EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING BY VIDEO

Claimant: Mrs M Nichols

Respondents: GBT Travel Services UK Ltd

Heard: Remotely by video **On:** 3 March 2022

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: In Person
Respondent: Ms L Usher, Solicitor

RESERVED JUDGMENT AND REASONS

The judgment of the Tribunal is that:

1. The claimant's claim of unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 was not presented within the time limit set out in section 23 of the Employment Rights Act 1996. It was reasonably practicable for the claim to have been presented in time. The claim is struck out as the Tribunal does not have jurisdiction to hear it.

2. The claimant's claim of indirect sex discrimination contrary to section 19 of the Equality Act 2010 was not presented within the time limit set out in section 123 of the Equality Act 2010. It was not just and equitable to extend the time limit. The claim is struck out as the Tribunal does not have jurisdiction to hear it.

REASONS

Background and History of this Hearing

1. The claimant has been employed continuously since 18 February 2008. The respondent was originally known by another name, is now known as GBT Travel Services UK Ltd. The claimant is employed as a Deployment Manager. The claimant began early conciliation with ACAS on 11 June 2021 and received an early conciliation certificate dated 23 July 2021. Her ET1 was presented on 6 August 2021. The claimant's ET1 indicated claims of sex discrimination, discrimination because of pregnancy or maternity, unauthorised deduction of wages, disability discrimination and religion or belief discrimination.

2. There have been two private preliminary hearings (TPH) by telephone in this case. The first was conducted by Employment Judge (EJ) Garnon on 21 October 2021. In his case management order (CMO) dated 22 October 2021, EJ Garnon set out a comprehensive summary of the claimant's claims and respondent's response. I do not propose to set out a full summary in this Judgment and reasons to save time and expense. Both parties have copies of EJ Garnon's CMO, which was in the Bundle for this hearing [39-49].

3. EJ Garnon went through the claims that the claimant had indicated on her ET1 and discussed the law with her on each. The claimant was then left to consider how she wished to proceed. I note that EJ Garnon made the following points about the claimant's claims:

    3.1. "The last incorrect pay alleged is in October 2020, so the claim is significantly out of time." (paragraph 9);

    3.2. In respect of the unauthorised deduction of pay claim, EJ Garnon stated "In short this part of [the claimant's] claim has major problems for her to overcome." (paragraph 10); and

    3.3. "I do not suggest that the [time limit in the discrimination claim] will be easily overcome…" (paragraph 12.14).

4. Mrs Nichols was asked to consider her position on the claims she had brought, having indicated to EJ Garnon an intention to pursue claims of disability discrimination or discrimination because of religion or belief (paragraph 1.1). EJ Garnon ordered the claimant to produce further information about her claims, which she did on 15 November 2021.

5. The second TPH was before me on 13 January 2022. Mrs Nichols confirmed that she did not wish to proceed with the claims of pregnancy/maternity discrimination, disability discrimination or religious belief discrimination. I prepared a Judgment dismissing those claims upon withdrawal. That left claims of unauthorised deduction form wages and indirect discrimination because of the protected characteristic of sex. After discussing matters with the parties, I listed this PuPH to consider:

5.1. Whether the claimant's claim of indirect sex discrimination was presented in time, and, if not, whether it would be just and equitable to extend time to allow the claim;

5.2. Whether the claimant's claim of unauthorised deduction of wages was presented in time and, if not, whether it was reasonably practicable for her to have presented it within the 3-month time limit (as extended by ACAS early conciliation). If it was not practicable for her to have presented the claim in time, the Tribunal will consider whether the claim was presented within such additional period as it considers reasonable; and

5.3. To make further case management orders as may be required.

6. The CMO of EJ Garnon had explained the principles involved in dealing with time limits in the two types of claim that the claimant had brought.

7. I ordered the parties to produce a bundle for the PuPH and to produce witness statements. I was involved in interlocutory exchanges between the parties about the content of the bundle, which I resolved.

