EMPLOYMENT TRIBUNALS

BETWEEN

Claimant Amy Saywell-Tune

Respondent Pear Tree House Rehabilitation Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Bristol **ON** **22 April 2021**
By Cloud Video Platform

EMPLOYMENT JUDGE K Halliday

Representation

Claimant: In person
Respondent: Barnaby Large of Counsel

JUDGMENT

The judgement of the Tribunal is that the Claimant's claim was issued outside the statutory time limit for such claims under s. 111 of the Employment Rights Act 1996 and it was reasonably practicable for it to have been issued in time and it is therefore dismissed.

REASONS

Preliminary matters

1. This matter was listed for a preliminary hearing to determine whether or not the claim was presented within the statutory limit prescribed by Section 111 of the Employment Rights ACT 1996.

2. The hearing was held remotely by Video on the Cloud Video Platform with the consent of the parties. Following connection issues, and by agreement, the Claimant continued to participate in the hearing by telephone part way through the hearing.

3. I heard evidence from the Claimant, from Ms Wasilek for the Respondent and had written and oral submissions from the Respondent and considered some further representations made by the claimant. I was referred to documentation during the hearing contained in the paginated bundle (52 pages).

4. The claimant relies on the following factors to explain the delay in issuing proceedings:

   4.1. her belief that she needed to await the outcome of the internal appeal;
   4.2. a relationship break-up in June and the need to care for her son;
   4.3. depression and feelings of "discrimination against her mental health" (although she did not understand there to be discrimination within the statutory framework).

Findings of Fact

5. I find the following relevant 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.

6. The claimant was employed as community support worker by the respondent from 31 July 2017 until her employment terminated by reason of her resignation on 5 April 2020.

7. In December 2019, the claimant provided a letter from her GP dated 20 December 2019 to the respondent confirming that she was fit to attend work. No other medical evidence was provided, but I find that she remained fit to attend work from that point until 13 July 2020 although I accept her evidence that she did suffer from depression.

8. In early 2020, the claimant was subjected to disciplinary action and a disciplinary hearing was held on 17 March 2020.

9. During the course of the disciplinary process the claimant spoke to ACAS on at least two and potentially three occasions and received advice in relation to: her suspension; compliance with the ACAS Code; and the requirement to submit evidence before a hearing, as referred to in emails dated 19 February 2020, 4 March 2020 and 15 March 2020 (pages 39, 40 and 43 of the bundle). She also used "google" to research her entitlements.

10. The claimant resigned from her employment with the respondent on 23 March 2020 with effect from 5 April 2020 before the outcome of the disciplinary hearing was known. The claimant resigned as she believed she was likely to be dismissed following the hearing and did not want a finding of gross misconduct on her record.

11. The claimant started a new job on 30 March 2020.

12. The respondent is a regulated care provider and therefore was required to conclude the disciplinary process. It notified the claimant on 11 May 2020 that, but for her resignation, she would have been dismissed for gross misconduct.

13. Prior to receipt of this letter, the claimant had taken no action to pursue a claim against the respondent.

14. The claimant appealed against the disciplinary outcome on 20 May 2020. An appeal hearing was arranged for and held on 9 June 2020 but the claimant did not attend because, as she said in an email to Peter Lock the appeal officer, on 16 June, "it completely slip my mind and I was also working".

15. The claimant did not explore the possibility of making a claim at this point as it "just wasn't a priority" as she had a lot going on and didn't have the time or the energy. She also stated in her evidence that "life is busy, I had mental health issues, a new job and my home life was more important at that time".

16. The claimant's relationship broke down in or around June 2020 and throughout the pandemic and particularly after her partner left, she had the additional pressure of caring for her son.

17. The claimant spoke to first the citizen's advice bureau and then to ACAS on 13 July 2020 and was informed of the 3 month time limit for bringing a claim. An ACAS conciliation certificate was issued the same day and the claimant issued a claim for constructive unfair dismissal also on 13 July 2020.

18. In this case the claimant's effective date of termination of employment was 5 April 2020. The three month time limit had therefore expired at midnight on 4 July 2020.

19. In her ET1 the claimant stated: …" I know I am around a week out of time to appeal, I wrongly assumed I had to follow the steps of appealing the decision and then wait for that outcome….". It was clarified in evidence that she understood herself to be a week out of time in issuing a claim. She also stated that "Along side being depression this has effected my life and mental health dramatically and I have buried my head a little bit…".

