EMPLOYMENT TRIBUNALS

Claimant: Miss G Nkoumbou

Respondent: Connect Assist Limited

Heard at: Cardiff (by video) **On:** 18 February 2022

Before: **Employment Judge G Cawthray**

Representation
Claimant: In person
Respondent: Mr Pollitt, Counsel

JUDGMENT having been sent to the parties on 23 February 2022 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

Introduction

1. The hearing on 18 February 2022 was a public preliminary hearing following an earlier telephone case management preliminary hearing (TCMPH) on 27 July 2021. At the TCMPH EJ Ryan explained the nature of the hearing today and the issues that would be determined.
2. At the TCMPH it was recorded that the Claimant was making the following complaints:
    a. Unfair dismissal – the Claimant said that she accepted that she was not employed for 2 years but "still [does not] think it should be cancelled". It was explained to the Claimant that she must show why she says she comes within an exception to the 2-year qualifying requirement.
    b. Direct disability discrimination about the following (where she was treated less favourably than the three colleagues who shared a room with her):
        i. Being ignored by colleagues and management in the office;
        ii. Management not replying to her emails;
        iii. Receiving warnings about absences from work due to ill- health when others were not; and
        iv. Being dismissed.

c. Discrimination arising from disability: The Claimant says that her knee condition would make her late for work on occasions as her knees stiffen or dislocate; she was late for this reason on 31st October 2019. Dismissal is unfavourable. The Claimant says she was dismissed for being late for work on 31st October 2019.

3. The Claimant relies on two disabilities: dyslexia and a knee condition leading to swelling and dislocation.

Issues

4. The issues for determination today are as set out Record of Hearing from the TCMPH and Notice of Hearing, summarised below:

a. Compliance with Early Conciliation (EC) requirements;
b. Whether the claims, or any of them, are out of time;
c. Disability;
d. Jurisdiction – qualifying employment;
e. Strike out – merits;
f. Deposit Order – merits.

5. I discussed the issues and approach to the hearing with the parties. The Claimant explained that she wished to withdraw the unfair dismissal claim (being the ordinary unfair dismissal claim under section 94 of the Employment Rights Act 1996) and only wished to continue with her disability discrimination claims. I explained to the Claimant how a dismissal upon withdrawal worked, namely she would not be able to later try and reinstate such a claim. The unfair dismissal claim was dismissed following withdrawal, and this has been set out in a separate judgment.
6. The Respondent raised that it was not able to properly deal with the issue of whether or not the Claimant was disabled because the Claimant had not provided medical records in breach of the tribunal orders. I noted there had been a significant volume of correspondence on the provision or otherwise of medical records. After discussion with parties, in view of the number of issues, the time available and the position regarding medical evidence it was agreed that it would be sensible to deal with the issues set out at 4.a, 4.b, 4.e and 4.f first, noting that upon withdrawal of the unfair dismissal claim 4.d was no longer an issue. I explained to the Claimant that during the first part of the hearing I would be making no decision on whether or not she was disabled, and would be considering the other issues. I explained that if her claim continued, after a decision had been reached on the issues, we would then return to dealing with whether or not the Claimant was disabled.
7. I explained to the Claimant I was only making a determination on the above preliminary issues, and that this wasn't a final hearing to determine the full merits of the claim.

Procedure/Evidence

8. I checked with the parties that we all had the same documentation. I was provided with an agree bundle amounting to 144 pages, emails dated 14 February 2022 and emails dated 17 February 2022.
9. The Claimant provided a witness statement and gave oral evidence.
10. The Respondent had provided a witness statement for a Gemma Banks, but Ms Banks was not called as a witness.
11. The Respondent had also provided a skeleton argument.
12. I explained to the parties that the Bundle would not be read from start to finish, and that if they wished me to consider a particular document, they should direct me to it.

13. I explained the difference stages of the hearing to the Claimant, namely the difference between giving evidence and summarising the position in submissions and directed the Claimant to the issues and repeated an explanation of the process several times throughout the hearing.

