



EMPLOYMENT TRIBUNALS

Claimant: Miss S Dunne
Respondent: Tame Cleaning & Maintenance Ltd
Heard at: Birmingham (by CVP)
On: 12 August 2022
Before: Employment Judge Meichen

Appearances

For the claimant: in person

For the respondent: Mr Jagpal, consultant

JUDGMENT was sent to the parties dated 18 August 2022. I decided that:

1. The unfair dismissal claim was not made in time.
2. It was not reasonably practicable for the unfair dismissal claim to be made in time.
3. The unfair dismissal claim was made within a reasonable period.
4. The discrimination claim was not made in time.
5. The discrimination claim was made within a period which is just and equitable and it is just and equitable in all the circumstances to extend time.
6. The Tribunal therefore has jurisdiction to consider the claimant's claims.

Written reasons were subsequently requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. The following reasons are provided. Oral reasons were given at the end of hearing and so these written reasons are based on the transcript of the reasons given orally.

REASONS

Introduction and the issues

1. The preliminary issues that I have agreed should be determined today relate to time limits and whether the Tribunal has jurisdiction to hear the claimant's claims.

2. The claimant has presented two complaints to the Tribunal; race discrimination and unfair dismissal. I make the following decisions about the timing of those complaints for today's purposes. In relation to unfair dismissal, I find that the effective date of termination is 16 November 2020. This means that the claim of unfair dismissal should have been brought within 3 months of that date. In relation to the claim for race discrimination, it seems that there is a possible act extending over a period and the last incident which the claimant is complaining about which may form part of the act is the decision not to uphold her appeal which was communicated to her by letter dated 30 November 2020. Text messages from the time show that the claimant received that letter on 3 December. That means the claim for race discrimination should have been brought within 3 months of that date.

3. In relation to the discrimination claim the issues for me to consider, at my discretion, are:
 - i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
 - ii. If not, was there conduct extending over a period?
 - iii. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - iv. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - a. Why were the complaints not made to the Tribunal in time?
 - b. In any event, is it just and equitable in all the circumstances to extend time?

4. In relation to the unfair dismissal claim the issues for me to consider, at my discretion, are:
 - i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?
 - ii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
 - iii. 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?

5. I should make it clear from the outset that I have decided to exercise my discretion not to consider today whether there was conduct extending over a period for the purpose of the discrimination claim. This is because I do not have sufficient evidence before me today to make a decision on that and I consider that a fair determination of that particular issue can only be made after the tribunal has heard all the evidence. What that means is that I am assuming for today's purposes that time for the discrimination claim will run from the last incident in the potential act extending over a period. As I explained above that is the decision not to uphold the claimant's appeal.

The law

Time limits in relation to the discrimination claim

6. Section 123 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.

...

(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;

...

7. So, if the allegations are out of time even if they form part of conduct extending over a period then the tribunal only has jurisdiction to hear them if they were brought within such other period as I think just and equitable.

8. I remind myself that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. I should take into account any relevant factor. I should consider the balance of prejudice. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule - see Robertson v Bexley Community Centre 2003 IRLR 434. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings - see Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050 CA.

9. Potentially relevant factors which may be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

10. Having said that however the important point to bear in mind is that the Tribunal has a very broad general discretion and therefore I should assess all the factors which are relevant to whether it is just and equitable to extend time without necessarily rigidly adhering to a

checklist. The factors which are almost always likely to be relevant are the length of and reasons for the delay and whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh). This approach was explained by Lord Justice Underhill in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

11. The EAT has recently considered the extent to which the potential merits of a proposed complaint can be taken into account when considering whether it is just and equitable to extend time, in Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132. The EAT held that the potential merits are not necessarily an irrelevant consideration even if the proposed complaint is not plainly so weak that it would fall to be struck out. However, the EAT advocated a careful approach. It said:

"It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it [the tribunal] does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform.