20. The appeal outcome was sent to the claimant on the 7 August 2020 and the original disciplinary decision was upheld.

21. Having established the above facts, I now apply the law.

The Law

22. Section 111(2) of the Employment Rights Act 1996 ("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.

23. A prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings and Section111(2A) provides for an extension if a time limit would apply during or after early conciliation.

24. 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; Wolverhampton University v Elbeltagi [2007] All ER (D) 303 EAT; Schultz v Esso Petroleum Ltd [1999] IRLR 488; Bodha v Hampshire Area Health Authority [1982] ICR 200; Benton v Give 2 Give ET 2302156/2017; Miller v Community Links Trust Limited (UK EAT/0486/07); Abbey National v Riddick EAT 0369/04. Mitchell v Inner London Probation Service (ET Case no:1100823/98 IDS p325) Case.

25. Where a claim is presented outside the period of three months it is necessary to ask firstly whether it was not reasonably practicable to present the claim in time and, only if it was not, go on to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated. There is no general discretion to extend time and the burden of proof is on the claimant to establish that both parts of the test are satisfied (Benton and Miller).

26. The question of whether or not it was reasonably practicable for the claimant to have presented her 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).

27. In Palmer and Saunders v Southend-on-Sea BC the headnote states: "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.

28. 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.

29. 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". See also Schultz v Esso Petroleum Ltd.

30. 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).

31. 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.

32. Mr Large has referred me to two cases. The case of Abbey National v Riddick (EAT) where an extension was granted on the basis of medical evidence from a consultant that the claimant’s health had only just reached the point where he was able to initiate proceedings and the first instance decision in Mitchell v Inner London Probation Service (ET) where the Tribunal found that severe depression fell short of the threshold for extension given the claimant’s coherent written appeal at the time.

Conclusion

33. The grounds referred to by the claimant in her evidence to show that it was not reasonably practicable to have issued proceedings within the relevant time limit are that she believed she needed to await the outcome of the internal appeal before issuing proceedings; her depression and feeling that she had been discriminated against; and personal pressures arising out of the breakdown of her relationship in June and the need to care for her son which was harder during the pandemic and after her relationship broke down.

34. The claimant submitted no medical evidence other than confirmation that she was fit to work on December 2019, a situation I have found continued until 13 July 2020. Specifically, she did not submit any evidence to confirm that her depression prevented her from issuing proceedings and I find that neither her depression nor her feelings of discrimination precluded her from acting.

35. Likewise, I do not find that her personal circumstances, although clearly challenging, meant that it was not reasonably feasible for her to have contacted ACAS and brought a claim.

36. I am satisfied that there was no physical impediment preventing her from issuing proceedings and that she was not misled either by the respondent or by an advisor about the time limits as she did not seek advice from the citizen's advice bureau or ACAS until after the three month limitation period had expired.

37. I have found that the claimant had previously contacted ACAS during the disciplinary proceedings and the emails sent by her during the disciplinary process demonstrate that she was well able to establish and articulate her rights as an employee.

38. I have considered carefully the claimant's assertion that she believed that she needed to exhaust the internal appeal process before she could issue proceedings. However, I am not satisfied that this was the reason for her delay. I have accepted her evidence that she did not consider bringing a claim at all until after she received the disciplinary outcome letter dated 11 May 2020, notwithstanding that she had resigned on 23 March 2020. I have also found that issuing proceedings was not a priority for her after that date as she had a lot going on her life at that time and I am satisfied that the actual reason for her failing to take any action to pursue a claim was just that – that it was not a priority for her. I am also mindful of the fact that at the point that she did contact ACAS and submit her claim, she was still awaiting the appeal outcome

and I therefore find that that there was no material change in her circumstances between 4 July 2020 when the limitation period ended and the 13 July when she did contact ACAS and no reason why this step could not have been taken earlier. I therefore conclude that it would have been reasonably feasible for her to establish whether she was able to bring a claim before 4 July 2020 and the time limits for doing so and likewise reasonably feasible for her to issue a claim within the three month time limit on or before 4 July 2020.

39. The claim is therefore out of time as it was not submitted within the period of three months of the termination of employment in circumstances where it was reasonably practicable to do so.

40. I do not therefore need to consider the second stage of the test, as to whether the claim was submitted within a further reasonable period under section 111(2)(b) ERA.

41. 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 5 to 21; a concise identification of the relevant law is at paragraphs 22 to 32; how that law has been applied to those findings in order to decide the issues is at paragraphs 33 to 39.

Employment Judge K Halliday
Date: 16 May 2021

Judgment sent to Parties: 21 May 2021

FOR THE TRIBUNAL OFFICE