



EMPLOYMENT TRIBUNALS

Claimant: Miss R Short

Respondent: Cragg & Roberts Ltd

Heard at: Manchester (remotely; by CVP)

On: 7 November 2022

Before: Employment Judge Rice-Birchall

REPRESENTATION:

Claimant: Mrs A M Moon, solicitor

Respondent: Mr P Tingle, Managing Director

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

Background

1. This was a preliminary hearing to determine whether the claimant's claims under the ERA 1996 (of unfair dismissal and unauthorised deductions) and under the Equality Act 2010 (direct sex discrimination and harassment) were brought in time.
2. This preliminary hearing was not concerned with the claimant's claims of wrongful dismissal and holiday pay which are not brought under the ERA 1996 or the Equality Act 2010 and which are not the subject of this judgment. Whether or not those claims are in time will fall to be determined at the final hearing. Accordingly, the Tribunal has corrected its judgment under rule 69 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to remove the reference to wrongful dismissal and holiday pay as being claims which are out of time. A corrected judgment will be sent to the parties.
3. The Tribunal had the benefit of a Bundle of documents and heard evidence from the claimant.

Issues

4. The issues to be determined were:
 - (1) What was the effective date of termination (the EDT);
 - (2) Were the complaints under ERA 1996 made within the time limit in section 111 ERA 1996? The Tribunal will decide:
 - a. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the effective date of termination and date of payment of the wages from which the deduction was made?
 - b. If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the last one?
 - c. If not, was there a series of deductions and was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the last one?
 - d. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
 - e. If not, was it made within such further period as the Tribunal considers reasonable?
 - (3) Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010. The Tribunal will decide:
 - a. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?
 - b. If not, was there conduct extending over a period?
 - c. If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) or the end of that period?
 - d. If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:
 - i. Why were the complaints not made to the Tribunal in time?
 - ii. In any event, is it just and equitable in all the circumstances to extend time?

Facts

5. The background to the case is set out in Employment Judge Sharkett's Case Summary contained in the Record of Preliminary Hearing sent to the parties on 2 August 2022.

6. In brief, the claimant was employed by the respondent from June 2017. It is her case that she was subjected to unreasonable and unfair treatment which had an adverse impact on her health and resulted in absences from work and her subsequent resignation. She brings a constructive unfair dismissal claim, a sex discrimination claim, an unlawful deduction from wages claim, a holiday pay claim and a breach of contract claim.

7. The respondent denies the claims and states that the claims are out of time, hence the preliminary hearing held to determine the out of time point in relation to the ERA 1996 claims (unfair dismissal and unlawful deductions) and the Equality Act 2010 claims (sex discrimination). As stated above, the holiday pay and breach of contract claims were not the subject of this preliminary hearing.

8. The claimant was signed off work from around June 2021.

9. The claimant confirmed in evidence that she had been in receipt of legal advice about her employment since around the end of June/beginning of July 2021.

10. On 12 July 2021, the claimant commenced employment with Accident Repair Centre. The claimant stated that this was a trial period.

11. On 19 July 2021 the claimant was invited to a meeting to discuss alleged unauthorised absences. The claimant attended the meeting and was suspended pending an investigation.

12. During the meeting on 19 July 2021, the claimant advised that she had failed to communicate the reasons for her absence from work because she was pursuing a constructive unfair dismissal claim.

13. On 20 July 2021, the claimant wrote to Michelle Withers, the respondent's payroll manager. She said that she had been in touch with her solicitor, and "as you are aware, I have a constructive dismissal claim against Cragg and Roberts." In that letter, the claimant confirmed that she would not be attending any meetings in the foreseeable future.

14. On 26 July 2021, the respondent wrote to the claimant's legal advisors. The email set out a timeline and stated that the respondent would assume that the claimant had resigned on 19 July 2021 unless they heard to the contrary. No response to that letter was sent or received. Accordingly, the claimant's employment was processed by the respondent as having terminated on 19 July 2021.

15. Early conciliation was started, by the claimant, on 19 October 2021. If 19 July 2021 was the EDT, then that date is one day outside the primary time limit. When the claimant commenced early conciliation she stated that 19 July 2021 was her EDT. Day B was 29 November 2021.

16. The claimant says that what she was enduring at that time was and still is, extremely sensitive, emotive and traumatic. She did not explain how that resulted in her commencing EC one day outside the primary time limit. She also confirmed that her legal advisor informed her that the process had to be commenced within three months.

17. The claimant confirmed that she had help from a solicitor in submitting her claim. Indeed, the claim form names Anne-Marie Moon of Solicitor Direct Limited as her representative. The claim form was submitted on 17 December 2021. As stated above, the claim form clearly identifies the EDT as 19 July 2021 in paragraph 5.1.

18. Further, paragraph 2 of the claim form states: " On 19 July 2021, the claimant left her position..." It goes on to state, in paragraph 3, that the claimant left her position in circumstances in which she was entitled to terminate her contract without notice by virtue of the respondent's conduct towards her.

The Law

Effective date of termination

19. The key date for employment law purposes is the effective date of termination (EDT) which is defined as the date on which the employee's notice expires or the date on which termination takes effect.

ACAS Early Conciliation (EC)

20. The time limits under the ERA 1996 and the Equality Act 2010 can be extended as a result of EC. To be effective in extending time, the ACAS reference must be commenced during the primary limitation period. So, if the EDT is 19 July 2021, the primary limitation period would expire on 18 October 2021. If ACAS EC is not commenced in that primary limitation period, there is no extension of time afforded under the EC procedure.

Time limits under ERA 1996

21. The claimant is seeking to pursue a complaint of constructive unfair dismissal, a claim brought under the ERA 1996. Such a claim is to be brought in the ET, but by section 111 it is provided:

“An [employment tribunal] shall not consider a complaint under this section unless it is presented —

- (a) before the end of the period of three months beginning with the effective date of termination, the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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.”

22. As the statute makes clear, there are two limbs to the formula: first, the employee must show that it was not reasonably practicable to present the claim in time; second, if he succeeds in doing that, the ET must be satisfied that the time within which the claim was in fact presented was reasonable. In other words, where a complaint is not presented on time, the onus is on the claimant to show that it was not "reasonably practicable" to present their complaint on time. Once the tribunal is satisfied of this, it must consider whether the further period taken to submit the claim was reasonable.

23. The way in which the Tribunal should approach the test of reasonableness for these purposes – both in deciding in what was reasonably practicable and

determining whether any further period was reasonable - is informed by the case law arising from the same test applied to unfair dismissal claims before the Tribunal (section 111(2) ERA 1996). As that case law has made clear, the question of what is, or is not, reasonably practicable, and as to the period within which it would be reasonable to present the claim thereafter, are questions of fact for the Tribunal to determine. The appellate courts will be slow to interfere with a Tribunal's decision on either limb.

24. The case law in this area has distinguished the reasonable practicability of presenting a claim within the time limit when the claimant is represented by a "skilled adviser" (when the Tribunal will usually find that it had been reasonably practicable for the claim to have been presented in time) from other circumstances. Skilled advisers have been held to include solicitors, employment consultants and CAB advisers.

25. Where the claimant's skilled advisers are at fault for failing to submit a claim in time, the Tribunal will usually consider that it was reasonably practicable for the claim to have been presented in time (*Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379*). A claimant's solicitor must demonstrate that they had taken all the steps they should reasonably have taken in the circumstances to see that the application was presented in time. Where this has not been established, the tribunal should not find that it was not reasonably practicable to present the claim on time.

Time limits under the Equality Act 2010

26. The law in relation to time limits is as follows:

123 Time limits

- (1) [Subject to [section 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.
- (2) ...
- (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;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something —

- (a) when P does an act inconsistent with doing it, or
- (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

27. In deciding whether it is just and equitable to extend time to permit an out-of-time discrimination claim to proceed, the tribunal is entitled to take into account anything that it deems to be relevant. A tribunal has a wide discretion when considering whether it is just and equitable to extend time, and an appeal against a tribunal's decision should only be allowed if it has made an error of law or its decision is perverse.
28. Time limits are applied strictly in employment cases, and there is no presumption in favour of extending time. In fact, tribunals should **not** extend time unless the claimant convinces them that it is just and equitable to do so. The exercise of discretion to extend time should be the exception, not the rule.
29. The tribunal's discretion when extending time is as wide as that of the civil courts. This requires courts to consider factors relevant to the prejudice that each party would suffer if an extension were refused, including: the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had co-operated with any requests for information; the promptness with which the claimant acted once they knew of the possibility of taking action; and the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action. The emphasis should be on whether the delay has affected the ability of the tribunal to conduct a fair hearing.

Conclusions

30. The EDT was 19 July 2021. There is no evidence to suggest an alternative date. The opportunity given, by the respondent, to the claimant's legal advisor to dispel the assumption of a termination date of 19 July 2021 was not taken and further, the claimant and her advisors both clearly considered the termination date to be 19 July 2021 from the clear and unambiguous claim form and particulars of claim.

