



EMPLOYMENT TRIBUNALS

Claimant: Miss A Nzitonda

Respondent: Barchester Healthcare Ltd

HELD AT: London Central ET (remotely, through CVP) **ON:** 16 October 2023

BEFORE: Employment Judge L Cowen (sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Miss E Greening (counsel)

JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The Claimant's disability discrimination claims were presented after the expiry of the time limit contained in section 123 (1) of the Equality Act 2010 and it is not just and equitable to extend time under section 123 (1) (b). The Tribunal thus has no jurisdiction to hear the claims and they are struck out.
2. The Claimant's claim for unfair dismissal was presented after the expiry of the time limit contained in section 111 of the Employment Rights Act 1996 and it was reasonably practicable for the claim to be made to the Tribunal within the time limit. The Tribunal thus has no jurisdiction to hear the claim and it is struck out.
3. The Claimant's claim for holiday pay (unlawful deduction from wages) was presented after the expiry of the time limit contained in section 23 of the Employment Rights Act 1996, and it was reasonably practicable for the claim to be made to the Tribunal within the time limit. The Tribunal thus has no jurisdiction to hear the claim and it is struck out.
4. The Claimant's claim for holiday pay (breach of contract) was presented after the expiry of the time limit contained in section of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994, and it

was reasonably practicable for the claim to be made to the Tribunal within the time limit. The Tribunal thus has no jurisdiction to hear the claim and it is struck out.

5. The Claimant's claim for holiday pay (Working Time Regulations) was presented after the expiry of the time limit contained in Reg 30 (2) of the Working Time Regulations 1998, and it was reasonably practicable for the claim to be made to the Tribunal within the time limit. The Tribunal thus has no jurisdiction to hear the claim and it is struck out.

REASONS

Introduction

1. The open preliminary hearing in relation to this case took place on 16 October 2023. The claimant attended, and gave evidence, and the respondent was represented by Ms Greening of counsel.
2. I have considered the following documents that were provided by the parties:
 - a. Preliminary Hearing Bundle (172 pages);
 - b. Updated witness statement from the claimant dated 22 September 2023) (14 pages)
 - c. Further documents submitted by the claimant during the hearing by email.
3. I reserved judgment at the conclusion of the hearing. I want to say at the outset of these reasons that I am aware this decision will be upsetting and disappointing for the claimant, and I hope that these reasons assist her in understanding my decision.

Summary of the claimant's claims

4. The claimant worked for the respondent, a care provider, as a senior nurse, from 11 June 2015 to 31 August 2018, when her employment was terminated by the respondent. She did not attend work due to poor health between 1 June 2016 and 31 August 2018.
5. The claimant submitted sick notes confirming her poor health. The respondent invited her to attend a meeting to discuss her absence on 19 June 2018. The claimant claims that at that meeting she told the respondent that she expected to be back at work at the end of September 2018.
6. The respondent says it arranged Occupational Health appointments during August which the claimant did not attend. The claimant says that she had told the respondent she could not attend the appointments in August as she needed her daughter to accompany her, and her daughter was away at this time. This is disputed by the respondent.

7. On 24 August 2018 the Respondent invited the Claimant to attend a capability meeting, but the claimant did not attend. The Respondent then terminated her employment with effect from 31 August 2018.
8. The claimant sought to appeal against her dismissal on 2 October 2018, but her appeal was unsuccessful as the respondent considered it to have been brought out of time. The claimant was notified that her appeal was unsuccessful on 3 October 2018.
9. The respondent accepts that the claimant was disabled at the relevant time, but denied all other aspects of the claimant's claim. In particular, the respondent asserts that the claimant was dismissed on grounds of capability, and that the respondent carried out an appropriate investigation into the claimant's condition.
10. The respondent also relies upon several objective justifications in response to the claim that reasonable adjustments were not made; namely, the aim of managing sick leave across the workforce; recruitment management; the need for consistency in staff; the need to alleviate pressure on the workforce and costs/budget management.