Housekeeping Matters

8. The parties produced a bundle of 456 pages which included the claimant's witness statement dated 15 November 2021 [50-60] and documents dated 28 January 2022 titled "Time Bar" [85-100] and "3 March 2022; 1000 – Video Hearing" [101-105] . If I refer to any documents from the bundle, I will indicate the appropriate page numbers in square brackets.

9. The respondent sent the following to the claimant and the Tribunal:

9.1. A chronology;

9.2. Written submissions; and

9.3. A bundle of authorities.

10. The hearing was conducted remotely by video with the agreement of the parties.

11. The claimant gave evidence on affirmation and adopted her witness statement. She was asked questions by Ms Usher. I asked the claimant a few questions.

12. I then heard closing submissions from Ms Usher, followed by closing submissions from Mrs Nichols. At the end of the submissions, it was 11:50am and I did not consider that I would be able to make a decision and deliver a cogent oral Judgment to the parties in the time available to me on the day. I therefore reserved my Judgment.

Relevant Law

13. I was mindful of the overriding objective to deal with cases justly and fairly in Rule 2 and the Tribunal's wide case management powers under Rule 29.

14. Under section 23(2) of the Employment Rights Act 1996 (the "ERA"), an Employment Tribunal "*shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*

> *(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*
>
> *(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*

15. Under section 23(3) of the ERA it states: -

> *(3) Where a complaint is brought under this section in respect of—*
>
> *(a) a series of deductions or payments, or*
>
> *(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received."*

16. Section 123 of the Equality Act 2010 states:

> *123. Time limits*
>
> *(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 3 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.*
>
> *(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*
>
> *(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

17. I was referred to the following cases by the respondent:

17.1. **Porter v Bandridge Ltd** [1978] ICR 943;

17.2. **The Royal Bank of Scotland Plc v Theobald** UKEAT/0444/06;

17.3. **Palmer and Saunders v Southend-on-Sea Borough Council** [1984] ICR 372;

17.4. **Trevelyans (Birmingham) Ltd v Norton** 1991 ICR 448;

17.5. **Dedman v British Building and Engineering Appliances Ltd** [1974] 1 WLR 171;

17.6. **Beasley v National Grid Electricity Transmissions** 2008 EWCA Civ 742;

17.7. **Hendricks v Metropolitan Police Commissioner** [2002] EWCA Civ 1686;

17.8. **Robertson v Bexley Community Centre** [2003] EWCA Civ 576; and

17.9. **British Coal Corporation v Keeble and others** EAT/496/96.

Issues

18. The issues (questions that I had to find the answers to in order to make a decision) were as follows:

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 11 March 2021 may not have been brought in time.

1.2 Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the unauthorised deductions complaint made within the time limit in 23 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?

1.3.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Findings of Fact

19. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided in favour of one of the parties. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so I have dealt with the case on the basis of the documents and evidence produced to the Tribunal. I make the following findings.

20. The claimant has been employed continuously since 18 February 2008. The respondent has changed its name to its current name; GBT Travel Services UK Ltd. The claimant is employed as a Deployment Manager. The claimant began early conciliation with ACAS on 11 June 2021 and received an early conciliation certificate dated 23 July 2021. Her ET1 was presented on 6 August 2021. None of these facts has ever been in dispute. I find that if the last unauthorised deduction from wages was on 31 October 2020, then the claimant had to start early conciliation by 31 March 2021.

21. Prior to the birth of her third child on 2 February 2020, the claimant's personal circumstances were that she was married to a Social Worker, who was designated as a 'key worker' at the start of the Covid-19 pandemic. She had two children under 9 years, the younger child is on the autistic spectrum. I do not dispute that these circumstances would have put the claimant under some considerable stress.

22. The claimant had a traumatic birth experience which resulted in a number of serious medical conditions and exacerbation of some exiting conditions. I do not need to list these, as they were not challenged by the respondent and they are

documented in the bundle. Again, I do not minimise the difficulties that the claimant's circumstances would have had on her.