Findings of Fact

14. The Claimant was employed by the Respondent from the 14th of August 2019 to 31st of October 2019.
15. On 16 September 2019 the Claimant attended a meeting and her lateness was discussed. She was issued with a warning.
16. The Claimant took a period of sickness absence end Sept/start of October 2019 due to a vomiting bug.
17. The Claimant was dismissed on 31 October 2019, within her probationary period and the dismissal letter set out the reasons being her arrival for work late on 3 occasions and 5 days sickness absence due.
18. The Claimant contacted the Citizens Advice Bureau in November 2019, and first contacted ACAS in December 2019. The Claimant stated she spoke with ACAS a number of times in December 2019, January 2020 and February 2020 but all the calls are not logged on the log she provided as in the Bundle.
19. The Claimant stated she was aware of the time limits.
20. The Claimant also made numerous attempts to discuss the matter with the Respondent in December 2019.
21. On or around 14 January 2020 the Claimant spoke with Gemma Banks of the Respondent. The Claimant was clear by the end of the discussion that the Respondent would not offer any right of appeal and would not discuss the matter with her further. It was at this point the Claimant, having previously spoken with CAB and ACAS, determined she would take the matter further to the ET. The Claimant explained she was aware of the time limits.
22. The ET1 was submitted online on 29 February 2020. The ET1 online form contains instructions regarding the need to include an ACAS EC Certificate number.
23. The ET1 did not contain an EC certificate number and the Claimant had ticked the box indicating that this was a case of interim relief and therefore an EC certificate was not required.
24. The Tribunal rejected the claim and a notice of rejection was sent to the Claimant on 3 March 2020 the rejection letter enclosed the standard explanatory notes.
25. The Claimant contacted ACAS on 9 March 2020.
26. The Claimant attempted to contact the Respondent further on 19 March 2020.
27. The Claimant contacted ACAS several times on 3 April and an EC certificate setting out Day A and Day B as being 3 April 2020 was issued by email on the same day, 3 April 2020.
28. The Claimant stated that Covid had caused a delay in the EC certificate being provided. I do not accept that the pandemic had any bearing on matters pre mid-March 2020.
29. The Claimant was sent an acknowledgment of the claim on 30th of November 2020 and the ET1 was served upon the respondent.
30. I note the Claimant referenced having a broken foot, however the details on when she broke her foot were not clear and no corroborative evidence was provided.
31. I accept ACAS routinely provide information on the operation of time limits and role of Early Conciliation as set out at page 92 of the Bundle. On the balance of probabilities, considering all of the evidence, I determined that Claimant was aware of the deadlines prior to the submission of the ET1, before the deadline, and knew this as early as December 2019.

Law

ACAS Early Conciliation

The provisions in relation to the requirement to participate in ACAS Early Conciliation are set out in sections 18 to 19 of the Employment Tribunals Act 1996.

Time limits

Discrimination

32. Section 123 of the Equality Act 2010 sets out the time limit for bringing harassment and discrimination claims in the Tribunal. It provides that complaints of discrimination should be presented within three months of the act complained of:

    (1) Subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –
    (a) the period of three months starting with the date of the act to which the complaint relates, or
    (b) such other period as the Employment Tribunal thinks just and equitable."
    (3) For the purposes of this section –
    (a) conduct extending over a period is to be treated as done at the end of the period.

33. Section 123(1)(b) provides that where a discrimination claim is prima facie out of time it may still be brought "within such other period as the Tribunal thinks is just and equitable". This provides a broader discretion than the reasonably practicable test for other claims, such as unfair dismissal.
34. The time for presenting a claim is extended for the duration of ACAS Early Conciliation.
35. However, where the ACAS EC process was started after the primary time limit had already expired the ACAS " freezing" of the time limits does not operate to assist a Claimant (Pearce v Bank of America EAT 0067/19).
36. Time limits should be adhered to strictly (relevant case being Robertson v Bexley Community Centre 2003 EWCA CIV 576.) The burden of proof is on the Claimant.
37. The case law on the application of the "just and equitable" extension includes *British Coal Corporation –v- Keeble [1997] IRLR 336*, in which the Employment Appeal Tribunal ("EAT") confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in Keeble:-

    "that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –
    (a) the length of and reasons for the delay;
    (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
    (c) the extent to which the party sued had cooperated with any request for information;
    (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
    (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

