Case No: 3303538/2022

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs L Sandu	v	Rooster Shack Ltd

Heard at: Reading On: 17 March 2023
Before: Employment Judge George

Appearances For the Claimant: in person
For the Respondent: Mr P Collins, senior litigation consultant

JUDGMENT having been sent to the parties on 31 March 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Following a period of conciliation that lasted from 14 to 16 February 2022, the claimant presented her claim on 23 March 2022. The respondent entered a response on 27 April 2022. This claim arose out of the claimant's employment by the respondent as Team Member which started on 26 February 2019. The date on which the employment ended is variously said to have been 30 November 2020 (see the claim form at page 8) or 5 December when the claimant states she was told verbally that she was dismissed by Mr Mahmud of the respondent. The respondent's version of events is that employment ended on 30 November following a resignation by the claimant in October of that year.

2. The claim originally included a complaint of disability discrimination but that was dismissed on withdrawal on 18 December 2022. That was confirmed at a case management hearing on 6 December at which the employment judge listed the claim for a final hearing in July 2023 but also this preliminary hearing to decide the issues set out on page 35.

3. At this preliminary hearing I have had the benefit of a 215-page bundle of relevant documents and a statement prepared by the claimant in accordance with the directions that was signed on 9 March and which she adopted in evidence. The respondent had provided their own chronology of events which was not agreed. It

is apparent, and was accepted at the hearing in December 2022, that these claims were presented long after the initial time limit that is specified under the relevant legislation. The claimant explained that she discovered that she was pregnant in September 2022, her daughter was born on 7 June 2021 (see the report at page 77) and the claim was not presented until nearly a year after the three-month time limit had originally expired. I also notice that it appears that it was presented more than a month after the early conciliation certificate was issued.

Applicable Law

4. The Employment Tribunal has no jurisdiction to hear pregnancy or maternity discrimination claims which were not presented within the time specified in s.123 of the Equality Act 2010 (hereafter the EQA). For present purposes, that section provides that, subject to the effect on time limits of early conciliation, proceedings on a complaint within Part 5 of the EQA (which relates to employment) 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."

5. The discretion in s.123(2) to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to. The burden is on the claimant to persuade the Tribunal that the discretion should be extended in her favour: Robertson v Bexley Community Services: [2003] I.R.L.R. 434 CA. There is no restriction on the matters which may be taken into account by the tribunal in the exercise of that discretion and relevant considerations can include the reason why proceedings may not have been brought in time and whether a fair trial is still possible. The tribunal should also consider the balance of hardship, in other words, what prejudice would be suffered by the parties respectively should the extension be granted or refused?

6. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT advised that tribunals should consider, in particular, the following factors:

   (a) the length of and reasons for the delay;

   (b) the extent to which the cogency of the evidence is likely to be affected by the delay;

   (c) the extent to which the party sued had cooperated with any requests for information;

   (d) the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and

   (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action.

7. This was reiterated by the Court of Appeal in Southwark London Borough Council v Afolabi [2003] I.R.L.R. 220 CA. However, the factors to be taken

into account depend upon the facts of a particular case and should not be considered mechanistically when exercising what is a broad general discretion: Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, CA.

8. It is not necessary that the Tribunal should be satisfied that there is a good reason for the delay before finding that it is just and equitable to extend time although the explanation will always be relevant: Abertawe Bro Morgannwg University v Morgan [2018] I.C.R. 1194 CA. Furthermore, one of the most significant factors to be taken into account when deciding whether to set aside the time limit is whether a fair trial of the issue is still possible (Director of Public Prosecutions v Marshall [1998] ICR 518). In Baynton v South West Trains Ltd [2005] ICR 1730 EAT, it was observed that a tribunal will err if, when refusing to exercise its discretion to extend time, it fails to recognise the absence of any real prejudice to an employer. This is part of considering the balance of prejudice and in doing so, the Tribunal may have regard to the potential merits of the claim: Rathakrishman v Pizza Express (Restaurants) Ltd [2016] I.R.L.R. 278.

9. Claims of breach of contract brought under Art.3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 the ERA are also subject to time limits. So, by Art.7, again, by reason of Art.8B, subject to the effect of early conciliation,

> "an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented -
>
> (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or
>
> …
>
> (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods as is applicable, within such further period as the tribunal considers reasonable."

10. When the Tribunal is considering whether it has jurisdiction to consider a complaint of breach of contract which was not presented within three months of the effective date of termination, the burden of proof in relation to both stages of Art.7 is on the claimant.

11. 'Reasonably practicable' means more than merely what is reasonably capable physically of being done but less than simply reasonable. When considering the claimant's explanation for the delay, the employment tribunal needs to investigate what was the substantial cause of the claimant's failure. Examples of situations where it might not be reasonable practicable to present the claim in time were given by Brandon L.J. (as he then was) in Walls Meat Co Ltd v Khan [1979] I.C.R. 52 CA at paragraph 44,

> ''The performance of an act. . .is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike:

> or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him.''