23. The claimant commenced maternity leave in respect of her third child on 20 January 2020. Her maternity leave ended on 2 November 2020. This was agreed evidence. There is a dispute between the parties as to her status between 2 November 2020 and 1 July 2021, which I do not find relevant to my Judgment.

24. The claimant returned to work on 1 July 2021. This was agreed evidence.

Unauthorised Deduction from Wages

25. The claimant's claim in respect of unauthorised deduction of wages is that she was placed on furlough from 6 April 2020 to 30 June 2021 inclusive. She also states that by a communication dated 3 April 2020, the respondent committed to pay 80% of the claimant's wages whilst on furlough and that the extensions of furlough continued by regular communications starting on 1 May 2020and continuing to 13 May 2021. The last communication confirmed furlough to 30 June 2021.

26. I find that her assertion is incorrect. I make that finding because:

    26.1. It defies logic that a large employer would volunteer to pay staff on maternity leave at 80% of their normal wage for the period of maternity leave that they would normally receive SMP for;

    26.2. In the claimant's case, that is the difference between 80% of £557.06 per week and £151.20 per week;

    26.3. The Coronavirus Job Protection Scheme (CJPS) was an arrangement between the government and employers. It had no effect of the contractual relationship between employers and employees. Therefore, the contractual position between Mrs Nichols and the respondent did not change;

    26.4. The meaning of the communication from the respondent to the claimant dated 2 April 2020 [237] can only be that the claimant was to receive 100% of her base salary from weeks 1 to 6 of her maternity leave. She would then receive 80% of her monthly salary for weeks 7 to 20 of her maternity leave and the she would revert to SMP for weeks 21 to 39;

    26.5. I saw no evidence to suggest that this did not happen;

    26.6. In paragraph 8.2 of the ET1, the claimant's stated "It seemed I was in receipt of SMP/Company maternity pay for the duration until November 2020 when I didn't get paid at all this wasn't changed. That is a tacit admission that the last alleged underpayment was in her wages paid at the end of October 2020;

    26.7. The claimant did not dispute the payments were made as set out in paragraph 26.4 above;

    26.8. I find her argument that time continued to run because she remained on furlough until 1 July 2021 has no merit in logic or in law. Section 23 of the

Employment Rights Act 1996 states that time starts to run from the date of **the deduction complained of**, or (where there has been a series of deductions) **the date of the last deduction** (my emphasis);

26.9. I find that the height of the claimant's case is that an alleged last deduction was made on 31 October 2020. She therefore had to start early conciliation by 31 January 2021. She actually started early conciliation with ACAS on11 June 2021; so

26.10. The claim for unauthorised deduction of wages was presented out of time.

27. I then have to consider whether it was reasonably practicable for the claimant to have presented the claim on time. I find that it was practicable for her to have presented the claim because:

27.1. I read and considered the claimant's evidence carefully;

27.2. I read the medical letters and documents that the claimant submitted carefully. I have no doubt that she went through the experiences detailed in the letters;

27.3. I read the letter from Dr A J Clarke dated 20 January 2022 [160-170] carefully. This was the only evidence from a medical expert that addressed the question of the ability of the claimant to present the claim on time. I note that the claimant was experiencing a number of concurrent medical issues;

27.4. However, I find that the claimant's oral evidence was that she would have been fit to return to work at the end of her maternity leave on 2 November 2020, if she had not been furloughed or taken accrued holiday. That statement is not consistent with her position that she could not have started early conciliation or submitted an ET1 before she did. I find that if she was fit to work, it was reasonably practicable for her to have engaged in ACAS early conciliation and for hr to have presented an ET1;

27.5. The claimant's position was further and gravely undermined by the fact that she raised an HR ticket (the first step in the respondent's grievance process) on 23 December 2020 [403]. She then engaged in lengthy correspondence with the respondent about the unauthorised deduction point;