38. However, this list of factors is a guide, not a legal requirement. The relevance of the factors depends on the particular case.
39. In *Aberttawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194* the Court of Appeal noted that the tribunal has a wide discretion and the Tribunal was not restricted to a specified list of factors.
40. The most important part of the exercise is to consider the length and reasons for the delay and balance the respective prejudice to the parties.
41. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]* the Court of Appeal considered the extent of the discretion. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

    "it is also of importance to note that the 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 a 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."
42. Subsequently in *Chief Constable of Lincolnshire -v- Caston [2010] IRLR 327* the Court of Appeal in confirming the Robertson approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.
43. Rule 37 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 states:

    "Striking out 37.—

    (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
    (a) that it is scandalous or vexatious or has no reasonable prospect of success;
    (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
    (c) for non-compliance with any of these Rules or with an order of the Tribunal;
    (d) that it has not been actively pursued;
    (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
    (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
    (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in Rule 21 above."

44. Rule 39 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 states:

    "Deposit orders 39.—

    (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
    (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.
(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

Conclusions

Compliance with ECC requirements

45. As set out above, the ET1 was submitted indicating that an ACAS EC Certificate was not required and the claim was initially rejected.
46. The Claimant had failed to comply with the requirement to obtain an EC Certificate before submitting the claim. Noting the claimant subsequently obtained an EC certificate and presented this to the Tribunal at which point the Tribunal accepted the claim, it being treated as having being accepted on 3 April 2020.
47. I understand that no revised ET1 has been submitted, but it appears the Tribunal treated the defect as having been rectified on 3 April 2020. Noting the reasons for the introduction of EC and the aim of resolving claims and not as a hurdle to prevent claims from being brought, I have decided that the error was rectified on 3 April 2020, upon the Claimant sending the EC certificate. However, it is important to note the EC Certificate was provided after the expiration of the ordinary time limit.

Whether the claims, or any of them, are out of time

48. The Claimant has sought to bring disability discrimination. The Claimant was employed from the 27th of August 2019 to 31st of October 2019.
49. The dates of the alleged discrimination have not been clearly set out, and the Claimant did not set out any clear argument about whether the alleged act of discrimination amounted to a course of conduct.
50. However, taking the last alleged discriminatory event, dismissal on 31 October 2019, on the face of it the Claimant presented her claim outside the primary time limit, which expired on 30 January 2020. However, the Claimant did not submit an ET1 until 29 February 2020, almost 1 month past the ordinary deadline.
51. This deadline is of course subject to any extension under the ACAS EC provisions.
52. However, as noted above the Claimant, despite being in contact with ACAS as early as December 2019, and having sought advice from the CAB, did not obtain an EC certificate until 3 April 2020, after her claim had initially been rejected by the Tribunal. Accordingly, she does not benefit from any EC extension.

53. The Tribunal has its discretion to extend the time limit if it considers it is just an equitable to do so and in deciding whether it is just an equitable to extend the time limit the Tribunal is entitled to account take into account anything that it deems to be relevant. There are a number of factors that the Tribunal may take into account such as length and reasons for the delay, the extent to which evidence may be affected by the delay, the extent to which the party against whom the claims brought has cooperated with requests for information, the promptness with which the Claimant acted once they knew of the possibility of taking action, the steps taken by the Claimant to obtain legal advice. As set out in established case law, the factors above may be a useful checklist but there is no obligation on the Tribunal to work through the list. It is important to note that time limits are applied strictly in employment tribunal cases and the burden on satisfying the Tribunal is on the claimant and the exercise of discretion should be the exception and not the rule.
54. The Claimant's evidence was unclear and confused at times, and there was contradiction between some of the documentation. However, the key findings on the steps the Claimant took are set out in the findings of fact above.
55. I consider it to be of great significance that the Claimant engaged with CAB, ACAS and the Respondent in a number of calls before the expiration of the ordinary time limit, and indeed that the Claimant accepted she was aware of the existence of time limits from her discussions. I also noted the standard approach to information given by ACAS, which accords with the Claimant's acceptance that she was aware of the deadline.

56. In reaching my decision on whether the Claimant presented her claim within such other period as I think is just and equitable, I have considered a range of factors, in accordance with case lase, and now turn to these.

