



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Appleyard
Respondent: Delta Acadamies Trust
Heard at: Leeds by CVP video link
On: 29 June 2023
Before: Employment Judge Shepherd

Appearances

For the Claimant: In person
For the Respondent: Mr Shears, Solicitor

Judgment having been given on 29 June 2023 and the written judgment having been sent to the parties on 6 July 2023. Written reasons have been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant represented herself and the respondent was represented by Mr Shears.
2. I heard evidence from Lesley Appleyard, the claimant.
3. I had sight of an agreed bundle of documents which was numbered up to page 295. Together with the hardcopy documents provided by the claimant I considered those documents to which I was referred by parties.
4. The issues to be determined at this Preliminary Hearing were:
 - 4.1. Whether it was not reasonably practicable to have presented the claim for unfair dismissal in time, and, if not, whether it is reasonable to extend the time for presentation.

4.2. When did time begin to run in respect of any discrimination claim, and is it just and equitable to extend time to present the claim from the date three months after that.

5. I have considered the evidence provided, both oral and documentary and the submissions made by and on behalf of both parties.

6. The claimant was employed by the respondent from 1 September 2010 as a Learning Manager. Her employment was terminated on 23 August 2022.

7. The be claimant brings claims of Unfair dismissal and Disability discrimination.

8. The claimant had discussions with her Trade Union representative. She said that she started discussions with the Union on 3 October 2022 and these ended on 2 November 2022. She was informed that there was a three-month time limit in which to submit claims.

9. The claimant provided copies of emails with her Trade Union representative. In these she referred to being conscious of the time closing in. On 21 October 2022 she sent an email to her Trade Union representative in which she stated:

“I’m stressing out about the timeframe as looking at all the emails etc is quite overwhelming to put it all together logically on paper. Makes total sense in my head but brain fog is getting better if me at the moment. You know I have everything I need I just don’t want to be up against it up at the last minute...”

10 The response from the Trade Union representative indicated that all the information was with the Area organiser –

“... They are aware of the timeframe etc. There getting back in touch next week, which is still within any timeframes if there is a potential for taking this further...”

11. On 3 November 2022 the claimant referred to having taken advice from ACAS and independent legal advice. In oral evidence the claimant said that the legal advice was only given in a casual conversation in a pub.

12. I had sight of a response from ACAS following an approach to the helpline dated 2 November 2022. That advice provided links to information in respect of Early Conciliation.

13. The claimant said that she had been given advice by the ACAS officer that she should put in a grievance to the respondent and that would stop the clock for six weeks. This is not mentioned in the claim form presented to the Tribunal on 18 December 2022 where the claimant refers to being aware that there was a delay in applying. She referred to a “misunderstanding/miscommunication between herself and the adviser”. She made no reference to been advised that the clock would be stopped. This is highly unlikely.

14. The ACAS Early Conciliation certificate shows that the claimant had notified ACAS on 29 November 2022 and the certificate was issued on 30 November 2022.

15. The claimant presented the first claim to the Tribunal on 18 December 2022. In the additional information on the claim form the claimant indicated that she was aware there had been a delay in applying. She said that her union did not give her a decision until two

weeks before the deadline and this was due to 'sickness and holidays'. She also said that there was a misunderstanding/miscommunication between herself and the adviser which only became clear when she called a query why she hadn't been contacted after 10 days.

16. Section 111 of the Employment Rights Act 1996 states:

"(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.

17. Section 123 of the Equality Act 2010 provides:

(1) 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.

18. Under the Equality Act the Tribunal has discretion to extend time if it is just and equitable to do so, the onus is on the claimant to convince the Tribunal that it should do so, and *'the exercise of discretion is the exception rather than the rule'* (Robertson v Bexley Community Centre [2003] EWCA Civ 576 per Auld LJ at para 25).