The history of the claimant's claim

11. The date of receipt by ACAS of the EC notification was 2 October 2018. ACAS issued its certificate by email on 17 October 2018.
12. The parties accept that the claimant did submit a claim form after she had engaged with ACAS and obtained advice on her claim. However, this claim was rejected by the Employment Tribunal as it did not contain the ACAS certificate number. I have been provided with the letter sent by the Employment Tribunal informing the claimant that her claim had been rejected, and what steps needed to be taken to bring the claim. This letter is undated. The claimant accepted in her evidence that it was sometime before Christmas 2018.
13. The Tribunal received the claimant's claim form on 13 February 2023. The claim form was therefore submitted more than 4 years after ACAS issued its certificate of early conciliation.
14. At a preliminary hearing on 13 June 2023, following the respondent's application to list an open preliminary hearing to determine the issue of whether the Tribunal has jurisdiction to hear the claimant's claims, Employment Judge Woodhead directed that an open preliminary hearing would be held on 16 October 2023 to determine the following time limit issues:

Time limits

- 1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 12 November 2022 may not have been brought in time.
- 1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Were the:

1.3.1 unfair dismissal claim (S.111 of the Employment Rights Act 1996)

1.3.2 holiday pay claim:

1.3.2.1 unauthorised deductions (S. 23 of the Employment Rights Act 1996);

1.3.2.2 breach of contract (Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 (S.7);

1.3.2.3 Working Time Regulations 1998 (Reg. 30)

Brought within the applicable time limits? The Tribunal will decide:

1.4 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / date of payment of the wages from which the deduction was made as applicable?

1.5 In respect of any unauthorised deductions claim, if not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.6 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.7 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?

The claimant's evidence about the timing of her claim

15. The claimant was entirely straightforward in her evidence. I found her to be a credible witness, and I have no doubt that talking about the events since her

dismissal, and the circumstances of her bringing her claim was distressing for her. I was impressed with how she gave her evidence and her composure throughout the hearing.

16. The claimant was frank in her explanation of why she brought the claim in February 2023. She explained that she was very unwell following her dismissal, and her mental health was such that she feared that taking the steps she needed to in order to bring her claim would have terrible consequences for her health.
17. I do not rehearse here the detail of her particular mental health issues, but it should be understood that I accept entirely that the claimant was very unwell for a significant period after her dismissal. The claimant described that she took the completely understandable decision that bringing a Tribunal claim is not something she could have managed at that time.
18. The claimant did accept that she had been able to send in an initial claim form after engaging with ACAS and seeking legal advice from them. She had not had any other legal advice. The claimant accepted that she was aware of the time limits that applied to bringing a claim.
19. The claimant explained that when her initial claim form was rejected, she felt that she could not cope with resubmitting a Tribunal claim. The claim being rejected shattered her confidence and she felt she could not manage to bring a claim. She described how she felt it was a choice between bringing the claim and protecting her mental health. She decided to focus on her mental health.
20. I have seen evidence, both in the documents, and what the claimant said in her evidence that she has taken a lot of time, and I am sure spent considerable effort in attending several kinds of therapy to address her mental health issues. The claimant was frank in describing some of the therapy she had as saving her life.
21. The claimant was able to undertake some volunteering with a charitable organisation by August 2019. Her role involved administration work. She felt able to look for other jobs in January 2023. Looking for jobs entailed using a computer and completing forms. She has obtained another job, which she started in February 2023, having been interviewed in January 2023 and the claimant described how happy she was in her current employment. The claimant explained that the confidence she has developed from her current employment led her to feel able to bring her claim to the Employment Tribunal in February 2023.

The parties' submissions regarding the applicable time limits

22. The parties agreed at the outset of the hearing that the claimant's claims had been brought out of time. The alleged conduct covered a relatively short period. Even if it was accepted there was a course of conduct, or a series of deductions, given the date of the claim form, and the effect of early conciliation, any act occurring before November 2022 would be out of time. The questions to be determined were therefore:

- a. In respect of the discrimination claims; would it be just and equitable to extend the applicable time limits?
- b. In respect of the holiday pay claims, was it reasonably practicable for the claimant to have presented her claim within the applicable time limit, and if not, was it presented within a reasonable time?

The respondent's submissions

23. The respondent submitted that although disability can be a reason to extend time, there is no general principle that mental health can mean a claimant is entitled to delay proceedings as a matter of course. The respondent submitted that there was a lack of documentary evidence in this case regarding key issues, such as the reason for meetings to discuss the claimant's conditions being cancelled and so much depends on witness recollection, and potential witnesses would be highly unlikely to recall the detail of relevant matters at this stage. One potential witness was no longer employed by the respondent, and whilst not out of contact, would be unfamiliar with the respondent's procedures and policies in a way that would be likely to impact upon his evidence. The respondent submitted that the delay in this case would therefore cause significant evidential prejudice.
24. The respondent also submitted that the claimant's claim was not particularly strong. The claimant had been absent for some time, and it was envisaged by the respondent that the claimant may not return to work until October 2018. In these circumstances, the respondent submitted that it was highly likely dismissal would be seen as a proportionate means of achieving a legitimate aim.
25. The respondent also submitted that the claimant was able to begin the early conciliation process, and had been able to submit a claim form. She had understood there was a time limit that would apply to her claim. The respondent submitted that the claimant had effectively made a choice not to prioritise the claim, and that there were times between December 2018 and February 2023 when things were better for the claimant.
26. Regarding whether it was reasonably practicable to bring the holiday pay claims within the applicable time limit, the respondent submitted that it was reasonably practicable to bring the claim. In any event, the claimant had not submitted that claim within a reasonable time frame, as the period of four and a half years could not be a reasonable time frame, particularly as that kind of delay caused significant evidential prejudice to the respondent.

The claimant's submissions

27. The claimant submitted that it would be just and equitable to extend time limits because being unwell should not be a barrier to accessing justice. The claimant referred to her significant mental and physical health problems, and how difficult they had made everyday tasks. She explained that for her, at the time, it had been a choice between her mental health and completing the claim form.

28. In relation to whether it was reasonably practicable to bring the claim within time, she explained that at that time she had children to raise and medical appointments and it seemed impossible to bring the claim due to her mental health issues.
29. The claimant explained how anything to do with the claim completely drained her, and she could not cope with it. She explained how when she brought the claim in February, she was at a point where she could cope with things much better than she had been able to before and so it was not reasonably practicable to bring the claim before then, and she had brought the claim as soon as she was well enough to do so.

The relevant law

“Just and equitable”

30. The Tribunal has discretion when considering whether it would be just and equitable to extend time limits. The Tribunal can have regard to the factors listed in section 33 of the Limitation Act 1980, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action (**British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT**).
31. Further relevant factors include the balance of prejudice, which involves considering the relative prejudice that extending time would cause to the respondent (**Pathan v South London Islamic Centre EAT 0312/13**) and the reasons for any delay (**British Coal Corporation v Keeble and ors**). The Tribunal may also consider the strength of the Claimant's claim (**Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT**), whether the claimant was correctly legally advised and whether the claimant understood what their rights were (**British Coal Corporation v Keeble and ors, above**).

“Not Reasonably practicable”

32. “Reasonably practicable” does not mean physically possible, and it does not mean reasonable. In **Asda Stores Ltd v Kauser EAT 0165/07**, “reasonably practicable” was explained in the following terms: *‘the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done’*.
33. If the Tribunal determine that it was not reasonably practicable to present the claim within the applicable time period, it must then ask whether the claim was presented within such further period as the Tribunal considers reasonable (section 112 of the Employment Rights Act 1996).

34. In determining whether the claim was presented within such further period as the Tribunal considers reasonable, the Tribunal should adopt an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted. This assessment must be made against the general background of the primary time limit and the strong public interest in claims being brought promptly.

Conclusions

“Just and equitable”

35. In relation to the disability discrimination claims, I have determined that the claim was brought out of time. The claimant was dismissed on 31 August 2018. The date of receipt by ACAS of the EC notification was 2 October 2018. ACAS issued its certificate by email on 17 October 2018. To be within time, the claim therefore had to be brought by 15 December 2018. The claim was brought on 13 February 2023, so the claim is over four years out of time.

36. Even were the claimant to argue that she was awaiting the outcome of her internal appeal against her dismissal before bringing her claim, her internal appeal was dismissed on 2 October 2018, and the decision communicated to her on 3 October 2018 meaning that the claim would still be substantially out of time. Even if there was a course of conduct, this would not mean that the claim was any less out of time as the time between the last act complained of (the dismissal) and the bringing of the claim is, over four years. This is the case even if the last act complained of is the dismissal of the claimant's internal appeal.

37. I have therefore gone on to consider whether it is just and equitable to extend time limits in this case. I have had regard to the fact that time limits exist for good reason; namely to allow prompt progress of claims, and to give parties some degree of certainty in the management of potential claims against them.

38. I have had regard to the overriding objective contained in Rule 2 of the Employment Tribunals Rules of Procedure 2013 which requires Tribunals to deal with cases fairly and justly. Of particular relevance to this claim is the need to ensure parties are on an equal footing, and the need to avoid delay, so far as is compatible with proper consideration of the issues.

39. I have had regard to the reasons for the delay in the claimant presenting the claim form. I accept the claimant's account of the very significant mental health difficulties that she experienced following her dismissal. I accept what I have heard about her diagnoses, and how her mental health conditions affected her. I accept that for her, there were times when her mental health was something that she had to take decisions to protect, and that she was at risk of real harm. I accept that she made a choice to prioritise her mental health. I also accept her account of how her physical health affected her between 2018 and 2023.

40. However, although I accept the claimant's evidence as to her mental and physical health, I do conclude that within the time between 2018 and 2023,

there were times when she was more able to cope with things, and at times, she could have managed to bring her claim. Of significance, she did bring a claim seemingly before Christmas of 2018. I appreciate that it being rejected deeply affected the claimant, but I do find that she demonstrated the ability to bring a claim at that time.

41. I also find that due to her own efforts, the claimant was well enough to undertake activities such as volunteering in August 2019, and to apply for jobs in January 2023. I do not wish these findings to suggest that I do not appreciate the reasons for the claimant prioritising her mental health. Those reasons, and her decisions, are entirely understandable. However, when considering the reasons for the delay, I have had regard to my finding that at some points between December 2018 and February 2023, she did have the ability to bring a claim, but for good reasons, she chose not to.
42. I have had regard to the balance of prejudice that would arise if I were to extend, or refuse to extend, the applicable time limit. If the time limits are not extended, the claimant loses the opportunity to bring her claim. I consider that there is an important interest in the claimant being able to have her claims, particularly her discrimination claims, fairly heard and determined.
43. However, weighed against this, I have considered the evidential prejudice that would arise were I to extend time limits in this case. I accept that much in this case will depend on the recollection of witnesses. For example, the circumstances of the claimant's dismissal and the reasons for it, and what was within the respondent's knowledge at relevant times.
44. Due to the significance of witness recollection in this case, I have concluded that there would be significant evidential prejudice were the claim permitted to continue. The relevant events took place in 2018. One witness no longer works for the company, and will lack familiarity with its procedures that he would have had were the claim brought promptly. Witnesses will no doubt struggle to recollect details of people and events from 2018.
45. I therefore conclude that when considering the balance of hardship, the hardship caused to the respondent in not being able to defend the claim is very significant.
46. I have also considered the strength of the claim when considering the balance of hardship. I do not consider the claim to be a weak one based on the evidence I have read and considered. That has weighed into my assessment of the prejudice caused to the claimant should time limits not be extended. However, I have concluded that as the delay in this case is so significant, and the consequential evidential prejudice so great, that weighing the balance of hardship leads to the conclusion that it would not be just and equitable to extend time limits in this case.

"Not reasonably practicable"

47. In relation to the unfair dismissal claims and claims for holiday pay, I have determined that the claim was brought out of time.

48. I accept that the claimant was very unwell in the period following her dismissal. However, I have concluded that it was reasonably practicable for the claimant to bring the claim within the appropriate time limit.
49. This conclusion is based on my finding that the claimant was aware of the applicable time limits, had taken advice from ACAS, and had in fact submitted a claim form prior to Christmas 2018. I therefore conclude that the claimant had the knowledge and the ability to bring the claim form within the applicable time limit.
50. If I had concluded that it was not reasonably practicable to bring the claim within the applicable time limit, I would have gone on to ask whether the claim was presented within such further time as the Tribunal considered reasonable. I have concluded that at some points between December 2018 and February 2023 the claimant experienced an improvement in her mental and physical health.
51. I conclude that at some times before February 2023, she was able to bring a claim. The significant delay until 2023 introduces a delay that in my view is unreasonable, given the evidential prejudice that this would cause to the respondent, and to the evidence in the case generally. I therefore conclude that even if it were not reasonably practicable to bring the claim within the applicable time limit, it was not presented within a period I consider to be reasonable.
52. For these reasons, I have determined that the Tribunal does not have jurisdiction to hear the claimant's claims, and the claims will be struck out.

Employment Judge L Cowen

9 November 2023

JUDGMENT SENT TO THE PARTIES ON
10/11/2023

FOR THE TRIBUNAL OFFICE

Notes

1. Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.