



EMPLOYMENT TRIBUNALS

Claimant

Ms D Pope

v

Respondent

Oliver Landon Limited

PRELIMINARY HEARING

Heard at: Bury St Edmunds

On: 19 May 2022

Before: Employment Judge K J Palmer (sitting alone)

Appearances:

For the Claimant: No attendance

For the Respondents: Mr K Harris (counsel)

JUDGMENT

Pursuant to an open preliminary hearing by CVP

1. It is the judgment of this tribunal that the claimant's claims are all struck out on the basis that they were presented outside the appropriate time limit and the tribunal therefore has no jurisdiction to hear them.

REASONS

1. This matter came before me today listed as an open preliminary hearing to determine whether the claimant's claims were in or out of time and, if they were out of time, whether I should exercise the appropriate discretion open to me to extend time to validate them. Unfortunately, the claimant did not attend this hearing which was listed to take place by Cloud Video Platform. I had the advantage of having the tribunal file in front of me and I can see from that file that this hearing was originally listed to take place on 10 January 2022 and was subsequently postponed. The claimant engaged with the tribunal in connection with that postponement and accordingly therefore was aware of this hearing and the nature of it.
2. The relisted hearing has come before me. The notice of hearing was sent to the parties on 23 January 2022. I have checked the address on the notice of hearing and the address accords entirely with the address given by the claimant in her ET1. When the claimant failed to attend at 2 o'clock today, having allowed her 10 minutes leeway, I caused my clerk to telephone the claimant on the number she had given for contact on the ET1, and that number went straight to voicemail. My

clerk left a message and asked the claimant to return the call and by 2.25 no call had been returned. I also caused my clerk to send an email to the claimant on the email address given on the ET1 and at this point even now at 3.05, no response has been received to that email. I therefore resolved to proceed with the hearing in the absence of the claimant there being no good reason on the face of it that I could determine why the claimant had not attended.

3. The hearing before me today is a hearing to determine whether the claimant's claims are out of time and, if they are out of time, whether I should exercise discretion to extend time to validate them.
4. The claimant presented her claims in an ET1 presented to the Watford Employment Tribunal on 3 March 2021. She is unrepresented and that ET1 claim form is homemade. In that claim form she ticked the box for disability discrimination, unfair dismissal, and other payments. The body of the claim relates to an allegation that she says she was unfairly dismissed by the respondent, the dismissal occurring on 21 October 2020. The disability discrimination claim is unparticularized and wholly unformed and it is difficult therefore from that which is on the ET1 to glean what the nature of the disability discrimination claim is. There is also no mention of any other payment claimed by way of, for example, unlawful deduction from wages. So, that is as much of the claim as I have before me.
5. I heard submissions from Mr Harris of counsel, who was representing the respondents and it is worth setting out the sequence of events so that we can determine whether the claims were out of time.
6. The effective date of termination of the claimant's employment was 21 October 2021. That is not in dispute. The claimant then initiated the compulsory Acas early conciliation on 30 September 2021 with Acas producing an appropriate certificate indicating that conciliation had been undertaken but was ineffective. That certificate was dated 30 October 2021.
7. In terms of looking at the time limits, from the effective date of termination, the claimant in pursuing the claims that she seeks to pursue, would have had three months for all of her claims from that date to present her claim before the tribunal. Those three months therefore would have expired on 20 January 2022. It is clear that there is no suggestion that there was any discrimination that is being relied upon post the EDT and so I concur with Mr Harris' submission that the last possible date that anything could have occurred that the claimant was relying upon in her claims must have been 21 October 2021, ie, the date of dismissal. It is from that date that the clock starts to run. Therefore, the ordinary three-month time limit expires on 20 January 2022. The claimant initiated early conciliation and therefore that ordinary time limit is extended by that early conciliation and the provisions of the Employment Tribunal's Act relating to early conciliation tells us that the period of conciliation must be added. It is a moot point when the conciliation period commences before the termination date whether the whole of the conciliation period should be added or whether only that part that relates to the time limit that has started running should be added. Taking the narrower assessment of the time limit, that means that the claimant's claims would have had to have been filed by 29 January 2022 but, taking a more generous assessment of the extension afforded by the Acas early conciliation, as Mr Harris did, it means that claims would have had to have been presented to the tribunal by 19 February 2022. In fact, the

claim was presented on 3 March 2022. So, even on the most generous analysis, the claim was 12 days out of time and on the least generous analysis it was much more out of time. Therefore, I conclude that the claim was out of time and, in fact, whilst the claimant is not present today, the claimant seems to accept that fact because the only document that I have in front of me where the claimant has addressed the issue of the claim being out of time is an email from her dated 26 March in which she agrees that the claim was submitted late and ventures a reason for it being late. I will come back to that shortly.

8. So, the claim is out of time and in fact all of the claimant's claims are out of time. I must consider the claims separately as different tests in terms of whether I exercise my discretion to extend time apply to the different claims.

