



EMPLOYMENT TRIBUNALS

Claimant

Miss Jessica Octavia Igies-
Mikaelson

v

Respondent

CMR Surgical Limited

Heard at: Huntingdon

On: 8 February 2023

Before: Employment Judge M Ord

Appearances

For the Claimants: Mr S Susak, Counsel

For the Respondent: Mr T Perry, Counsel

JUDGMENT on Preliminary Issues

1. The Claimant's complaint that she was unfairly dismissed by the Respondent was presented out of time. The Claimant has not satisfied me that it was not reasonably practicable for the claim to be presented in time and that claim is therefore dismissed.
2. The Claimant's complaint that she was the victim of discrimination on the protected characteristic of disability, was presented out of time. I am not satisfied that it is just and equitable to extend time. Accordingly, that complaint is dismissed.

REASONS

Background

1. The Claimant was employed by the Respondent as a Quality Assurance Expert from a date in either April or May 2019. There is an outstanding issue about that which is immaterial for the matters before me today. I am told her resignation was with immediate effect on 7 January 2022.

2. The Claimant did not begin Early Conciliation until 5 May 2022. Her Certificate is dated 10 May 2022 and on the same day she presented her claim form to the Tribunal.
3. The Claimant accepted through her Counsel at a Preliminary Hearing before Employment Judge Bedeau on 11 November 2022, that the claims were presented out of time and the learned Judge listed today's Hearing to determine the following two questions:
 - 3.1. In relation to the constructive unfair dismissal claim brought by the Claimant, whether it was not reasonably practicable for the claim to have been presented within the three month primary time limit and if it was not reasonably practicable, was it presented within reasonable time thereafter?
 - 3.2. In relation to the disability discrimination claims, is it just and equitable to extend time?
4. At today's Hearing I heard evidence from the Claimant, from her Mother Ms E Antiopoulos and from Mrs Sophie Paterson Senior People Team Business Partner, employed by the Respondent. Reference has been made to a Bundle of documents and I have had written submissions from the Respondent and oral submissions from both Counsel. I am grateful to the Representatives for the clarity of their submissions and their presentation of their client's respective cases.
5. Most of the salient facts of the case are largely not disputed. The relevant chronology is as follows:
 - 5.1. The Claimant has for some time suffered from severe back problems and has suffered from depression due to a number of life related issues;
 - 5.2. On 28 November 2021, she raised a formal complaint with her employer, which was treated as a Grievance, concerning "*a failure to accommodate for her disability*" which related to the alleged failure to provide an appropriate chair or seating arrangements at the Respondent's premises at Swavesey. She had previously worked at another location where a suitable chair was provided;
 - 5.3. In her evidence the Claimant confirmed that she had spoken to ACAS at this time, but

"was under the impression that I needed to exhaust my employer's Grievance Procedure before bringing a claim";
 - 5.4. On 7 December 2021, the Claimant had a Grievance Meeting which was held by the Respondent at the Claimant's home. She had been absent through sickness since mid-November 2021;

- 5.5. On 15 December 2021, the Respondent delivered the outcome of the Grievance in writing. The Grievance was not upheld.
- 5.6. On the same day, the Claimant lodged an Appeal against that outcome.
- 5.7. In the formal complaint, the Claimant made reference to the Respondent's negligence and the fact that adjustments outlined in the Occupational Health Report had not been made and that,
"the British Law... obligates the company to provide them";
- 5.8. In her letter appealing the Grievance Outcome, the Claimant made reference to reasonable adjustments, the Equality Act 2010 and that a failure to make reasonable adjustments constituted discrimination. The Appeal concludes with these words,
"I am more than happy to discuss this further in the Employment Tribunal if you wish to do so";
- 5.9. The Appeal Hearing was conducted online on 31 December 2021 and the Outcome Letter is dated 6 January 2022. The original outcome was upheld and the Appeal was rejected;
- 5.10. On the following day, 7 January 2022, the Claimant resigned in writing with immediate effect. She referred to being constructively dismissed, that she had been
"working under protest"
at Swavesey and that she had neither
"affirmed nor waived your breach";
- 5.11. The Claimant began new employment on 17 January 2022 and was offered a further new post on 1 March 2022. She began that job on 21 March 2022 and has worked full time throughout the period without any sick leave, as far as I have been told;
- 5.12. On 29 April 2022, the Respondent sent letters to the Claimant and each of her two subsequent employers, regarding alleged breaches of the terms of confidentiality regarding the Respondent's intellectual property, and, to the Claimant and her current employer, alleging that she had provided false information for the purpose of procuring an inaccurate reference;
- 5.13. On 2 May 2022, the Claimant replied denying any wrongdoing and said that she had spoken to her Solicitor; and

- 5.14. On 5 May 2022, the Claimant contacted ACAS with Early Conciliation information, obtained her Certificate and presented a claim to the Tribunal on 10 May 2022.
6. The Claimant says that she could not present her claim earlier than she did due to the levels of medication she was taking, that this caused her to be fuzzy headed and she says that at the time she contacted ACAS she had become used to the medication and was therefore thinking more clearly. She had been taking medication since early December 2021.
7. The Respondent disputes this as being the reason for the delay and says that the reason why the Claimant brought her claim when she did was as a direct result of the letters written on 29 April 2022. The Claimant says this is a mere coincidence of time.
8. The Claimant also says that the letters and emails sent by her, which made reference to statutes or the law, had been written by her brother who was a Family Law Solicitor, but who does not have a detailed knowledge of Employment Law. The Claimant says she was unaware of time limits, did not ask her brother about time limits and that they were not mentioned to her by ACAS until May 2022 when she was told she was already out of time.