So, the tribunal needs to consider the matter with care, identify if there are readily apparent features that point to potential weakness or obstacles, and consider whether it can safely regard them as having some bearing on the merits. If the tribunal is not in a position to do that, then it should not count an assessment of the merits as weighing against the claimant. But if it is, and even though it may not be a position to say there is no reasonable prospect of success, it may put its assessment of the merits in the scales. In such a case the appellate court will not interfere unless the tribunal's approach to assessing the merits, or to the weight attached to them, is, in the legal sense, perverse."

Time limits in relation to the unfair dismissal claim

12. The time limits in relation to a claim for unfair dismissal are in section 111 of the Employment Rights Act. Subsection (2) provides: "... an employment tribunal shall not consider a complaint ... 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."
13. As to what is meant by "not reasonably practicable" the most important case is Palmer v Southend Council [1984] ICR 372. In that case May LJ made it clear that the issue is pre-eminently one of fact for the

employment tribunal and that whether something is "reasonably practicable" is a concept which comes somewhere between whether it is reasonable and whether it is physically capable of being done. It was suggested that it means something like "reasonably feasible". May LJ outlined various matters that may be relevant for an employment tribunal to consider. Among these are the question of what the substantial cause of the failure to present the claim within time was and also whether there was any "substantial fault" on the part of the claimant.

14. Lady Smith in Asda Stores Ltd v Kauser EAT 0165/07 explained the test as follows: *'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'*.
15. The onus of proving that presentation in time was not reasonably practicable rests on the claimant and *'That imposes a duty upon him to show precisely why it was that he did not present his complaint'* (Porter v Bandridge Ltd 1978 ICR 943). Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable (Sterling v United Learning Trust EAT 0439/14).
16. In Schultz v Esso Petroleum Co Ltd 1999 ICR 1202 the Court of Appeal accepted that illness may justify the late submission of claims. The Court emphasised that the test is one of practicability — what could be done — not whether it was reasonable not to do what could be done. Although it was necessary to consider what could have been done during the whole of the limitation period, attention should be focused on the closing stages rather than the earlier ones. In that case the claimant's disabling illness took place at the end of the period in question and it was not reasonably practicable for him to have made the claim in time.
17. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, the tribunal must then go on to decide whether the claim was presented within a further reasonable period. In University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12 the EAT explained that this does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the expiry of the time limit in order to allow the claim to proceed. Rather, it requires the tribunal to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired.
18. What amounts to a 'further reasonable period' is essentially a matter of fact for the employment tribunal to decide. There is no hard and fast rule about what period of delay is reasonable. In Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT 0537/10 it was suggested that the question of whether the period between expiry of the time limit and the eventual presentation of a claim is reasonable requires an objective consideration of the factors causing the delay and of what period should reasonably be allowed in those circumstances

for proceedings to be instituted. Crucially, this assessment must always be made taking into account the primary time limit, the strong public interest in claims being brought promptly and the important general principle that litigation should be progressed efficiently and without delay. When deciding what would have been a reasonable time within which to present a late claim, tribunals should have regard to all the circumstances of a case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred.

Findings of fact

19. It is clear that both complaints were presented out-of-time. The claimant should have brought her unfair dismissal claim by mid-February and her discrimination claim by early March. The claimant did not commence early conciliation until 23 March 2021. Early conciliation was completed by 26 March 2021 and the claimant then lodged her ET1 claim form on the 5 April 2021. This means that early conciliation did not have any effect on the time limits because the claimant commenced early conciliation after the expiry of the primary time limit. The claimant was around 4 weeks out of time in relation to her discrimination complaint and around 6 weeks out of time in relation to her unfair dismissal complaint.
20. The reason why the claimant presented her claim out-of-time was ill health, in particular poor mental health caused by depression.
21. I have made this essential finding of fact on the basis of the evidence I have seen and heard today. The claimant has produced a witness statement on her own behalf and also a witness statement from her sister. Both the claimant and her sister have attended this hearing to speak to their statements and they have both been robustly and fairly cross-examined by Mr. Jagpal. I find that the evidence presented by the claimant and her sister was consistent and credible. I have accepted the evidence which the claimant and her sister gave me as honest. Both the claimant and her sister struck me as direct and straightforward individuals who were not attempting to mislead me in any way. When Mr. Jagpal challenged what they had said through his searching cross examination they made appropriate concessions when it was appropriate to do so. When answering questions they did so frankly and succinctly without hesitating or attempting to obfuscate. These were the hallmarks of honest and impressive witnesses. What this means is that I accept the claimant and her sister's evidence that the claimant was for a period of around 4 months following her dismissal incapable by reason of her depression of dealing with many everyday tasks. She found it difficult to come to terms with her dismissal and this deepened her depressive state to the point where she was seriously unwell. That was why she did not progress her claim in this period.
22. The claimant went through a very dark and difficult time following her dismissal from the respondent. The claimant had in the past suffered with depression and she experienced a severe relapse of that following her dismissal. The depression was so severe that the claimant was

