EMPLOYMENT TRIBUNALS

Claimant:	**Mrs M Becher**
Respondent:	**The Commissioners for Her Majesty's Revenue and Customs**
Heard at:	**Cardiff** **On: 11 October 2021**
Before:	**Employment Judge S Jenkins**

Representation:
Claimant: In person
Respondent: Mr O James (Counsel)

JUDGMENT having been sent to the parties on 11 October 2021 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was listed to consider whether the Claimant's claims, of unfair dismissal, breach of contract and in respect of payment for accrued but untaken holiday, had been brought within the stipulated time limits. If not, which on the face of the claims appeared to have been the case, I was to consider whether it had been reasonably practicable for the claims to have been brought within that time period, and, if not, I would then need to consider whether the claims had been brought within a further reasonable period.

2. I heard evidence from the Claimant on her own behalf and considered the documents in the bundle to which my attention was drawn.

Issues and Law

3. The legislation in respect of the time limits for submitting claims of unfair dismissal, breach of contract and in respect of holiday pay is identical, and provides that an Employment Tribunal should not consider a complaint 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 have been presented before the end of that three month period. The three month period is to be extended by virtue of any time spent pursuing early conciliation with ACAS, which essentially means that a claimant must make contact with ACAS for the purposes of Early Conciliation during that three months.

4. There has been a considerable amount of case law on this point over the years, and one point that has been made clear is that it is a strict test. It is for a claimant to justify the conclusion that the claim was not able to be reasonably practicably brought within time, and that then it was brought within a reasonable time thereafter.

5. The cases have made clear that a number of reasons for delay can arise in assessing the reasonable practicability question, including whether the claimant was aware of the right to pursue matters before the Tribunal, the fact that a claimant may have been unaware of factual matters which might justify a claim, and the impact of a claimant's health, all of which, to a greater or lesser degree, arose in this case.

6. The issue of reasonable practicability includes an assessment of the Claimant's ignorance of rights, but any ignorance must be reasonable. Scarman LJ (as he then was), in ***Dedman -v- British Building Engineering Appliances Limited*** **[1974] 1 WLR 171**, noted that a Tribunal must ask the questions of, "*What were [the claimant's] opportunities for finding out that [they] had rights? Did [they] take them? If not, why not?*"

7. I also noted that the Court of Appeal, in ***Porter -v- Bandridge Limited*** **[1978] ICR 943**, noted that the test was not whether the Claimant knew of his or her rights, but whether he or she ought to have known of them.

8. The Court of Appeal in ***Dedman*** also noted that where any delay arises through ignorance or fault of a skilled adviser, it will have been reasonably practicable for the claims to have been brought in time, and whilst a skilled adviser includes solicitors, it can also include trade union representatives. I noted that the Employment Appeal Tribunal, in ***Times Newspapers Limited -v- O'Regan*** **[1977] IRLR 101**, had held that the claimant was not entitled to the benefit of the escape clause because the union official's fault was attributable to her and she could not claim that it had not been reasonably practicable to claim in time.

9. The appellate courts have also made clear that where a claimant is generally aware of their rights, ignorance of a time limit will rarely be acceptable as a reason for delay.

10. In terms of ignorance of fact, the Court of Appeal in ***Machine Tool Industry Research Association -v- Simpson*** **[1988] ICR 558**, noted that the claimant must establish three things; that their ignorance of the fact relied upon was reasonable, that they reasonably gained knowledge outside the time limit that they reasonably and genuinely believed to be crucial to the case and to amount to grounds for a claim, and that the acquisition of this knowledge was in fact crucial to the decision to bring the claim.

11. Underhill P (as he then was), in the Employment Appeal Tribunal in ***Cambridge and Peterborough NHS Trust -v- Crouchman*** **[2009] ICR 1306**, further distilled the relevant principles to be taken into account in assessing the issue of reasonable practicability where a claimant initially is not aware they have a viable claim, but changes their mind when presented with new information after the expiry of the primary time limit. These include

    (i) That ignorance of a fact that is crucial or fundamental to a claim will in principle be a circumstance rendering it impracticable for a claimant to present that claim.
    (ii) That a fact will be crucial or fundamental if it is such that when the claimant learns of it their state of mind genuinely and reasonably changes from one where they do not believe they have grounds for the claim to one where they believe that the claim is viable.
    (iii) The ignorance of the fact in question will not render it not reasonably practicable to present a claim unless the ignorance is reasonable and the change of belief in light of the new knowledge is reasonable.

12. With regard to illness, the cases make clear that a debilitating illness may prevent a claimant from submitting a claim in time, but usually this will only constitute a valid reason for extending time if supported by medical evidence which demonstrates not only the illness, but the fact that the illness prevented the claimant from submitting the claim in time. Although equally the cases do confirm that medical evidence is not absolutely essential.

13. If the decision is that it was not reasonably practicable for the claim to have been brought in time then the EAT confirmed, in ***Cullinan -v- Balfour Beatty*** **(UKEAT/0537/20)**, that consideration of whether the claim is brought within a further reasonable period will require an objective consideration of the relevant factors causing the delay and what period should reasonably be allowed in the circumstances having regard to the strong public interest in claims being brought in time.

Findings

14. The Claimant was employed by the Respondent for some 37 years until her employment ended by reason of her resignation on 31 October 2019. The Claimant had undergone a heart attack in February of that year and had been on long term sickness absence. She contends that she resigned with immediate effect in circumstances which amount to constructive unfair dismissal and constructive wrongful dismissal. She also contends that the Respondent did not pay her adequately in respect of accrued but untaken holiday.

