



EMPLOYMENT TRIBUNALS

BETWEEN

MS POLLY REYMOND

Claimant

AND

GREYSTOKE MANOR

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton (in public, by VHS) ON 21 April 2023

EMPLOYMENT JUDGE H Lumby

Representation

For the Claimant: In person
For the Respondent: Mr Quelch, counsel

JUDGMENT

The judgment of the tribunal is that the Claimant's claim was brought within such period as the tribunal considers reasonable and so it can consider her claim.

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims were presented in time.
2. I have heard from the claimant. I have heard from Mr Quelch on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.

Issues

3. The issues to be determined is whether it was reasonably practicable for the Claimant's claim to be presented within the three month time limit and if not whether it was presented within such period as the tribunal considers reasonable. The tribunal can only consider the claim if brought within such period.

Facts

4. The Claimant was employed by the Respondent between 15 December 2021 and 20 May 2022 as a dishwasher at its care home, working five hours a day, five days a week. She brings claims for unlawful deduction of wages and for holiday pay for accrued but untaken holiday.
5. The claim form was presented on 20 October 2022. The Claimant left her employment on 20 May 2022. She commenced the Early Conciliation process with ACAS on 27 July 2022 (Day A). The Early Conciliation Certificate was issued on 11 August 2022 (Day B).
6. The three month time limit for the Claimant to bring her claim expired at midnight on 5 September 2022. By bringing the claim on 20 October 2022 it was brought outside that time limit.
7. I find that the Claimant had mental health issues, in particular anxiety and depression. She was suffering from trauma from her time at Greystoke Manor. She had experienced severe stress working in a care home during covid. This meant that she was unable to cope with bringing the claim forward earlier, even though she was aware of the need to do so.
8. She was aware or ought to have been aware of the time limits although had not been advised by any third party as to the strict time limits. There was no misrepresentation in relation to them by her employer.
9. The substantial cause of her failure to comply with the time limit was her trauma and aversion to stress caused by her poor mental health, in particular her anxiety and depression. This acted as a physical impediment to compliance.

Law

10. Having established the above facts, I now apply the law.
11. One of the relevant statutes is the Employment Rights Act 1996 ("the Act"). Section 23 of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the last date upon which a deduction occurred, 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 be presented before the end of that period of three months.

12. The claimant also claims in respect of holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 ("the Regulations"), and there are similar time limit provisions in Regulation 30(2).
13. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
14. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
15. I considered the cases of Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT;
16. The grounds relied upon by the Claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are her mental health and the trauma she was suffering from working for the Respondent, preventing her from being able to bring the claim forward.
17. The question of whether or not it was reasonably practicable for the Claimant to have presented her claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).

18. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-
19. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
20. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) 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".
21. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability ... the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
 22. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."

Conclusions

23. I now consider the issues by applying the law to the facts.
24. The issue is whether it was reasonably practicable to have presented the claim within the relevant time limit and if not whether it was presented within a reasonable period thereafter. In reaching conclusions, I have looked at the five points to be considered set out in the case of Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372, referred to above.
25. Taking each of these in turn, and applying the facts to them, I find:
 - a. the substantial cause of the claimant's failure to comply with the time limit was her trauma and aversion to stress caused by her poor mental health, in particular her anxiety and depression;
 - b. the mental health and trauma acted as a physical impediment to compliance;
 - c. the claimant did know of her rights;
 - d. there was no relevant misrepresentation by the employer;
 - e. the claimant had not been advised and there was no substantial fault on the part of any third party or the claimant that led to the non-compliance.

26. Applying these conclusions, I find on balance that the Claimant's mental health had prevented her bringing the claim in time. Given that the mental health issues were ongoing, I conclude that it was presented within what I consider to be a reasonable further period.
27. As a result, the tribunal has jurisdiction to hear the claim and can consider it.
28. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 1 and 3; the findings of fact made in relation to those issues are at paragraphs 4 to 9; a concise identification of the relevant law is at paragraphs 10 to 23; how that law has been applied to those findings in order to decide the issues is at paragraphs 24 to 27.

Employment Judge H Lumby
Date: 21 April 2023

Judgment sent to Parties: 17 May 2023

FOR THE TRIBUNAL OFFICE