unable to do many normal day-to-day tasks. There were periods when the claimant could not get out of bed. Both the claimant and her sister describe how the claimant required assistance with everyday tasks such as cleaning her house, washing herself and taking her young daughter to and from school. I accept that evidence and in my view it supports my finding about why the claimant did not progress a tribunal claim for a period of around 4 months following her dismissal.

23. The claimant and her sister's evidence was in my judgement consistent with the contemporaneous documentation. In particular, the claimant's appeal letter described how the dismissal had made her depressed.
24. The claimant also provided relevant medical evidence. That medical evidence was in the form of a letter from the claimant's GP. It should be acknowledged that the claimant's GP did not explicitly address the issues which I have to consider and in particular the GP did not express a view on whether it would have been reasonably practicable for the claimant to have presented her claim in time. However the GP did, at least in broad terms, support what the claimant had said about being incapacitated by depression following her dismissal. In particular, the GP describes diagnosing the claimant with moderate to severe depression and of prescribing anti-depressants in November 2020. The GP also describes that the claimant was "*not in the right frame of mind for the initial 3 months following her dismissal*". It seems to me that this was an attempt by the claimant to obtain evidence relevant to whether she could have brought her claim within the primary time limit. Although the GP letter does not have the evidential weight of a formal expert report which would have specifically addressed the issues I am looking at I find that in broad terms the medical evidence supports the claimant's case that she was too ill to bring her claim within the primary time limit.
25. I should mention that an anomaly was identified today with the date in the GP's letter because the GP describes a consultation on 11 November where the claimant reported being dismissed. This cannot be right as the claimant had not been informed of her dismissal by that stage. I don't think this anomaly affects my decision in any way. It seems to me the most likely thing is that the GP has simply made an error as to the date. I shall therefore take into account the GP letter to the extent I have already explained.
26. The evidence I have seen and heard today indicates that the claimant started to feel better around 23 March when she initiated the early conciliation process. My finding is that around that time the claimant started to recover from the most severe period of her depression and she was able to engage with more domestic activities and her tribunal claim. However this was a gradual process and the claimant remained depressed. She slowly got better rather than there being a sudden recovery.

Analysis and conclusions

27. The claimant relied on her illness caused by her depression. As a result of that she said it was not reasonably practicable to bring the

unfair dismissal claim in time and she had acted reasonably promptly once she began to recover from her depression around the end of March. For the same reasons the claimant argued it would be just and equitable to extend time for her discrimination claim.