27.6. The claimant filed a formal grievance and fully engaged in the process through to a hearing on 17 March 2021 and an outcome letter of 15 April 2021 [415-416]. I find that her ability to raise, discuss and argue her claims with the respondent in a grievance procedure is evidence that it was reasonably practicable for her to have presented her claim for unauthorised deduction of wages in time; and

27.7. The claimant raised ignorance of the law as a reason for failing to start proceedings in time. As the CMO of EJ Garnon makes clear, that is a difficult case to make when so much information is available online. The claimant accepted that she had contacted ACAS in the past and I see no

circumstances that meet the high bar of "not reasonably practicable" in respect of this claim.

28. In the alternative, if I had not been reasonably practicable to have filed the claim in time, I find that after the claimant took legal advice on the claims in early March 2021, she then waited until 11 Jane 2021 to start early conciliation. The certificate was issued on 23 June 2021 and the claimant waited until 6 August 2021 to present her claim to the Tribunal. I do not find the period between the expiry of the time limit and the presentation of the claim to be reasonable.

29. The claimant's claim of unauthorised deduction of wages is struck out because the Tribunal does not have jurisdiction to hear it.

Indirect Sex Discrimination

30. The claimant's claim of indirect sex discrimination is that she was denied the opportunity to apply for voluntary redundancy via the respondent's VRP scheme. The scheme was launched on or around 3 August 2020 [292]. It was agreed that applications for the VRP scheme closed on 20 August 2020. The claimant was on maternity leave at the time.

31. We spent some considerable time debating the date on which the claimant's access to the respondent's computer systems was restored during her maternity leave. The claimant was sure that she had no connection until December 2020. The respondent's case was that documents seemed to show that the claimant regained access in early to mid-August. The date of 8 August was suggested. I have approached this issue from the perspective that I did not hear full evidence from both sides on the point. I have therefore decided that in determining the time point, it is just and equitable to assume that the claimant's date of December 2020 is correct. In that way, she cannot be prejudiced in respect of my subsequent findings on the time points.

32. The date of the alleged act of indirect discrimination cannot be later than 20 August 2020, which is the date that the VRP scheme closed. I make that finding because it is the denial of access to the VRP scheme that the claimant complains of. The time limit is therefore midnight on 19 November 2020. The claimant began early conciliation with ACAS on 11 June 2021 and received an early conciliation certificate dated 23 July 2021. Her ET1 was presented on 6 August 2021.

33. I find that it would not be just and equitable to extend the time for presentation of the claimant's claim of indirect sex discrimination. I make that decision because:

    33.1. I read and considered the claimant's evidence carefully;

    33.2. I read the medical letters and documents that the claimant submitted carefully. I have no doubt that she went through the experiences detailed in the letters;

    33.3. I read the letter from Dr A J Clarke dated 20 January 2022 [160-170] carefully. This was the only evidence from a medical expert that addressed the question of the ability of the claimant to present the claim on time. I note that the claimant was experiencing a number of concurrent medical issues;

33.4. However, I find that the claimant's oral evidence was that she would have been fit to return to work at the end of her maternity leave on 2 November 2020, if she had not been furloughed or taken accrued holiday. That statement is not consistent with her position that she could not have started early conciliation or submitted an ET1 before she did. I find that if she was fit to work, it was possible for her to have engaged in ACAS early conciliation and for her to have presented an ET1 before the expiry of primary limitation on 19 November 2020;

33.5. The claimant's position was further and gravely undermined by the fact that she raised an HR ticket (the first step in the respondent's grievance process) on 23 December 2020 [403]. She then engaged in lengthy correspondence with the respondent about the unauthorised deduction point. I find that even though primary limitation had passed when the claimant had started the grievance process, she still took more than 6 months before starting early conciliation and more than 8 months before submitting her ET1;

33.6. The claimant clearly expressed an opinion that the denial of the VRP scheme was discriminatory, even if she initially attached the wrong label to the type of discrimination. This was part of her grievance and the way she expressed her grievance clearly demonstrated that she knew she could make a Tribunal claim;