15. Although her employment ended on 31 October 2019, the Claimant did not commence Tribunal proceedings until February 2021. Early conciliation with ACAS took place over one day, 11 January 2021, and her claim form was then submitted by post on 15 February 2021. On the face of it therefore, the claims were brought significantly out of time, the primary time limit in respect of all of her claims having expired on 30 January 2020.

16. The Claimant underwent a period of hospitalisation for a cancer operation in November 2019, but on her return home noted that the final pay slip she received from the Respondent appeared to under provide for holiday pay. She wrote to the Respondent on 2 December 2019 setting out her concerns in that regard.

17. The Claimant underwent a second operation in February 2020 returning home on 3 March, and, some time after that, certainly some time before July 2020, spoke to a legal adviser at her Union, the PCS. That person advised the Claimant that she should give the Respondent an opportunity to remedy matters, and also suggested that the Claimant could consider that she had been constructively unfair dismissed. It is not clear what information was given to the Claimant at that time about time limits.

18. The Claimant did however, in July 2020, write a letter to the Respondent, which was not before me, but within which the Claimant accepted she had mentioned the possibility of litigation. It appeared that the Respondent took a long time to respond to that, and it was only towards the end of 2020, in December, that it provided a full explanation for the holiday pay situation. That response was not satisfactory to the Claimant, albeit she accepted the response had not taken matters any further forward than had been the case in December 2019.

19. Following that, the Claimant spoke again to her union who advised her to contact ACAS. ACAS referred to time running in respect of the Claimant's holiday pay as running from December 2020 and then sent her a hard copy Tribunal claim form to complete, which the Claimant received in early January 2021.

20. The Claimant did not initially complete the form, waiting for the Respondent to respond further to her, and it was only when the position, as far as the Claimant was concerned, remained unsatisfactory, that she submitted her claim, in February 2021.

21. The Claimant, as I have noted, underwent a couple of operations in November 2019 and February 2020, and thus was in hospital and subsequently at home recuperating, and, following the onset of the COVID-19 pandemic, was shielding, but she lived alone and managed her household throughout the period with assistance from a neighbour.

Conclusions

22. As I have noted, on the face of the claim form, the claims were submitted some way out of time. My focus therefore was on whether it had been reasonably practicable for the claims to have been brought in time. The Claimant focused on ignorance of her right to claim, and of the facts giving rise to her claim only coming to her attention in December 2020, and, to a lesser degree, her health. I take each of those in turn.

23. In terms of ignorance of rights, the ***Dedman*** and ***Porter*** cases focused on whether a claimant ought to have known about their rights rather than on their actual state of knowledge, and on what their opportunities were which may have made it possible for them to find out about them. The suggestion in those cases, both decided in the 1970s, was that ignorance of the right to pursue an Employment Tribunal claim, a relatively recent invention at the time, was not reasonable. Obviously we are now well over forty years on from that.

24. In this case, the Claimant asserted that she was not aware of the right to pursue matters before the Tribunal until she pursued matters with ACAS in December 2020. However, I noted that the Claimant was aware of possible resolution of her rights through the Tribunal process as she contacted the PCS somewhere between March and July 2020, and again later in that year, and, crucially, referred to the prospect of litigation in her letter to the Respondent in July 2020. In my view therefore, there were opportunities for the Claimant to have explored her rights, certainly by July 2020, and therefore that it had been reasonably practicable for her to pursue her claims in time, or certainly by July 2020 or within a period shortly after that.

25. To the extent that the Claimant was inappropriately or improperly advised by her union, then, as I indicated, the ***O'Regan*** case indicated that that did not assist her, as any fault on the part of the trade union to advise properly is considered to be attributable to the Claimant. I considered that particularly

to be the case here, where the Claimant was advised by a legal adviser at her union and not by a local representative.

26. In terms of ignorance of fact, I noted the guidance in the ***Crouchman*** case which is that ignorance of fact must be of a fact which is crucial or fundamental to a claim. In that regard, I noted that there was no material change in the circumstances as far as the holiday pay point was concerned between December 2019 and December 2020. The Claimant was dissatisfied about the holiday pay position in December 2019 and she remained dissatisfied in December 2020. In my view therefore, this was not a case where it could be said that the Respondent's confirmation of its position in December 2020 crucially or fundamentally changed the Claimant's understanding from that which had prevailed prior to that, and in fact prevailed in December 2019. There was nothing before me which suggested that the Claimant's understanding of potential constructive unfair dismissal or constructive wrongful dismissal claims had changed.

27. With regard to the Claimant's health, the Claimant did not seem to maintain that this had a major impact on her, although clearly her periods of hospitalisation, recuperation and shielding must have had some impact on her. However, I noted that she managed her household affairs, with some assistance from a neighbour, was able to contact her PCS representative and speak to the PCS legal adviser in the Spring and Summer of 2020, and was able to write a letter to the Respondent in July 2020 raising the possibility of litigation. It did not seem to me therefore that the Claimant's health was such that it prevented her from having submitted her claim in time.

28. Overall therefore, I considered that it had been reasonably practicable for the claims to have been brought in time and therefore that the claims should be dismissed as having been brought out of time.

_____

Employment Judge S Jenkins
Dated: 17 November 2021

REASONS SENT TO THE PARTIES ON 18 November 2021

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche