



EMPLOYMENT TRIBUNALS

Claimant: Ms GC Graham

Respondent: Cumbria County Council

HELD AT: Liverpool (by CVP)

ON: 9 November 2022

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: In person

Respondent: Mr Paul Brodie, solicitor

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Kinley CVP video fully remote. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The claimant was given as many breaks as she wanted with the Equal Treatment Bench Book in mind, and we adjourned a number of times taking into account she found the process stressful.
2. Part way through the hearing the claimant wished to amend her claim from sex discrimination to disability discrimination. There is no written application before me as the claimant made this request for the first time today. The claimant has not provided amended Grounds of Complaint including the disability discrimination allegations and there are clear time limit issues with the new claim. The respondent was taken by surprise and I was not in a position to deal with the oral application. It was left that the claimant, if she

wished to amend and her claim survived the strike out, would need to make a written application setting out why she has left it so long before bringing a claim of disability discrimination, why she first raised disability discrimination for the first time during this hearing, deal with the time limit issue and attaching a draft amended Grounds of Complaint. It was after this discussion the claimant withdrew her sex discrimination complaint.

3. It is undisputed after the claimant's summary dismissal on the 10 June 2021 proceeds were not issued within the primary limitation period and ACAS was not consulted.
4. This is a preliminary hearing to consider the respondent's application to strike the claimant's complaints of unfair dismissal, wrongful dismissal, a redundancy payment and sex discrimination brought under section 13 of the Equality Act 2010 ("the EqA"). The claimant withdrew her claim of sex discrimination at this hearing and the time limit issue related solely to the claim of unfair dismissal.
5. The Tribunal has before it a bundle consisting of 281 pages and a correct copy of the respondent's ET3 form.

The proceedings

6. ACAS early conciliation took place between the 10 and 13 June 2022 and the claim form lodged with the Tribunal on the 21 June 2022. The effective date of termination is agreed as 10 June 2021, approximately a year before the proceedings were issued. The Grounds of Complaint confirm the claimant was referred by the police to LADO and an investigation took place that resulted in summary dismissal at a disciplinary hearing held on 10 June 2022. A copy of the outcome letter dated 14 June 2021 was sent to the claimant. I noted that the findings following the disciplinary hearing was the claimant had admitted using illegal drugs and secondly, her honesty and integrity was in question and the claimant had not adhered to social work standards as a professional social worker taking into account the risk to "safeguarding children and vulnerable young adults in your care."
7. Case management orders were issued on the 23 September 2022 that have been complied by the parties. I have before me the respondent's written application titled "Respondent's Application to Strike Out the Claim form," a document titled "Claimant's Response in Preparation For the Preliminary Hearing – 09 November 2022" and a separate written document setting out her means.
8. There is an issue with the claimant's continuity of employment, the respondent stating she has less than 2 years, the claimant maintaining she had been employed on three roles since 2017 and she wished for the matter to be resolved today as it was important to her. In oral closing submissions the claimant stated it was important because it showed clear issues with the respondent. I indicated that continuity of employment would be discussed today after a decision had been made on time limits as it was not a relevant

consideration unless the claimant's unfair dismissal claim survived the respondent's application to strike out the complaint on the basis that it was out of time.

9. As agreed at the outset, the first issue before me is whether the complaint of unfair dismissal was presented before the end of the period of 3 months beginning with the effective date of termination of employment. The claimant conceded that the claim was out-of-time. Her unfair dismissal claim should have been made before the end of the period of 3 months beginning with the effective date of termination (s.111(2)(a) of the Employment Rights Act 1996 ("ERA")). The claimant does not benefit from any extension of this 3-month period by virtue of early conciliation which she entered into late many months after the primary limitation period had expired..
10. The key issue was whether the claimant can satisfy the Tribunal that it was not reasonably practicable for her complaint to be presented before the end of that period of 3 months, and if she can, whether the complaint was presented within such further period as the Tribunal considers reasonable. The claimant is aware of the respondent's position as recorded in the written application at paragraphs 10 to 38 and the legal tests referred to at paragraph 24 onwards. I have taken the case law referred to into account.
11. The claimant in her written response deals with time limits from paragraph 12 onwards which I do not intend to repeat. The claimant gave evidence under affirmation and clarified her position, including the claims she was bringing which resulted in the sex discrimination claim being withdrawn by her.

The out-of-time issue

12. The claimant, who accepts her claims are out of time, relies on four factors to support her position that it was not reasonably practicable to have lodged/filed the claim form within the statutory time limit, which I will deal with in turn taking into account the oral evidence given by the claimant to questions asked by me and in cross-examination.

Delays were exacerbated by the claimant's decision to appeal the decision and the advice received from Citizen Advice Bureau ("CAB").

13. The claimant tried to instruct a union to represent her during the investigation into her gross misconduct, but as her student membership had lapsed and she was in the middle of the disciplinary process, the union was unable to assist. The claimant also sought advice from ACAS, but not in respect of early conciliation in June 2021.
14. Following the claimant's summary dismissal for gross misconduct on the 10 June 2021 two or three days later she obtained advice from the Citizens Advice Bureau ("CAB"). The claimant states she was advised to wait until her appeal was heard before issuing proceedings for unfair dismissal. I find it surprising that the claimant was told this and relied upon advice that she should effectively disregard the 3-month time limit. The claimant had access

to the internet, she was aware that she had a claim of unfair dismissal and it was relatively straightforward to check up on the legal position where the 3-month limitation period is clearly set out. The claimant had made contact with ACAS before her dismissal and I find it surprising that she did not consult ACAS again until the 10 June 2022, almost a year after her dismissal, when ACAS early conciliation was entered into.