Length of delay

57. Treating the date of presentation of the EC certificate as the rectified date and therefore the date claim was submitted, on 3 April 2020, the claim is just over two months late (noting 30 January 2020 was the primary deadline). This is not an insignificant period of time given a time limit of 3 months.

Reason for delay

58. The Claimant, confusingly at times, seeks to argue that the delay in receipt of the ACAS EC certificate was due to the fault of ACAS and was impacted by the pandemic. I do not consider that to be the case. The Claimant promptly contacted CAB in November 2019 and ACAS in December 2019, this is pre-pandemic (noting the first national lockdown commenced on 23 March 2020). On her own admission she was aware of the three-month time limit. The ACAS EC Certificate was provided by email on the day it was produced.
59. It is always sensible for parties to try and resolve disputes without the need to go to an Employment Tribunal, and the Claimant is not criticized for taking steps to discuss the matter with the Respondent. However, resolution attempts do not avoid the necessary and important time limits.
60. The Claimant asserts that she did what she was told by ACAS and sought to resolve internally, but she also acknowledges she was aware of the deadline.
61. I note in particular that on 14 January 2020 a conversation took place between the Claimant and Respondent, and that the Claimant was clear at that point that the Respondent would not revisit the issue. The Claimant's own evidence was that it was at that time she decided to take the next step and lodge a claim at the employment tribunal. Yet she did not submit a claim until almost 6 weeks later. She provided no reasonable explanation for that delay.
62. I also note in particular the Claimant completed the ET1 form online and there are various notes/guidance in relation to ACAS EC process, yet the Claimant did

not contact ACAS around the time of submission, when she quite easily could have done so, having already been in contact.

63. I note the Claimant referenced having a broken foot – the details on when she broke her foot were not clear - as but in any event, I do not consider this to be a barrier to submission of an online claim form.
64. The Claimant has not provided any clear explanation for why, after the call on 14 January 2020, she waited until 29 February 2020 to submit the claim. She provided no evidence on why she did not take heed of the warning on the online submission form regarding the need for an EC Certificate or why she indicated this was a claim for interim relief. The Claimant could have called ACAS at the point of submission, which of course was after the primary time limit in any event, she knew how to contact them.
65. Furthermore, the provided no clear explanation for the gap between 9 March 2020 and 3 April 2020 – after she had been told by the Tribunal on 3 March 2020 that the claim had been rejected and there was still a significant delay in obtaining the EC certificate.

Cogency of evidence

66. The Claimant's account and recollection of events varied during the course of the hearing today was confused and unclear. A significant period of time has passed since the alleged discriminatory events and further time will pass before a final hearing.

Balance of prejudice to the parties

67. The Respondent, and the Tribunal, are still unclear on the precise allegations and recollection of witness memory and indeed availability is likely to have been adversely impacted, of course noting there has been some delay due to the impact of Covid on the progression of the claim. The Respondent is still not in a position where it is clear on who is said to have done what wrong and when, and therefore does not know if the necessary witnesses remain employed or contactable.

Merits of case

68. To be clear, I have not made any findings on the substantive merits of this claim, but note that the strength of a claim may be a relevant factor in deciding whether is it just and equitable to extend time. However, even where a case is strong, time may not be extended.
69. In this case it is hard to see the link between the dismissal, and the other alleged acts of discrimination, with the alleged disabilities. It is still necessary to consider whether there is a satisfactory explanation for why the claims were not presented in time.

70. From the evidence as a whole the picture emerges of an individual that chose to raise matters with CAB, ACAS and her employer promptly after dismissal.

71. Putting matters together overall, and taking into account all these factors, and applying the test set out in the legislation, my judgment is that the Claimant has failed to show it would be just and equitable to extend the time limit. Accordingly, the direct disability discrimination and discrimination arising from disability claims are out of time and they will not continue.

72. As I have concluded that claim is out of time, I have not made a determination on whether the claim should be struck out on the basis of no reasonable prospect of success under Rule 37, but note the Respondent's submissions and case law. It is also not necessary for me to consider a deposit order, as no claims continue.

Employment Judge G Cawthray

Dated 6 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....14 March 2022.....

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FOR EMPLOYMENT TRIBUNALS