EMPLOYMENT TRIBUNALS

Claimant: Mrs L Cook

Respondent: Electricity North West Limited

Heard at: Manchester (as a hybrid hearing) **On:** 17 January 2022 and in chambers on 21 January and 16 March 2022

Before: Employment Judge McDonald (sitting alone)

REPRESENTATION:

Claimant: Mrs G Henderson (Friend)
Respondent: Mr M Humphreys (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim is dismissed in its entirely. It was reasonably practicable for it to have been brought in time but it was not.

REASONS

Introduction

1. On 17 January 2022 I conducted a public preliminary hearing which Employment Judge Robinson had ordered should take place at a case management preliminary hearing on 16 August 2021. He ordered that the hearing should decide the following issues:

(1) Whether the claims for unfair dismissal and notice pay had been made in time, and if not was it reasonably practicable to issue the proceedings in time;

(2) Whether the claimant has a claim for disability discrimination and if so, has there been an appropriate application to amend the ET1 to include an application for disability discrimination;

(3) Whether any claim for disability discrimination has been made in time, and if not whether it is just and equitable to extend time to allow that claim to proceed to a final hearing;

(4) Whether the claims of the claimant have any reasonable prospects of success or whether those claims have little reasonable prospects of success, and if so whether a deposit order should be made and in what amount.

2. At the start of the hearing Mr Humphreys for the respondent confirmed that the respondent's applications to strike out the claims as having no reasonable prospects of success, or for a deposit order if the Tribunal was satisfied that they had little reasonable prospects of success, were made only in relation to any claims of disability discrimination which the Tribunal found that the claimant's case included (or included by way of amendment) and not in relation to the unfair dismissal and notice pay claims.

3. I have set explained in my case management order ("the CMO") of today's date why I refused the claimant's application to amend her claim to add allegations of disability discrimination. That refusal meant the claimant's claim remained as originally presented, i.e. a claim of unfair dismissal and for payment of notice pay only.

4. In this judgment I have set out my reasons for deciding that the unfair dismissal and notice pay claims should be dismissed on time limit grounds.

Conduct of the hearing – conversion to hybrid hearing and reserving of decision

5. The hearing was due to start at 10.00am and was due to have been held in person at the Employment Tribunal in Manchester. Mr Humphreys attended at the Tribunal as did those instructing him. The claimant did not. When contacted by the Tribunal she said that she had thought that the hearing was on the following day. I adjourned the start of the hearing to enable the claimant to attend at her friend Mrs Henderson's house so that Mrs Henderson could represent her.

6. I converted the hearing into a hybrid hearing, the claimant and Mrs Henderson joining by CVP video link over a mobile phone. Both the claimant and the respondent confirmed they had no objection to the claimant giving evidence over CVP video link. In the event, Mrs Henderson also gave brief evidence over CVP video link. There were times when it was difficult to hear Mrs Henderson and the claimant clearly so that I had to ask them to repeat what they had said. However, I am satisfied that the parties and I were able to hear each other well enough for there to be a fair hearing.

7. At the start of the hearing I explained to the parties how I was intending to structure the hearing. That was to first identify the amendments which the claimant was seeking to make, then to hear evidence about the reasons for the delay in bringing the claims and in making the application to amend, and then hear

submissions from both parties about the time limit, amendment and strike out/deposit order issues. It seemed to me that was the best way to proceed given that I would need to take into account the evidence about the reasons for delay both in dealing with the time limit issues and in dealing with the application to amend.

8. Because of the late start I was concerned at lunchtime that there would not be enough time to deal with everything within the time listed. I raised with the parties the possibility of dealing with the application to amend at the hearing and setting a further hearing to deal with the time limit questions and the application for strike out or deposit order. Both parties objected to that proposal on the basis that they wanted to get the matter dealt with in one day if possible. We also had a further break in the proceedings between 3.00pm and 3.30pm to allow Mrs Henderson to undertake childcare duties. The end result was that the hearing did not finish until around 6.00pm and there was no time for me to deliberate and give my judgment. I explained to the parties that I would reserve my decision, which meant that they would be sent the decision in writing.

9. I was due to consider this matter in chambers on 21 January 2022. Unfortunately, other judicial work allocated on that date limited the time available for deliberation. The matter was re-listed in chambers on 16 March 2022. I apologise to the parties that this has led to an unforeseen delay in sending this judgment to the parties.

Case Summary

10. The claimant was employed by the respondent as a Customer Service Adviser at its Contact Centre. She was employed from 8 September 2003. She was dismissed without notice for gross misconduct on 11 December 2020 for bringing the respondent into disrepute and breaching its social media policy.

11. This was a preliminary hearing, so I did not hear oral evidence about the incidents which led to the dismissal. In brief, however, it is agreed that sadly on 3 October 2020 a colleague of the claimant died. The following day the claimant posted Facebook comments referring to his death. In summary they said that he had died of COVID and that he had requested to work from home but had been refused permission to do so. The respondent found that the natural reading of the Facebook posts was that the claimant was alleging that the respondent and a particular manager were responsible for the death of her colleague because he had not been able to work from home. It also found that the clear implication of the posts was that the respondent's workplace was not safe. The respondent's case is that the colleague who died had not requested to work from home. The claimant accepts that she did post the comments. She says they did not name any managers and that she removed the comments a very short time after they were posted. The respondent says that the claimant only deleted some of the posts and only after she was asked to do so by one of the respondent's managers.