15. It is notable the claimant searched on the internet for legal advice and made contact with solicitors on 28 June 2021 via the internet, and barristers on other dates the claimant was unable to recall. The claimant was aware of her legal rights immediately following dismissal, and the outcome letter dated 14 June 2021 which ran to 5-pages made the position clear. It set out the serious allegations and referred to the investigation, the claimant's credibility and the consequences of her actions in relation to the professional standards for social workers.

The delay was due to delays in obtaining documents from the respondent and Cumbria constabulary.

16. The claimant's case is that after the appeal outcome, despite the advice received from the CAB, the claimant chose not to issue proceedings and sought to obtain a copy of a document held by Cumbria Constabulary relating to the allegations which was finally provided to her on the 9 June 2022.

The delay was due to the respondent intentionally delaying the appeal outcome.

17. The appeal outcome letter is dated 22 September 2021. The claimant maintains the respondent intentionally delayed the appeal heard by four counsellors and attended by a number of other officers including a solicitor, the dismissing officer and appeal officer. The letter runs to 6-pages which reflects the claimant was not found to be honest or credible by the appeal panel who determined she had "failed to meet social work standards." There was no evidence the respondent had intentionally delayed the appeal in order that the claimant missed the three-month time limit, and I took the view that there was nothing to stop the claimant from taking part in early conciliation that would have extended the statutory time limit and issue these proceedings in time after her appeal had been dealt with, and it was reasonably practicable for the claimant to have taken this step.

18. I found the disciplinary and appeal outcome letters gave the claimant sufficient information on which to base a claim of unfair dismissal. It is notable the grounds of the claimant's appeal was defective procedure, not all the evidence was considered and the sanction too severe, all matters that could be dealt with in an unfair dismissal complaint. The claimant chose not to issue proceedings, despite being aware of the statutory time limit, because she wanted to see the police documentation held by Cumbria Constabulary relating to the serious allegations of misconduct she faced in her employment.

The claimant experienced distress and ill-health due to stress and domestic violence .

19. I have sympathy for the claimant who states she was the victim of domestic violence, and a Woman's Refuge suggested to her on 1 August 2021 that she should seek legal advice. There was no evidence before me that the claimant was so incapacitated that she was prevented from issuing proceedings. The claimant was actively seeking legal advice, consulting with ACAS and the CAB, attempting to instruct legal advisors, writing her appeal, dealing with her appeal, seeking alternative employment by applying for work, going for interviews including being offered a role following interview in November 2021 which was withdrawn as a result of the reference given by the respondent. According to the medical evidence she worked for Cumbria Learning in October 2021. The claimant had also "picked up part-time roles to keep going," and in 2022 worked in a store for a number of months and in housekeeping.
20. It is notable on the 31 August 2021 the claimant made a subject access request to Cumbria Constabulary and a number of other applications as listed in the bundle. All of this points to the claimant being in a position to issue proceedings within the statutory time limit, and it being reasonably practicable for her to do so. I have also taken into account the GP letter in the bundle dated 31 May 2022 referring to the claimant working for Cumbria Learning in October 2021, applying for a "variety of jobs" and "coping well" with interviews etc. an ongoing Social Work England investigation, the claimant attending "numerous interviews" with no dates and the fact the claimant was not on medication and there were no plans for treatment for the claimant's anxiety and depression referred to in 2022.
21. The claimant in oral evidence stated she was waiting for a medical assessment for autism, there is no medical evidence before me that the claimant was unable to issue proceedings due to a mental impairment, and the strong evidence in the bundle was that she was more than capable of dealing with her affairs and did.

The law

22. Section 111(2) of the ERA states:

...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.

Conclusion

23. It is for the claimant to show that it was not reasonably practicable for her to present the applicable claims within the 3-month time limit and she has failed to do so.
24. I was referred by Mr Brodie to the following cases; Porter v Bandridge Ltd [1978] ICR 943 CA and Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA, in which the Court of Appeal concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in Asda Stores Ltd v Kauser EAT 0165/07 explained it in the following words: *'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'* [my emphasis]. I took the view that it was possible for the claimant to have issued unfair dismissal proceedings within the statutory period. She was not ignorant of her rights, was aware of the three-month time limit and ought to have known that waiting until the appeal was concluded or later than this would result in her complaint of unfair dismissal and redundancy payment being out of time.
25. Mr Brodie relied on the EAT decision in Midland Bank plc v Samuels EAT/672/92 *"if a person asserts that they were unwell, then it is up to them to produce medical evidence of the extent and effect of the illness."* Taking into account the evidence before me there was no satisfactory evidence pointing to the claimant being too unwell to issue proceedings and I was not persuaded that she was concluding the claimant took it upon herself to wait until the Cumbria Constabulary had dealt with her request and provided the document she sought during which period the claimant managed her own affairs, attended interviews and worked.
26. The claimant has not satisfied the first limb of the test under section 111(2)(b), in the alternative had she done so I would have gone on to find the complaint was not presented within a reasonable time thereafter taking into account the length and circumstances of the delay. In short, the claimant did not act promptly.

REASONS SENT TO THE PARTIES ON

13 December 2022

FOR THE SECRETARY OF THE TRIBUNALS