Unfair dismissal

9. Unfair dismissal claims are governed by s.111 of the Employment Rights Act 1996.
10. That sets out the three-month time limit and indicates also that a claim will be out of time unless a tribunal considers that it was presented 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 the period of three months. That is the test that applies for unfair dismissal claims and it is also the test that would be applied to the unlawful deduction's claims were that part of the claimant's claim, albeit wholly unparticularised, under s.23 of the Employment Rights Act 1996.
11. The test is a harsh one and there is a reason why there are time limits and time limits are there to be adhered to. The not reasonably practicable test is a difficult test for a claimant to satisfy, to persuade a tribunal to extend time. I have been referred to various authorities by Mr Harris and have also considered various authorities myself but one of the leading cases on not reasonably practicable is Palmer and Saunders v Southend On Sea Borough Council [1984] IRLR 119 . We note from that case that the test of reasonably practicable does not mean physically possible and they used the phrase "reasonably feasible". Usually this means that a claimant would have to present evidence to the tribunal to explain why a claim was out of time, and the reason why it was out of time, and the reasonably practicable test applied means that it would not have been reasonably feasible for the reasons put forward by the claimant for the claim to have been lodged in time.
12. The difficulty I have here today is that I have no claimant. The claimant therefore cannot provide an explanation as to why her claim was lodged out of time other than in the email that she sent to the tribunal on 26 March. That email suggests that she was struggling with her mental health and that that was the reason why the claim was lodged out of time. She said she had tried several times to complete the form by the deadline required but was completely overwhelmed by it. She said she managed to submit her claim and the court accepted the case. She said that the illness that she was suffering from was due to the fact that she was treated unfairly by her former employer and that she eventually had a breakdown in the office from which she is still suffering.

13. Mr Harris points out that of course she is not here to be cross examined on that evidence and that is contained purely in an email that was sent to the tribunal in March of last year. He says that were she here, the onus is on her to show that it was not reasonably practicable to present her claim for unfair dismissal and unlawful deduction of wages within time and that he would have cross examined her about the nature of her illness and would have required some medical evidence to support her assertions and would also have asked her about the fact that she was able to lodge an early conciliation claim and, ultimately, was also able to lodge the claim albeit late and beyond the time limit. He said that by not being here he had not been able to explore any of that including whether she sought legal advice and the nature of that legal advice.
14. I am bound to say that I agree with Mr Harris. Had the claimant been here to be tested on those reasons, it may be that she would have made some headway in persuading me that I should exercise my discretion on the reasonably practicable basis to validate her out of time claim. However, she is not here, and the law is clear there is no presumption of an extension where a claim is out of time, time limits are there for a reason and it is for the claimant to show that it was not reasonably practicable for the claim to be lodged in time. I have to take into account other factors such as the length of the delay. Even on the best analysis the claim was nearly two weeks out of time. It is not clear what advice the claimant took or what steps she took once she knew the claim was out of time. She has not attended today. We do not know the reason why. Therefore, I think it is very difficult for the claimant to clear what is a tricky hurdle for her on the reasonably practicable test. Therefore, on the authorities, on the basis of those tests, I do not exercise my discretion to extend time to validate the unfair dismissal claim and the unlawful deduction of wages claim in so far as one exists, and therefore those claims are struck out.

Disability discrimination claim

15. Turning then to the disability discrimination claim.
16. I have considered the various authorities that Mr Harris has placed before me and I refer to them now. The cases of Ahmed v Ministry of Justice, Robertson v Bexley Community Centre [2003] IRLR 434, Palmer and Saunders v Southend on Sea Borough Council, which I have already mentioned, and Schultz v Esso Petroleum Company [199] IRLR 488. I have also taken into account the principles in the British Coal Corporation v Keeble and others [1997] IRLR 336, and Hall v ADPD Services Limited, an EAT case.
17. By the same token as with the reasonably practicable test, the test for my exercising my discretion in respect of any disability discrimination claim falls under s.123 of the Equality Act 2010 and the test there for me to determine whether I exercise my discretion is whether it was just and equitable to do so. Therefore, it is a different test from the test I have had to apply to the unfair dismissal and the unlawful deduction of wages act claims. That test is a lower bar, and it is easier for claimants to cross that hurdle and persuade a tribunal to extend time. However, there are factors which I must look at. Once again, the length and reason for the delay, what advice was taken and the steps the claimant took once she knew the claim was out of time. I am also bound to consider the strength of the claimant's claim and that is something that I must look at. In the ET1 the claimant has

essentially just ticked the disability discrimination box but has not in any way articulated what her disability discrimination claim is. I have seen no medical evidence to support the fact that she is a disabled person under s.6 of the Equality Act 2010. She may be but at this stage in the proceedings the claim is wholly unformed and there is nothing to support any claim for disability discrimination. On that basis, the strength of the claim at this stage must be considered to be weak.

18. I must also consider the relative prejudice to the parties and the balance of hardship. The claim was not manifestly out of time, it was not months or years out of time, but was a significant period out of time, and the respondents have already been embroiled in these proceedings for over a year now and that is something which has caused them prejudice and hardship. Therefore, I must take that into account when deciding whether I am going to exercise my discretion on the just and equitable basis. The claimant has not attended today, and it may be that if she had she would have been able to persuade me to exercise that discretion, one cannot tell. Mr Harris would have had the opportunity of cross examining her and putting to her questions which would have elicited answers which may have supported an assertion that I should extend time on the just and equitable basis, but she has not been here. Therefore, on that basis, I conclude that there is no good reason for me to exercise my discretion and extend time to validate the disability discrimination claim. Taking into account the leading authorities which I have mentioned, and the tests which apply, I regard, on the face of it, the claimant's disability discrimination claim to be weak. I consider that the prejudice therefore to the respondent is significant and that on the balance of hardship, taking into account the claimant's non-attendance today, that weighs with the respondent. Reasons for the delay have not been fully explained and not been fully backed up by evidence. All I have is an email dated 26 March last year. So, for those reasons, I am not going to exercise my discretion under the just and equitable principle under s.123 of the Equality Act and extend time and the claimant's claims, such as they are, in disability discrimination are also struck out.

**Dictated by Employment Judge K J
Palmer on 19 May 2022.**

Sent to the parties on:

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For the Tribunal:

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