12. The respondent became aware of the posts on 5 October 2020. The claimant was absent from work due to ill health from 12 October 2020 until her dismissal. The dismissal followed an investigation and disciplinary process carried out by the respondent. On 22 October 2020 the respondent obtained an Occupational Health Report which it says confirmed the process should proceed despite the claimant being signed off sick. The claimant disputes that that is what it means. I explore that

more fully in the CMO in giving reasons for my decision on the application to amend. The claimant appealed against her dismissal, but that appeal was rejected on 21 April 2021 following an appeal hearing attended by the claimant and Mrs Henderson.

Evidence and findings of fact

Evidence

13. Employment Judge Robinson ordered that the claimant, by 24 September 2021, serve two statements on the respondent's solicitors. The first (which I will call the "time limit statement") was to set out why she issued her claim so late after she was dismissed, giving details of the solicitors she saw, what she knew about limitation periods and when, and any other detail she believed relevant to the fact of the case. The second statement was to set out why the claimant believed that she was disabled within the meaning of section 6 of the Equality Act 2010 and to give details of the day-to-day activities that she could do and what medication she was taking at the relevant time ("the discrimination statement").

14. There was a bundle of documents consisting of 101 pages ("the Bundle"). Pages 79-101 were the respondent's written submissions for the preliminary hearing prepared by Mr Humphreys. Employment Judge Robinson in his Case Management Order had required that those written submissions should be sent to the claimant by 12 November 2021 and must "not be overly legalistic but should set out in clear language the respondent's position regarding the issues for the preliminary hearing". I am grateful to Mr Humphreys for setting out the relevant law on the issues I need to decide in a clear and (I find) accurate way. The time limit statement and disability statements for the claimant were both in the Bundle (pp.40-47). I took those into account in making my findings of fact as well as the claimant's oral evidence and that of Mrs Henderson.

15. During the hearing two further documents were produced. These were a document headed "Claimants case for unfair dismissal" and the claimant's agenda for the preliminary hearing on 16 August 2021.Mrs Henderson told me that those documents had been sent to the Tribunal by the claimant for that preliminary hearing. It does not appear to me from Employment Judge Robinson's Case Management Summary that he was aware of those documents at that hearing. Mr Humphreys had not seen those documents before the preliminary hearing on 17 January 2022.

Findings of Fact relevant to the Time Limit point

16. The claimant was dismissed on 11 December 2020. The time limit for bringing a claim for unfair dismissal and for notice pay expired (unless extended by Early Conciliation) on 10 March 2021. The claimant started the ACAS early conciliation process on 26 April 2021. ACAS issued the early conciliation certificate on 6 June 2021 (page 31). She does not benefit from any extension of time due to early conciliation. The claimant filed her claim form on 13 June 2021, some 3 months out of time.

17. The claimant accepted that she was represented by her trade union, Unison, at the investigation meeting on 19 November 2020 and at both the disciplinary meetings on 10-11 December 2020. I accept the claimant's evidence that she did

not get advice from Unison about the time limits for making a Tribunal claim. The claimant accepted she could have asked about her representative about that but didn't. She suggested in her evidence that the trade union representative was not very helpful. That trade union representative had herself been taken ill, which was why Mrs Henderson had assisted the claimant with her appeal and at her appeal hearing.

18. Mrs Henderson is not legally qualified. She had worked as a manager for a blue-chip company and therefore had some understanding of employment matters and how an employer should treat an employee. She said that she knew that the respondent had done things differently to the way that she would have done things in her role as manager. However, Mrs Henderson had never been involved in taking a matter to an Employment Tribunal before. I find she did not have prior knowledge of Tribunal time limits and procedure.

19. Immediately following her dismissal in December 2020, the claimant spoke to a solicitor who advised her to go through the ACAS early conciliation process and then revert back to them. Although there was reference in the correspondence in the Bundle to the claimant's "solicitor", I accept that she had not instructed a solicitor to represent her. What she had done was to obtain advice from a solicitor on a "one-off free advice basis". Nonetheless, I find that by the end of December 2020 at the latest the claimant was aware of her right to bring a Tribunal claim and of the need to undertake ACAS Early Conciliation before doing do.

20. The claimant was asked in cross examination by Mr Humphreys why, having been advised in December 2020 to start early conciliation through ACAS the claimant had not done so until 26 April 2021. She said that this was down to her mental health issues and that she was not in the frame of mind to do so.

21. There was no medical evidence in the form of GP or medical practitioner records in the Bundle. There was an Occupational Health report dated 20 October 2020 (pp.51-53) which recorded that the claimant had a history of mental health issues and that symptoms of anxiety and depression had been exacerbated at that point by work related issues. The report states that "although ultimately a legal decision…….the Equality Act 2010 is likely to apply". On balance, I find it likely that the claimant's dismissal would have further exacerbated (or at the very least not diminished) the anxiety and depression the claimant was experiencing at the end of 2020.

