



EMPLOYMENT TRIBUNALS

Claimant: Miss C Edwards

Respondent: Derbyshire County Council

Heard: in Nottingham

On: 8 March 2023

Before: Employment Judge Ayre

Appearances

Claimant Did not attend and was not represented

Respondent Mr J Heard, counsel

JUDGMENT

The Tribunal does not have jurisdiction to hear the claim as it was presented out of time.

REASONS

Background

1. The claimant was employed by the respondent from 26 January 2011 until 22 March 2021. She worked at Overseal Primary School as a Teaching Assistant and Midday Supervisor.
2. She began early conciliation on 3 August 2022 and the early conciliation certificate was issued on 11 August 2022. She presented her claim to the Tribunal on 11 August 2022.
3. The claim form includes complaints of unfair dismissal, disability discrimination, for a redundancy payment and for 'other payments'
4. In her claim form the claimant said that her employment terminated on 20 December 2021. There was no evidence before me to support that

suggestion, however. The respondent said the claimant's employment terminated on 22 March 2021 and produced evidence to support its position.

5. On 7 October 2022 Employment Judge V Butler ordered that the case be listed for a Preliminary Hearing to consider whether the Tribunal has jurisdiction to hear the claim as it was presented out of time. The parties were ordered to agree a short bundle of documents for the hearing, and the claimant was ordered to send any witness statement that she wished to rely upon to the respondent in advance of the hearing.

The proceedings

6. The claimant did not attend today's hearing and was not represented. There is no evidence on the Tribunal's file of the claimant having made any contact with the Tribunal since she filed her claim form in August 2022.
7. The claimant has not made any application for postponement of today's hearing and provided no explanation for her non-attendance. Several attempts were made to contact the claimant on the telephone number provided on the Claim Form, but to no avail.
8. Mr Heard told me that his instructing solicitors had been in contact with the claimant in recent weeks with a view to preparing for today's hearing. They had received no documents from her, nor had she served a witness statement. The last contact from the claimant had been an email on 16 February 2023.
9. It appears from the respondent's Grounds of Resistance that the claimant has a history of not attending meetings, having repeatedly failed to attend meetings arranged by the respondent during the course of her employment.
10. In light of the above I decided, in accordance with Rule 47 of the Employment Tribunal Rules of Procedure, to proceed with the hearing in the absence of the claimant.
11. There was before me a bundle of documents running to 84 pages, and I heard submissions on behalf of the respondent from Mr Heard.

The issues

12. The issue for determination today was whether the Tribunal has jurisdiction to hear the claim as it was presented more than three months after the date upon which the claimant's employment terminated. Specifically:
 - a. Were the discrimination claims presented to the Tribunal within a period that the Tribunal thinks is just and equitable? This involves considering:
 - i. Why were the complaints not made to the Tribunal in time?
 - ii. Would it be just and equitable in all the circumstances to extend time?
 - b. Were the unfair dismissal and unauthorised deductions claims made within the time limits in sections 111 and 23 of the Employment Rights Act 1996? This involves considering:

- i. Was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
- ii. 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?

Findings of fact

13. The claimant was employed by the respondent from 26 January 2011 until 22 March 2021 when she was dismissed by reason of ill health capability. Prior to her dismissal the claimant was invited to a number of meetings with the respondent, which she did not attend. She has a history of not coming to meetings.
14. The primary limitation period for presenting claims arising out of the claimant's employment expired on 21 June 2021. She did not present her claim until 11 August 2022, some 415 days late.
15. After her employment terminated the claimant sent a number of emails to the respondent including the following:
 - a. A lengthy email dated 8 February 2021 in which she wrote: "*...I'm considering taking legal action...*"
 - b. An email dated 13 September 2021 in which she wrote: "*...I...feel I have been dismissed unfairly....How do I claim unfair dismissal?*"
 - c. An 'online submission' dated 27 October 2021 in which she wrote: "*...I want yo [sic] put a claim in for unfair dismissal...*" and in response to which she was advised to contact her Trade Union or Citizens Advice.
 - d. An email dated 1 November 2021 in which she wrote: "*...I also need to know how to put an unfair dismissal in...*"
16. The claimant did not appeal against the decision to dismiss her but did apply for ill health retirement.
17. The claimant was assessed by Occupational health on 21 September 2021 for the purposes of her application for ill health retirement. Following that assessment consent was requested to get a report from the claimant's GP / consultant.
18. On 7 March 2022 the respondent's Director Schools and Learning wrote to the claimant to inform her that her application for retirement on the grounds of ill health had been refused
19. The claimant began early conciliation on 3 August 2022 and the early conciliation certificate was issued on 11 August 2022. She presented her claim to the Tribunal on 11 August 2022, some 415 days late.
20. There was no evidence before me as to why the claimant did not submit her claim earlier, or of why she decided to issue proceedings on 11 August 2022.

The Law

Time limits – discrimination claims

21. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination 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...

(a) Such other period as the employment tribunal thinks just and equitable.