The Law

UNFAIR DISMISSAL CLAIM

9. Stating the Law as briefly as possible and dealing first with the question of unfair dismissal, s.111 of the Employment Rights Act 1996 ("ERA") says this,
111. Complaints to Employment Tribunal
- (1) ...
- (2) 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.
10. I have been referred to a number of Authorities, but the starting point should always be to consider this question; what was the reason for the delay? Secondly, in the light of that reason, was it not reasonably practicable to present the claim in time?

11. I have been reminded of the Authority in Porter v Bandridge Limited [1978] IRLR 271, and in particular that throughout the word 'practicable' means 'feasible'.
12. I have been referred to the case of Wall's Meat Company Limited v Khan [1978] IRLR 499. In that case it was stated that ignorance or mistake were not reasonable if a Claimant had not made such enquiries as they should reasonably in all the circumstances have made and further that it was not reasonably practicable to present a claim if there was some impediment which prevented, interfered with or prohibited such performance.
13. In the case of Schultz v Esso Petroleum Company Limited [1999] IRLR 488, it was directed that a Tribunal should consider the overall limitation period, but give particular focus for the latter part of the period.
14. Therefore, the first question I ask is: why was the claim not presented in time?
15. The Claimant said first that she was under the impression that she had to conclude internal procedures first. So be it, but they ended on 6 January 2022, the day before the Claimant resigned and those internal procedures therefore have no bearing at all on the delay in this case.
16. The Claimant did nothing regarding the bringing of her claim thereafter until 5 May 2022. On enquiry, she accepted that she had taken no steps at all to consider how to bring a claim, or by when a claim must be brought. She accepted that she was aware that legal claims do have time limits.
17. During this period the Claimant had, from 17 January 2022 onwards, been employed full time. Whilst much of that work was conducted from home, she was sufficiently mentally capable to carry out her important role in Quality Assurance and was preparing documents for QA systems. She had access to a computer and could easily have entered 'Employment Tribunal claims', 'time limits' or similar wording into any available search engine. She had already been in contact with ACAs and thus was aware that she could contact them for help or advice regarding any possible claim.
18. The Claimant was, at the time, going through difficulties in her life beyond those relating to her previous employment. Due to wrongdoing of her previous partner, which left her in financial difficulties she had to move home in December 2021, before her resignation. She says she did not place the possibility of a Tribunal claim high on her list of priorities.
19. I accept those factors, but I do not find that this made the presentation of a claim to the Employment Tribunal not reasonably practicable.

20. The Claimant knew that ACAS was the source of information and assistance; she had contacted them at the time she submitted her Grievance in November 2021. She could have contacted ACAS again.
21. Further she had the assistance of her brother – a Solicitor - who, whilst not an employment lawyer, was sufficiently well versed to use appropriate language in relation to reasonable adjustments and constructive dismissal and to refer to Employment Tribunal proceedings. Some enquiry could and should reasonably have been made to at least ask how and when a claim could be brought in the Employment Tribunal.
22. I am satisfied that the Claimant was in fact jolted into action by the Respondent's letter of 29 April 2022. Her reply to that letter again refers to advice from a Solicitor. I am satisfied that the Claimant would have been concerned at the time that errors in her reference caused by her providing incorrect information to a former colleague might have had consequences with her new employer. Whilst this has not, I am told, subsequently proved to be the case, it would have been a genuine concern at the time.
23. Until that letter was received, the Claimant had not taken any steps to progress the matter. She made no enquiry as she reasonably ought to have done if she had been genuinely intending to bring a claim, first as to how and second as to when a claim had to be advanced.
24. I am satisfied that the Claimant failed to make reasonable enquiry in this case so that she has not satisfied me that it was not reasonably practicable for her to present her claim in time. I am also satisfied that the impetus for bringing a claim when she did was the letters sent by the Respondent's Solicitors and her concern over how this could affect her current employment. The cause of delay was a lack of an intention to progress the matter until the Claimant received the letter of 29 April.
25. The Claimant, whilst relying on her medical condition and in particular her ongoing medication and her ability to think clearly, has not advanced any medical evidence or opinion to support her contention that in or about the end of April 2022 she was able, having not been able previously, to advance thinking regarding her Employment Tribunal claim. She has not established that there was any medical impediment preventing her making the reasonable enquiry she ought to have made. She was capable of carrying out full time work throughout the period in a post where accuracy is required.
26. For those reasons the Claimant has not satisfied me (and the burden lies on her to do so) that it was not reasonably practicable to present her claim of unfair dismissal in time and that claim is therefore dismissed.