31. The claimant has not advanced any logical basis on which the Tribunal should now conclude that the termination date was, in fact, on a different, later date, particularly in light of the letter written to the claimant's representative on 26 July 2021 which invited the claimant to dispute that date as the EDT. That opportunity was not taken.

Were the complaints under ERA 1996 made within the time limit in section 111 ERA 1996?

32. As the EDT was 19 July 2021, the claimant does not benefit from the extension of time afforded by compliance with the EC requirements. Because the claimant did not seek EC within the primary limitation period, the claim was submitted significantly out of time. The claim was submitted on 17 December 2021, almost two months late.

33. As regards the unlawful deductions from wages claim, no evidence was forthcoming regarding the date on which the claimant was paid and what deductions were alleged. Therefore, the matter was not considered at the preliminary hearing and therefore as above, the judgment has been corrected to remove the unlawful deductions from wages claim as being stated to be out of time. Again, whether or not that claim is in time will need to be considered at the final hearing.

34. The Tribunal must then go on to consider whether it was reasonably practicable for the constructive unfair dismissal claim to be made to the Tribunal within the time limit. It concludes that it was. The Tribunal concludes that the reason for the delay was the claimant's legal advisor's mistaken belief that EC gave the benefit of an extension of time when that was not, in fact, the case because EC had commenced one day too late (according to their own understanding of the termination date) and was therefore outside the primary time limit. The claimant was receiving legal advice throughout this period, even though it was she who approached ACAS for EC. It was the legal advisor who submitted the claim.

35. Although the Tribunal understands that the claimant contacted ACAS to commence EC herself, she was in receipt of legal advice specifically about the process of submitting a claim. There was no evidence before the Tribunal as to when the legal advisor became aware that EC was not commenced during the primary time limit, but the claim was not submitted until almost two months later. There was no evidence given as to the reason why the claim was submitted on that date.

36. Where the claimant engages solicitors to act for them, it will normally be presumed that it was reasonably practicable to present the claim in time, and no extension will be granted. Where skilled advisors are engaged and they mistake the time limit, the claim is out.

37. The Tribunal considers that, by exercising reasonable diligence, the claim could have been presented in time. Accordingly, the claimant's claim of constructive unfair dismissal is out of time. The Tribunal does not have jurisdiction to hear this claim.

Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010?

38. No detail was given as to the acts complained of. It was therefore assumed that the last act complained of was the constructive unfair dismissal. It was not put forward by the claimant that there was any act of discrimination which post-dated 19 July 2021.

39. The claim was not made to the Tribunal within three months (allowing for any early conciliation extension) of EDT.

40. As the EDT was 19 July 2021, the claimant does not benefit from the extension of time afforded by compliance with the EC requirements. Because the claimant did not seek EC within the primary limitation period, the claim was submitted significantly out of time. The claim was submitted on 17 December 2021, almost two months late.

41. The Tribunal must therefore consider whether the claims made within such further period as the Tribunal thinks is just and equitable.

42. As stated above, the Tribunal concludes that the reason for the delay was the claimant's legal advisor's mistaken belief that EC gave the benefit of an extension of time when that was not, in fact, the case because EC had commenced one day too late and was therefore outside the primary time limit. The claimant was receiving legal advice throughout this period, even though it was she who approached ACAS for EC. It was the legal advisor who submitted the claim.

43. In considering whether it is just and equitable in all the circumstances to extend time, the Tribunal must consider factors relevant to the prejudice that each party would suffer if an extension were refused.

44. The Tribunal has considered that the claimant would suffer the greatest prejudice as she would be unable to pursue her claim of sex discrimination. To the contrary, the respondent would be in receipt of a windfall as they would not need to defend those claims.

45. The emphasis should be on whether the delay has affected the ability of the tribunal to conduct a fair hearing. There can be a fair hearing. Indeed, had the claimant commenced EC just one day earlier, the claim would have been in time.

46. Accordingly, the Tribunal considers that, although the Equality Act claim is out of time, it is just and equitable to extend time so that the sex discrimination claim can proceed.

47. The claim of constructive unfair dismissal is out of time and cannot proceed. The claim of sex discrimination is out of time but it is just and equitable to allow the claim to proceed. The judgment will be corrected so that it is clear that the claims of unlawful deductions from wages and for holiday pay and breach of contract were not considered at the preliminary hearing and that any limitation issue as regards these claims should be considered at the final hearing.

Employment Judge Rice-Birchall

Date: 18 March 2023

REASONS SENT TO THE PARTIES ON

22 March 2023

FOR THE TRIBUNAL OFFICE

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