The substantive issues

12. It is relevant to say something about the nature of the underlying dispute. The respondent's case, according to page 23, is that the claimant resigned. Text messages and an email have been included in the bundle and the respondent argues that those are consistent with that case. They assert that the claimant gave notice that she was leaving her employment in October 2020 and point, in particular, to a communication from the Director, Mr Mahmud, to payroll, to that effect.

13. On the other hand, the claimant said in her claim form (page 11), that she had been on authorised leave for a month until 30 November 2020. There is then a disputed incident of 4 or 5 December 2020 when, according to the claimant, she said she was available to return to work and Mr Mahmud unexpectedly told her that she no longer had a job and her employment had already ended. In other descriptions of the incident she seems to suggest that he told her that she did not work there anymore and he knew she was pregnant. The inference she draws is that this was a communication by him that the employment ended because of the pregnancy.

14. I am not making a decision about the underlying merits today. Even the debate about exactly when employment ended is only over a few days. I do not think that those few days are material to the issues I have to decide today in the context of the length of delay in this case. It is not necessary for today's purposes to decide whether the employment ended on 30 November 2020 or 4 or 5 December 2020 and I have not made a finding about that.

15. However, the explanation I have just given does show is that it is not simply evidence about what happened during the December 2020 visit by the claimant to the restaurant that will be critical to a tribunal's decision about whether the claimant was dismissed by reason of pregnancy. Evidence about the conversation that happened in October and about whether the claimant resigned or was given leave will also be of great importance, if the substantive dispute goes to a final hearing.

The issues before me

16. The claimant gave evidence in her written statement that she was very shocked and scared when the statement was made to her by the respondent on 4 or 5 December 2020 that she was no longer employed. She states that she tried to calm down because she understood it could be dangerous for the baby that she was carrying. She explains that, during her pregnancy, she had a lot of investigations and appointments and tried to

rest.

17. There was a particular reason why avoiding anxiety and resting was a priority for this claimant. It is completely understandable that she should be concerned to do so. As was recorded in her medical notes (including those dated February and April 2021) she was highly anxious during her pregnancy because of a history of three previous pregnancies which had tragically ended with the loss of her babies. This meant that the claimant had a particular and understandable reason not to put herself at risk during her pregnancy.

18. She has explained that she had gestational diabetes. Although she did not raise this in evidence or in argument, I do note that all of this took place during the coronavirus pandemic which, as is commonly known, was a particularly uncertain time for pregnant women who were faced with making decisions about how best to protect themselves and their unborn children in a developing and scary situation. On a human level it is completely understandable that the claimant may not have gone out very much during her pregnancy and may have rested as much as possible to avoid stress.

19. However, she also said in oral evidence that she had not realised that she had been treated in a way that was contrary to the law. She said both in oral evidence and in her statement that she did not realise that she was dismissed. This seems to me to be something that underlines the difficulty that there would be for a tribunal in making findings of fact about what was said in December 2020; at least on one account that she had adopted in evidence, the claimant herself appears to have come out of that meeting not believing that her employment was terminated. So, it seems to me that there is some cause for concern about the reliability of the evidence she now gives about her realisation that the employment came to an end because of something done by Mr Mahmud when that is a version of events she has told me today only came to her many months after the event.

20. What she said in oral evidence was,

> "When I had calmed down with regards to my little girl and my mind was clear I could think clearly, I started thinking of myself because I was having more time for myself and I started looking up online what does a person do if they are dismissed and what rights do they have."

Here she is referring to what she describes as underlying health concerns in respect of Sophia, her daughter. She has explained that there is an eye condition and a chest condition both of which she told me require ongoing treatment.

21. So, the essence of what she said is that she was focused solely on her daughter. However, in her oral evidence, she could not to my mind satisfactorily explain what changed that enabled her to start thinking about her own position.

22. Other factors that were relied on to explain inactivity were that the claimant and her husband were both alone in the United Kingdom and not nationals of this country. She said that they did not know the legislation that applies here and thought that what had happened was normal. She said that she thought that Mr Mahmud was telling her that he could not employ her when she was pregnant and thought that this was normal and that she relied and trusted on him.

23. What is clear is that once the claimant started to look for information she found it quickly. In particular, it appears that she used online translation tools to check the information which she found in English online so that she could verify the meaning of it in a language which she understood. She has been able to set out well-structured statements in the claim form which clearly sets out the basis of her now complaint, So, I am satisfied that once the claimant started looking for information, the language barrier was not an impediment to her finding out within a very short period of time what she needed to do to bring a formal complaint. I say that because she has given evidence and represented herself at the tribunal through the services of an interpreter and the language barrier was something she needed to overcome in order to access the Tribunal system. It was not, however, something which caused any appreciable loss of time.

24. The respondent argues that it was not reasonable for the claimant to fail to seek advice. At the relevant time the claimant had been living in the United Kingdom for two and a half years. She accepted that, in Romania, the law prevents dismissal because of pregnancy or at least provides a right under which someone who has been dismissed because of pregnancy can seek compensation. She says that she was shocked by what had happened on 5 December 2020.

25. I do not think it was a reasonable conclusion for her to reach that this was normal under UK law and that she should just take Mr Mahmud's word for it. If, as seemed to be the gist of what she was saying, she considered Mr Mahmud to have ended her employment against her wishes because she was pregnant, it was not reasonable for her in the context of her knowledge and understanding to conclude that she could do nothing about it.