22. However, there was no evidence on which I could base a finding that the impact of her mental health issues on the claimant was such that she was unable to progress her case. The claimant said she was only able to progress matters when she got help from Mrs Henderson. The claimant's evidence was that although she had been assisted by Mrs Henderson from the point when the investigation started, Mrs Henderson herself was in hospital in January and February 2021.

23. I find, however, that claimant was able to seek advice from a solicitor in December 2020. The claimant had also sought to get in touch with other solicitors but had not been successful in obtaining any advice from them. She was also able to write to the respondent to make a subject access request and to request a postponement of the appeal (page 61 on 15 January 2021). That email requesting

postponement makes no reference to the claimant's mental health issues being a reason for the postponement.

24. I also find the claimant was able in January 2021, with Mrs Henderson's assistance, to carry out internet searches to establish her rights in relation to subject access requests.

25. The claimant and Mrs Henderson spoke to ACAS after the appeal outcome on 21 April 2021. I find that was on or shortly before 26 April 2021 which is when early conciliation was initiated. When the early conciliation certificate was issued on 6 June 2021, they went back to the solicitor who had advised the claimant in December 2020. I find that was when they were told that the claim was out of time. The claim was lodged with the Tribunal a few days later on 13 June 2021.

Relevant Law

26. The time limit for an unfair dismissal complaint appears in section 111(2) of the Employment Rights Act 1996 :

> **"(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the Tribunal;**
>
> **(a) before the end of the period of three months beginning with the effective date of termination, 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."**

27. Two issues may therefore arise: firstly whether it was not reasonably practicable for the claimant to present the complaint within time, and, if not, secondly whether it was presented within such further period as is reasonable.

28. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372, Court of Appeal**).

29. Ignorance of one's rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488 Employment Appeal Tribunal**.

30. The fact an internal appeal process is continuing and even where that internal process is delayed is not in itself a sufficient reason to justify a finding that it was not reasonably practicable to present a complaint within the statutory time period (**Palmer v Southend on Sea Borough Council [1984] 1 WLR 1129**).

31. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

32. A claim for breach of contract by failing to pay notice pay is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The time limit is set out in article 7 of that order and is the same as that for an unfair dismissal claim, i.e. three months from the effective date of termination unless it was not reasonably practicable for the claim to b brought in time.

Discussion and Conclusions

33. The claimant put forward two reasons why it was not reasonably practicable for her to bring a claim in time. The first was that her mental health issues prevented her from being able to do so. I have found on the facts that her mental health issues did not prevent her from progressing her claim. I do not mean by that to diminish the impact on her of those issues. However, I have found she was able to seek advice on her case in December and, with Mrs Henderson's assistance, to lodge and proceed with an appeal against her dismissal. I find that Mrs Henderson's being in hospital during January and February 2021 did not prevent the claimant being able to correspond with the respondent including about the requirements of subject access request rules in January 2021 (see p.61). I do not accept that the claimant's mental health issues meant it was not reasonably practicable for her to have brought her claim in time.

34. The second reason put forward by the claimant was that she was not aware of the time limits for bringing a claim until told in June 2021 that her claim was out of time. I accept that the claimant was not aware of the time limit until then. However, I also need to decide whether the claimant's ignorance of the time limit was itself reasonable. I have found that the claimant was advised by a trade union representative up to and including the disciplinary hearing at which she was dismissed. After that, she sought advice from a solicitor and was advised to start early conciliation through ACAS. The claimant was also (with the assistance of Mrs Henderson) able to carry out internet searches as evidenced by her making a subject access request. Being aware of her ability to bring a Tribunal claim, I find that it would have been reasonable for the claimant to carry out further enquiries to establish what the relevant time limit for bringing a claim was. I therefore find that it was reasonably practicable for the claimant to have brought her unfair dismissal claim in time.

35. In case I am wrong about the "reasonably practicable" point, I record that had it been not reasonably practicable for the claimant to bring her claim in time I would have found that she did bring her claim within such further time as was reasonable. The ACAS early conciliation certificate was not issued until 6 June 2021 and the claimant filed her claim on 13 June 2021. Mr Humphreys did not suggest that the claimant was in any way responsible for the delay while early conciliation was underway. I do not find that she was responsible for the delay from 27 April 2021 until 6 June 2021. Given that the claimant,

after the issue of the certificate, got back in touch with the solicitor who had originally advised her, only to be told that she was out of time and that solicitor would not assist, it also does not seem to me that the week long delay before the ET1 was filed is itself unreasonable.

Summary

36. Since it was reasonably practicable for the claimant to have brought her unfair dismissal and notice pay claims in time but she did not do so, those claims are dismissed. Because I did not allow the amendments to add the claimant's proposed discrimination claims, that means her claim is dismissed in its entirety.

Employment Judge McDonald

Date: 22 April 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
26 April 2022

FOR THE TRIBUNAL OFFICE