from a stress-related illness which resulted in visits to her doctor and the prescription of medication.

57. In my judgment, while sympathy must be extended to the claimant, particularly in relation to the difficulties of coping with a premature birth and the consequences for the baby, and the undoubted health issues from which she has suffered, the most convincing explanation for the delay is that she was awaiting the outcome of the grievance procedure before presenting her claim to the Tribunal.

58. She took no steps to investigate her rights and how she would require to seek to enforce them until the point when she realised that her grievance would not be upheld. She had known of the actions of the respondent since her maternity leave but had taken no steps to progress the matter outwith the respondent's organisation. She accepted – as she must – that there is nothing in the respondent's handbook or grievance policy which leads her to believe that she could not present her claim to the Tribunal at the same time as lodging a grievance.

59. At no stage did she seek professional advice, though she did contact ACAS after consulting the Government website which told her of the need to initiate early conciliation.

60. I am not persuaded that the explanation for the delays in raising her discrimination claim are sufficient to cover the excessive length of time which it took the claimant in this case to present her claim to the Tribunal.

Extensions of time are only granted in exceptional circumstances, and in my judgment this case does not fall into that category. The claimant was plainly able to articulate her complaints, and during that long period she was largely in attendance at work. While she was clearly preoccupied with her baby, and had other concerns, she was not prevented from taking steps to protect her position by raising a claim with the Tribunal. She was able to take those steps at the point when she sought advice from ACAS and there is no explanation as to why she did not contact ACAS at a much earlier stage.

61. There is no basis, further, for blaming the respondent for having misled her. They were entitled to point her to the grievance procedure as the appropriate internal method of resolving complaints, but they did not, on the evidence, ever suggest to her that she could not or should not raise Tribunal proceedings concurrent with that internal process.

62. The Tribunal must consider the balance of prejudice. In my judgment, the balance of prejudice would fall more heavily on the respondent if this case were allowed to proceed than upon the claimant if it is dismissed. While the claimant loses a significant right, to make a claim to the Tribunal, she does so due to her failure to comply with strict statutory deadlines. The respondent would require to face in Tribunal complaints which relate to matters which have not been current for more than 18 months prior to the claim having been submitted. In my judgment, it would be unjust and prejudicial to insist that the respondent be required to address these matters after such a long delay without adequate explanation.

63. Accordingly it is my judgment that the Tribunal lacks jurisdiction to hear the claimant's claim of discrimination on the grounds of pregnancy or maternity on the basis that it is time-barred, and that it is not just and equitable to allow the claim to proceed.

64. With regard to the claims under the Employment Rights Act 1996, the test is essentially whether it was not reasonably practicable for the claims to have been presented within three months of the date of the unlawful acts.

65. The unlawful acts in these claims are related to the claimant's payment claims and the respondent's alleged failure to pay her holiday pay properly backdated.

66. Again, the explanation for the delay here appears to turn on the same points as in the discrimination claim. The claimant was aware, on 27 January 2020, that her terms and conditions had changed and it was at that point it occurred to her that her holiday pay should have included calculation of her overtime payments.

67. The claimant presented her claim to the Tribunal within a short time after the grievance outcome was received on 10 August 2021. Again, however, her explanation was that she was awaiting that outcome as she understood that she had to go through the internal process before doing so.

68. In my judgment, it cannot be said that it was not reasonably practicable for the claimant to have presented her claims under the 1996 within three months. The claimant did suffer some illness due to anxiety, though she was able to remain at work for the majority of the time following her return from maternity leave. She was able to present a grievance to the respondent, and to attend three grievance hearings, two of which were appeal hearings. She was able to carry out normal functions and to look after her baby.

69. The fact that the claimant misunderstood the position with regard to the Tribunal claim is not based on a reasonable understanding. She took no steps, until a very late stage, to investigate her legal rights or any time limits which may apply. She was clearly capable of doing so, having consulted both the Government website and ACAS when she needed to.

70. The test is a stringent one, and in my judgment, on the evidence, it cannot be said that it was not reasonably feasible for the claimant to have presented her claims in time.

71. Accordingly, it is my judgment that the Tribunal lacks jurisdiction to hear the claimant's claims under the Employment Rights Act 1996 owing to time bar.

Employment Judge: Murdo Macleod
Date of Judgment: 23 February 2022
Entered in register: 25 February 2022
and copied to parties