26. In terms of the reliability of the evidence, I recognise that the respondent says that they have a witness to the relevant events and the claimant says her husband was present. There is some documentary evidence in terms of text and email. But this is likely to be a very fact sensitive case dependent on the tribunal's assessment of oral evidence at two separate meetings and about texts sent nearly three years before the date on which this would be coming to trial.

27. I am concerned that the tribunal will be asked to consider the claimant's account when she appears on her own account to have changed her perspective of the key events on reflection. She said that if a person was telling the truth they would not misremember. However, it is well known that human memory is far more complex than that.

28. What, factually, was the reason or reasons for the delay in bringing the claim and was it not reasonably practicable for the claimant to present the breach of contract claim in time? In reality, it was the claimant's failure to seek advice that was the most significant factor; once she looked for information about claiming to the Tribunal she found it relatively quickly. Why did she not seek advice?

29. On a human level, it was entirely understandable that at that point in her life, when she was pregnant with a much wanted child after previous loss, she was not giving serious thought to her own position. I accept that a health pregnancy was her priority. But the test of what was reasonably practicable requires me to look at whether that was objectively reasonable.

30. Many people who are dismissed during pregnancy or maternity leave have to take action at a time in their lives when they have competing priorities either in pregnancy or in the first months of their child's life. In this case, there is evidence that the pregnancy was more than averagely complex, and the claimant was, understandably, highly anxious. However, what seems more to have affected her failure to take action was the mistaken and unreasonable belief that she had not been treated in a way for which she could seek redress.

31. In those circumstances I think it was reasonably practicable for her to bring the claim in three months. Even if I am wrong about that, she did not bring the claim within a reasonable further period. Not only did she wait throughout her pregnancy but her daughter was eight months old before the claimant started to take steps to pursue her rights. There is nothing in particular in the daughter's medical evidence that points to a resolution of health problems at any specific point. The medical evidence does not suggest acute difficulties which resolved so that the claimant's caring responsibilities were less demanding such that one could understand the claimant's decision that she could take steps about her own circumstances at the time when she did. That being so, she could, I conclude, have taken the same steps earlier.

32. At page 149 there is a chronology of appointments concerning the claimant herself and Sophia. There is nothing in that or in the supporting documents that is a sufficient explanation for the claimant not taking steps well before she did to find out what her rights might be. She seems to have just simply felt stronger and clearer at some point. In reality, there was nothing preventing her from finding out about her rights sooner. For that reason, the breach of contract claim was not brought in time.

33. I then consider the various relevant factors for the claim under the EQA. I do not repeat what I say about the sufficiency of the reason. It is well established that whether or not there is a good reason for delay is not the only factor.

34. The delay is of relatively long duration; nearly a year.

35. So far as the effect of delay on the evidence is concerned, the respondent does not make a positive assertion that their witnesses' memories have actually faded. Notwithstanding that, I need to look at the cogency and reliability of the evidence in the circumstances of the issues in this case. Witnesses can be mistaken about events that they claim to recall clearly and that can be exacerbated by time. As I have already said, in the present case, oral evidence is likely to be crucial to the merits of the case. There is reason to be concerned that the passage of time has actually affected the claimant's recollection.

36. All things considered, I accept the respondent's submissions that the reliability of evidence in this case is likely to be adversely affected by the delay and that that would affect the fairness of the trial.

37. The claimant did not act promptly when she knew of the EQA provisions which make dismissal for reasons of pregnancy unlawful. She apparently believed that she was entitled to come back to work in early December and had been told she was not entitled to come back to work. On her case, as explained at this hearing, she

believed that her dismissal was because of pregnancy at the time. Given this, I do not think she acted promptly.

38. There are reasons why she prioritised other concerns. As I have already said, I quite understand why she was anxious during her pregnancy but the delay continued even after the safe delivery of her daughter. She has provided some information about health concerns about her daughter that she had to deal with but those are not sufficient to explain the length of delay or the periods of inactivity.

39. There is some obligation on an individual to acquaint themselves with their right to claim and the claimant was well able to do so when she made the attempt. The claimant's interests in being permitted to pursue a claim of discrimination have to be balanced against the fact that Employment Tribunal time limits are relatively short, by design, to ensure that claims are started relatively soon after the events in question which increases the chance that they will come to hearing with reasonable speed.

40. There is prejudice to the claimant in not being able to pursue the claims. A consequence of a decision by me that it is not just and equitable to extend time will be that she is deprived of a trial on the merits of discrimination allegations which are rightly described as being amongst the most serious that the Tribunal has to deal with. It is a draconian sanction that is not lightly used. I need to balance that against some other factors including the reason for delay, the prejudice on the respondent in having to deal with claims presented a year late, and the impact on the evidence.

41. Taking all those factors into accounts I have decided that it is not just and equitable to extend the time for presentation of the claim.

Employment Judge George

Date: …19 June 2023 ………….

Judgment sent to the parties on

20 June 2023

GDJ
For the Tribunal office