DISCRIMINATION CLAIMS

27. S.123 Equality Act 2010 states,

123. Time Limits

- (1) Proceedings on a complaint 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.

28. I have been reminded of a number of Authorities. In Robertson v Bexley Community Centre [2003] IRLR 434, it was stated that time limits are exercised strictly in employment cases and that there is no presumption that a Tribunal should exercise discretion to extend time unless it can think of a reason not to. The exercise of discretion is the exception rather than the rule, but that does not mean that discretion should be exercised restrictively.

29. Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327, confirmed that the burden of persuading the Tribunal to exercise its discretion to extend time lies with the Claimant.

30. Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] ICR D5, where the Court of Appeal expressed caution against Tribunals relying on the check list of factors found in s.33 of the Limitation Act 1980 and said that the best approach was to assess all the factors in the particular case which it considers relevant, to whether it is just and equitable to extend time including in particular the length of and the reasons for delay.

31. I have also been referred to the sequence of Authorities,

- Habinteg Housing Association v Holleron UKEAT/0274/14;
- Rathakrishnan v Pizza Express (Restaurants) Limited [2016] IRLR 278; and most recently
- Edomobi v La Retraite RC Girls School UKEAT/0180/16.

32. The Authority in Habinteg suggested that where there was no evidence of a valid explanation for delay, the extension should be refused. In Rathakrishnan, Judge Peter Clark stated that if it was intended to be so starkly put that a failure to provide a good excuse for delay would inevitably result in an extension of time being refused, he could not accept that proposition.

33. In Edomobi the Appeal Tribunal held that if there had to be a choice between those two approaches, the approach in Habinteg would be preferred, but said this,

“I find it difficult to see how a Claimant can discharge the burden of showing that it is just and equitable to extend time if they simply do not explain the delay, or does so but is disbelieved. In neither case, in my Judgment, is there material on which the Tribunal can exercise its discretion to extend time.”

34. Has the Claimant in this case presented a good reason for the delay? I find that she has not.

35. As already set out above, the Claimant could and should have been aware of any limitation period and how and when to present a claim.

36. I do not accept her explanation of the reason for the delay and her evidence that it was only in or around the end of April or early part of May, that she was thinking sufficiently clearly to bring a claim. There is no medical evidence in support of that broad contention, and the claimant was able to carry out her work throughout the period, work which required attention to detail.

37. I am satisfied that she was moved into action, not as a result of any improvement in her condition, but because of the possible consequences of her being held to account for alleged wrongdoing in relation to the Respondent's intellectual property and in relation to her procuring an incorrect reference.

38. In relation to the reference, the Claimant says that the errors (which related to an overstatement of her previous salary and a minimisation of her sickness record), were genuine mistakes and that they are evidence of her reduced mental capacity due to her medication.

39. There is no medical evidence in support of that and I do not accept it. Rather, on the balance of probabilities I am satisfied that this was not an innocent error, but an effort to, (a) procure a higher salary, the Claimant facing as she was financial difficulties; and (b) to reduce in the mind of her new employer her sickness record and thus her potential reliability.

40. I am satisfied that the Claimant was concerned that once these matters were brought to the attention of her employer, there may be consequences because of her misdirection in those areas.

41. On that basis the Claimant has failed to establish a reason for delay and the claim would, on that basis, be dismissed. I have not accepted the stated reason for the delay.

42. If I was then to turn to the balance of prejudice, I would still be satisfied that this falls in favour of the Respondent. The Claimant will be unable to

prosecute a claim out of time and she would suffer prejudice as a result. The Respondent will have to face such a claim.

43. In this area I do reflect on the following; first that the Claimant has in fact been in better paid employment throughout the period since 17 January 2022; and second, since that she has submitted in her calculation of losses a payment of some £28,500 for health complications, impact on current and future life and difficulty with finding a new job. That is notwithstanding the fact that she has been in paid employment since 10 days after her resignation.
44. She also fails to give any credit for her employment beginning on 17 January 2022.
45. These indicate to me that the Respondent would be put to defending a claim which on the barest analysis is overstated and puts before the Tribunal matters which require detailed analysis and consideration. The costs of resisting those claims, however ill founded, would be substantial. Whilst the Respondent accepts there would be little or no forensic prejudice in that there would be no loss of evidential recall, that does not serve in this case to tip the balance of prejudice in favour of the Claimant.
46. The starting point, however, is that the Claimant has failed to provide a proper explanation for the delay in this case.
47. For those reasons the Claimant's complaint of disability discrimination was presented out of time and it is not just and equitable to extend time.
48. For those reasons, the claim is dismissed.

Employment Judge M **Ord**

Date: 16 February 2023

Sent to the parties on: 17/3/23

For the Tribunal Office.