28. The respondent made the point that the claimant was able to engage in some domestic tasks in the relevant period and she was able to inform the Benefits Office of her change in circumstances (i.e. her dismissal) which led to a change in her benefits. As a result of those matters, Mr. Jagpal has encouraged me to find that the claimant's illness was not as severe as had been indicated in the witness statements.
29. Mr. Jagpal also made a specific point that even if I consider that it was not reasonably practicable for the claimant to submit her claim within 3 months, she appeared not to have brought it within a further reasonable period because the evidence suggested that the claimant was feeling better around 23 March when she initiated the early conciliation process. The claimant then did not lodge her claim until 5 April.
30. In relation to the discrimination claim, Mr Jagpal submitted that that claim is to some extent unclear and still requires further particularisation. He suggested that the claimant may need permission to amend to pursue all of that claim and there is a question mark over whether the respondent can be liable for an element of the claimant's discrimination claim relating to alleged harassment by an individual who was an employee of the school, rather than an employee of the respondent. Mr Jagpal says that those are all factors which would go against the grant of a just and equitable extension.
31. I have concluded as follows: -
 - (i) I acknowledge that the claimant was able to complete some domestic tasks and she updated the Benefits Office that she had lost her job but in my judgement these matters do not destabilise my essential finding that the claimant was seriously ill and incapacitated by severe depression for around 4 months after her dismissal. As I have explained I found the claimant and her sister's evidence to be compelling and I accepted it. Appropriate concessions were made and have been picked up by Mr. Jagpal but to my mind these concessions speak to the overall honesty of the evidence presented by the claimant that she was seriously ill for around 4 months. Some days were obviously slightly better for the claimant than others and so I do not consider that the concessions made undermine my fundamental finding that the claimant experienced severe depression following her dismissal. This was not a case where it was shown that the claimant was focusing on other significant tasks when she could and should have been focusing on submitting a claim. Rather concessions were made that the claimant was able (with assistance from family, in particular her sister) to complete some limited domestic and administrative tasks, but it could not be said that she was well enough to

prepare and submit a claim for a period of around 4 months after her dismissal.

- (ii) I find that it was not reasonably practicable for the claimant to have brought her claim within the primary limitation period of 3 months. This is because of the severe effects of her depression upon her in that period. As a result of that I consider that it was not reasonably feasible for the claimant to bring her claim in time. I do not consider that the claimant can be said to be at fault because the evidence was that she did not bring her claim in time because of a serious debilitating illness. In those circumstances I find that it was not reasonable to expect the claimant to present her claim in time. In short, she could not do so due to her depressed state.
- (iii) I find that the claim was brought within a reasonable period after the time limit expired. I have taken into account that there was no exact moment in time when the claimant suddenly got better and suddenly recovered from her depression. I found that the claimant was beginning to feel better around the end of March. The claimant was unable due to her illness to start thinking about bringing her claim or preparing to do so until that time. I accept the claimant's evidence that she still continued to suffer with the effects of her depression from that point rather than instantly recovering. Around that period it seems to me that the claimant did act promptly. Within a relatively short period of time, the claimant took steps to consult ACAS, to go through early conciliation, to arrange to see the Citizens Advice Bureau, to take advice from the Citizens Advice Bureau and then to prepare and lodge her reasonably detailed claim form. Those steps were all taken between 23 March and 5 April. The shortness of that period does not indicate to me that the claimant was unreasonably delaying. On the contrary it indicates to me that the claimant was acting reasonably promptly to progress her claim, once she started feeling better. I have also taken into account that the claimant is dyslexic and that causes her to take longer over documents than other people might. She has not been formally represented and has been dealing with matters herself. She is not somebody who had a sophisticated awareness of time limits, employment law or the steps necessary to lodge a claim before she started doing her own research and taking advice from the Citizens Advice Bureau. Adding all these factors together, I consider that the claim was brought within a further reasonable period.
- (iv) In relation to the claimant's discrimination claim, whilst I agree that some further particularisation is likely required and that there is a question mark over whether the respondent can be liable for some of the allegations which the claimant makes I do not agree that these matters should weigh heavily against the grant of a just and equitable extension to bring a claim of race discrimination.