19. The Tribunal's discretion to extend time under the 'just and equitable' formula is similar to that given to the civil courts by section 33 of the Limitation Act 1980 for extending time in personal injury cases (British Coal Corp v Keeble, [1997] IRLR 336). Under section 33, a court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

1. The length of and reasons for the delay;
2. The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or defendant is or is likely to be less cogent than if the action had been brought within the time; the conduct of the respondent after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant.
3. The duration of any disability of the claimant arising after the date of the accrual of the cause of action;

4. The extent to which the claimant acted promptly and reasonably once she knew of her potential cause of action. Using internal proceedings is not in itself an excuse for not issuing within time see *Robinson v The Post Office* but is a relevant factor.
5. The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

20. In the case of *Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23* it was held by the Court of Appeal that Keeble did no more than suggest that a comparison with the requirements of section 33 of the Limitation Act might help illuminate. But rigid adherence to a checklist could lead to a mechanistic approach. The best approach for the Tribunal was to assess all the factors in the particular case which it considered relevant to whether it was just and equitable to extend time'

21. The time limits Employment Tribunals are not simply procedural niceties that can be waived at the Tribunal's discretion. They are clearly expressed in mandatory terms that an Employment Tribunal shall not consider a complaint unless it is presented within the prescribed time limit. The 'not reasonably practicable' formula requires the Tribunal to make a finding of fact and the onus of proving that presentation in time was not reasonably practicable rests on the claimant. In the case of *Trevelyan's (Birmingham) Limited v Norton EAT 175/90* it was said that when a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right.

22. The claimant was aware of her right to bring a claim of unfair dismissal and should have been put on notice to find out about the relevant time limits.

23. In respect of the complaint of unfair dismissal the time limit had expired on 22 November 2022.

24. The claimant was made aware of the three month time limit by her Trade Union well before the time the claim should have been submitted. It is highly unlikely that the ACAS advisor had told the claimant that putting in a grievance to her employer would 'stop the clock for six weeks'. The claimant was provided with information in respect of the early conciliation included in links which she did not open.

25. The claimant has not shown that it was not reasonably practicable for the unfair dismissal to be presented in time.

26. With regard to the disability discrimination claims, the claimant was aware of the three-month time limit. She had advice from her Trade Union who were extensively involved.

27. The claimant suffered from numerous complex debilitating medical conditions including Rheumatoid Arthritis, chronic kidney disease and possible Long Covid. However, there was no evidence of any mental incapacity which prevented her from presenting a claim to the Tribunal. The claimant had extensive contact with her Trade Union. She raised a grievance and spoke to ACAS. I do not accept that the claimant has established that she was under such a medical incapacity which meant that it would be just and equitable to extend the time for presenting a complaint to the Tribunal.

28. I do not accept that the claimant received incorrect advice from the ACAS officer. The claimant was provided with an email containing links from which to gain advice about the Early Conciliation process. Even if she had misunderstood some advice, she should have looked into the position contained in the links provided to her.

29. I have not considered the merits of the claim in any detail. However, the main issue is with regard to the dismissal. The medical evidence was clear that the claimant was completely unable to work in any capacity either at the respondent or elsewhere. There were no adjustments to her role that would enable her to work for the foreseeable future and she was unlikely to return to work before her normal retirement date. It was advised that ill-health retirement was appropriate. The claimant was given the highest level of medical retirement. Tier 1 in which the employee was unlikely to be capable of gainful employment before her normal retirement age. The claimant has not yet been in a position to return to work of any type up to the present date.

30. The claimant's case was that the respondent should have waited longer until her condition was medicated. This would mean that she would not have been in a position to return to work for at least a further year from the date of termination.

31. This was not raised at the ill-health capability meeting by the claimant's Trade union representative who attended on her behalf.

32. I have considered the various factors including the length of and reasons for the delay.

33. The cogency of evidence is not likely to be affected as the delay was only around six days. However, there is prejudice to the respondent in that it would face a significant claim of disability discrimination which has been presented out of time. It was submitted by Mr Shears that the respondent was likely to incur substantial costs which would come out of public funds. The claimant had taken medical retirement and she remains incapable of work.

34. It remains the case that the exercise of discretion is the exception rather than the rule and I am not satisfied that the circumstances this case are such as to exercise that discretion.

35. The second claim brought by the claimant was a claim with regard to the events leading up to the termination of the claimant's employment. There was no specific allegation of discrimination about the handling of the grievance and in those circumstances it is covered within the dismissal as out of time.

36. I have a great deal of sympathy with the claimant and it gives me no pleasure to conclude that The Tribunal does not have jurisdiction to hear the claims of unfair dismissal and disability discrimination and they are dismissed.

**Employment Judge Shepherd
Date: 21 July 2023**