22. Section 123 (3) states that:

“(a) conduct extending over a period is to be treated as done at the end of the period;

(a) Failure to do something is to be treated as occurring when the person in question decided on it.”

23. In discrimination cases therefore, the Tribunal has to consider whether the respondent did unlawfully discriminate against the claimant and, if so, the dates of the unlawful acts of discrimination. If some of those acts occurred more than three months before the claimant started early conciliation the Tribunal must consider whether there was discriminatory conduct extending over a period of time (i.e., an ongoing act of discrimination) and / or whether it is just and equitable to extend time. Tribunals have a discretion as to whether to extend time but exercising that discretion should still not be the general rule. There is no presumption that the Tribunal should exercise its discretion to extend time:

Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434.

24. Factors that are relevant when considering whether to extend time include:

- a. The length of and reasons for the delay in presenting the claim;
- b. The extent to which the cogency of the evidence is likely to be affected by the delay;
- c. The extent to which the respondent cooperated with any requests for information;
- d. How quickly the claimant acted when he knew of the facts giving rise to the claim; and
- e. The steps taken by the claimant to obtain professional advice once he knew of the possibility of taking action.

Time limits - unfair dismissal and unlawful deduction from wages claims

25. The time limits for presenting claims of unfair dismissal are contained in section 111 of the Employment Rights Act 1996 which states that:

“(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, 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.*

(2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a)."

26. Section 23 of the Employment Rights Act 1996 gives workers the right to bring complaints of unlawful deduction from wages to the Employment Tribunal. The time limit for bringing such claims is contained within Sections 23(2), (3) and (4) which provide as follows:

"(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –

- (a) In the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made....*

- (3) Where a complaint is brought under this section in respect of –*
 - (a) a series of deductions or payments...*

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

27. In cases, such as this one, in which a question arises as to whether it was reasonably practicable for the claimant to present his claim on time, there are three general principles that fall to be considered –

- a. The question of reasonable practicability should be interpreted liberally in favour of the claimant;
- b. It is a question of fact as to whether it was reasonably practicable for the claimant to present his claim on time; and
- c. It is for the claimant to prove that it was not reasonably practicable for him to present his claim on time.

28. In *Palmer and another v Southend-On-Sea Borough Council* [1984] ICR 372, the Court of Appeal concluded that 'reasonably practicable' does not mean 'reasonable' or 'physically possible', but rather 'reasonably feasible'.

29. In ***Cygnets Behavioural Health Ltd v Britton* [2022] IRLR 108** the EAT held that a person who is considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits that apply, and that it is their responsibility to do so. The EAT reminded Tribunals that they only have jurisdiction to hear claims that are presented outside the primary time limit if the claimant satisfies the Tribunal both that it had not been reasonably practicable for the claim to be presented within time, and that she presented her claim within a reasonable period thereafter. Section 111(2) of the Employment Rights Act 1996 does not have to be given a liberal interpretation, and the test is a strict one.

Conclusions

30. The claimant presented all of her claims significantly out of time. The onus is therefore on her to persuade the Tribunal to extend time, in relation to each of the complaints that she makes.
31. The claimant has provided no explanation for the delay in presenting her claims and has adduced no evidence at this hearing. There is no evidence before me on which I could conclude that it was not reasonably practicable for her to present her claims of unfair dismissal and unlawful deduction from wages on time. I therefore conclude that it would have been reasonably practicable for her to do so.
32. There is evidence before me of the claimant engaging in lengthy and detailed correspondence with the respondent after her dismissal, and of her referring on several occasions to taking legal action and bringing a claim of unfair dismissal. She was therefore clearly aware of her right, at the very least to bring a claim of unfair dismissal, and able to produce written documents.
33. I also find that the claimant did not present her claim within a reasonable period following the expiry of the primary limitation period. She waited 415 days before doing so. This was a very substantial delay for which no explanation whatsoever has been provided by the claimant.
34. The claims for unfair dismissal and unlawful deduction from wages are out of time and the Tribunal does not have jurisdiction to hear them.
35. The discrimination claim was also presented 415 days after the expiry of the primary limitation period. This is a very lengthy delay, for which the claimant has provided no reasons or explanation. Although in discrimination claims the Tribunal has a broad discretion to extend time if it considers it would be just and equitable to do so, there must be some basis upon which it could conclude that it would be just and equitable to extend time.
36. There is, quite simply, no evidence before me as to the reasons for the delay or as to why it would be just and equitable to extend time. I have to consider not just the prejudice to the claimant of not being able to pursue her claim if I do not extend time, but also the prejudice to the respondent if I do. I accept Mr Heard's submission that there would be prejudice to the respondent if I were to extend time, as the respondent would be put to the time and cost of defending a claim in which memories will now have faded.
37. There is an important public policy in the finality of litigation and in the existence of time limits.
38. I therefore find that the discrimination claim is also out of time and that the Tribunal does not have jurisdiction to hear it.

Employment Judge Ayre

Date: 8 March 2023

JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

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FOR THE TRIBUNAL OFFICE