- (v) I think that the essential allegation which the claimant is making is quite clear and is something which the respondent could plainly be liable for. The essential allegation is that the third-party pressure which the respondent succumbed to in dismissing the claimant came from the individual who the claimant alleged was discriminating against her because of her race. The purported reason for the pressure was bogus and the real reason was race. In that way, the claimant argues that her dismissal was tainted by race discrimination. In those circumstances, it seems to me that there is a case of race discrimination which is clear and cogent and which the respondent is potentially liable for. I am not dealing with any issue relating to amendment today but I observe that this essential allegation was apparent to me upon reading the pleadings, it has been confirmed by the claimant today that that is how she wishes to put her case and this allegation was also raised in the internal proceedings. For those reasons I do not think the respondent's suggestions that further particulars and/or an amendment application are required are matters which should weigh heavily against the grant of a just and equitable extension today.
- (vi) Furthermore I observe that the essential allegation as I have just described it is clearly very important as the fundamental reason why the claimant has brought this claim and why the claimant says this dismissal affected her so badly was that she believes the real reason for her dismissal related to her Irish nationality. She has made it clear that it is part of her case that she put the respondent on notice that the pressure to dismiss came from someone who was hostile to her due to her race. This is a serious allegation of discrimination. For these reasons I consider there is considerable prejudice to the claimant if she is not permitted to pursue the race discrimination claim and this is a significant factor in favour of the claimant.
- (vii) As I have said there is an issue over whether the respondent can be responsible as a matter of law for the acts of Sue Longthorn. The respondent says Sue Longthorn was employed by the school where the claimant cleaned and it cannot therefore be liable for her actions. However, the respondent has not pleaded its position in respect of Sue Longthorn and no evidence about that was presented to me today. I did not hear full argument on the scope of the respondent's liability today. No authorities were put before the tribunal on this point. I do not consider that the claimant has had a fair opportunity to respond to this issue and the tribunal is not in a position to make a fair analysis today. The respondent focused its attention primarily on other matters and indicated it would seek a further preliminary hearing to determine the issue relating to liability for Sue Longthorn. In my view if the issue is to be determined as a preliminary point it should be considered at a separate hearing as the respondent suggests because then the tribunal will be in a position to undertake a proper analysis. It is not necessarily a straightforward matter. Following the repeal of the relevant

provisions in the Equality Act the extent to which an employer may be liable for the acts of a third party is much reduced. However, part of the claimant's case is that she reported the harassment to the respondent and nothing was done. The reason for the respondent's alleged inaction will therefore be in issue. Further, the evidence surrounding the alleged harassment may well be relevant to the claimant's claim that her dismissal was tainted by race discrimination and was unfair. The extent of the respondent's liability will need to be considered in light of the authorities in particular Conteh v Parking Partners Ltd 2011 ICR 341, Unite the Union v Nailard 2019 ICR 28 and Macdonald v Ministry of Defence 2003 ICR 937. But on my reading of those authorities and taking the claimant's case at this stage at its highest I think the respondent may be liable for the allegations of failure to investigate/failure to prevent the harassment by Sue Longthorn, even if Sue Longthorn is found to be a third party. For these reasons I consider it is not appropriate to assess the merits of the argument concerning the extent of the respondent's liability and I do not consider this merits issue is a factor which should go against the grant of a just and equitable extension.

- (viii) When considering the length of the delay it is in my view not a particular lengthy delay – it is one that is measured in weeks (around 4) rather than months. It is not in my judgement a delay which is likely to affect the cogency of the evidence. The respondent did not argue that it would. I therefore do not think the length of the delay is a factor which goes against the grant of an extension on just and equitable grounds.
- (ix) The respondent has not pointed to any particular prejudice which it faces in defending this claim. I do not consider that there is any particular prejudice. The respondent has not been prevented or inhibited from investigating the claim while matters were fresh. The delay was not particularly lengthy and the allegation had not become stale. The respondent was already on notice of the essential allegation which the claimant was making through the internal process and there is no suggestion of any difficulty in obtaining witness or documentary evidence. In these circumstances I consider that any prejudice suffered by the respondent if the extension is granted is clearly outweighed by the prejudice which would be suffered by the claimant were it refused.
- (x) As to the reason for delay it seems to me that this is a factor which would strongly go in favour of a just and equitable extension. This is because I have found that the claimant had a good reason for not presenting her claim in time (her ill health) and that she acted promptly once she began to recover from her ill health, including by promptly making enquiries and taking advice. In my view this is a factor which would further indicate that the claimant would face significant prejudice if her claim was not allowed to proceed.

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- (xi) It follows from the findings I have made that I think the discrimination claim was brought within a just and equitable period. I have considered all the relevant factors and in my view the most substantial relevant factors weigh in favour of granting of an extension on just and equitable grounds. I therefore find that it is just and equitable to extend time.

32. The result is that I find that that the Tribunal does have jurisdiction to hear the claimant's claims for unfair dismissal and race discrimination.

Employment Judge Meichen
18 October 2022