33.7. The claimant filed a formal grievance and fully engaged in the process through to a hearing on 17 March 2021 and an outcome letter of 15 April 2021 [415-416]. I find that her ability to raise, discuss and argue her claims with the respondent in a grievance procedure is evidence that it was possible for her to have presented her claim for indirect sex discrimination in time;

33.8. The claimant raised ignorance of the law as a reason for failing to start proceedings in time. As the CMO of EJ Garnon makes clear, that is a difficult case to make when so much information is available online. The claimant accepted that she had contacted ACAS in the past and I see no reason why it was not possible for the claimant to meet the time limit;

33.9. I find that the ET1 was presented outside the time limit set out in section 123 of the Equality Act 2010;

33.10. The claimant cannot rely on any extension of time because of ACAS early conciliation;

33.11. The onus is on the claimant to establish that it would be just and equitable to extend time;

33.12. In **Robertson v Bexley Community Centre** [2003] EWCA Civ 576 Lord Justice Auld stated (§25):

"…*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."

33.13. As we discussed at the hearing, there are many authorities on what a Tribunal should consider when deciding whether to exercise its jurisdiction to extend time on a just and equitable basis. In this case, I have decided to consider:

33.13.1. The length of and reasons for the delay;

33.13.2. The extent to which the cogency of the evidence is likely to be affected by the delay;

33.13.3. The extent to which the party sued had co-operated with any requests for information;

33.13.4. The promptness with which the Claimant acted once he knew of the facts giving rise to the action;

33.13.5. The steps taken by the Claimant to obtain advice once he knew of the possibility of taking action.

33.13.6. The merits of the claim; and

33.13.7. The balance of prejudice between the parties;

33.14. The length of the delay is considerable – 8 months;

33.15. I find that the claimant says she was fit to return to work on 2 November and was able to engage in correspondence and a grievance procedure at which the issue of the VRP was front and centre from November 2020;

33.16. The claimant had childcare responsibilities, but accepted that her children were back at school for at least some of the time after 8 March 2021;

33.17. The claimant had legal advice in early March 2021 and spoke to ACAS about her potential claim around the same time. She could offer no cogent reason why it took her until 11 June 2021 to start early conciliation. She confirmed that she was aware of the time limit;

33.18. I do not find that the cogency of the evidence is adversely affected in any great sense. One of the respondent's witnesses may have moved employers, but as Tribunals in other regions are listing cases for hearings in 2024, I cannot see how the delay in the claimant's submission of this case has made a just and fair hearing impossible;

33.19. The respondent had provided the claimant with the information she needed to make this claim as part of the grievance procedure. No fault lies with the respondent for the claimant's failure to present her claim in time;

33.20. I find that the claimant did not act promptly once she knew of the facts giving rise to the action for the reasons I have set out above;

33.21. I find that the claimant knew, or ought to have known, that she had a cause of action in August 2020. She took the steps in the internal procedures that I have set out above. She took legal advice. She spoke to ACAS. The claimant told the respondent that its conduct regarding the VRP scheme was discriminatory in an email dated 11 February 2021 [403];

33.22. I find that the claimant's claim is far from a straightforward one for her. She would have difficulty establishing that women were disadvantaged on the scheme if the respondent can bring evidence to show that 15 of the 35 women on maternity at the time that the VRP scheme was launched applied for it, as was indicated in the documents;

33.23. I understand that the claimant will be prejudiced by being denied the opportunity to proceed with this claim, but I find that prejudice is, on balance, less than the prejudice caused to the respondent of having to defend a claim that was brought months out of time. Time limits are limits, not targets.

34. I find that the claimant has not shown on the balance of probabilities that it would be just and equitable to extend time to allow her claim of indirect sex discrimination to proceed. The claimant's claim of indirect sex discrimination is struck out because the Tribunal does not have jurisdiction to hear it.

Employment Judge S A Shore

Date 9 March 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON