



EMPLOYMENT TRIBUNALS

Claimant: Miss A Timmins

Respondent: The Baby Store Limited

Heard at: Liverpool

On: 21 November 2023

Before: Employment Judge Ainscough
Ms L Heath
Ms J Williams

REPRESENTATION:

Claimant: In person

Respondent: Mr Compton, Owner

JUDGMENT

The judgment of the Tribunal is that:

1. It was reasonably practicable for the claimant to bring the claims for breach of contract and unlawful deduction from wages by 4 April 2021. Therefore, the claims for breach of contract and unlawful deduction from wages are dismissed.
2. It would not be just and equitable to extend time for submitting the indirect sex discrimination claim until 19 May 2021. The claim of indirect sex discrimination is therefore dismissed.

REASONS

Proceedings

1. The claimant worked for the respondent as a sales assistant from 14 September 2020 until termination of her employment on 28 December 2020.
2. The claimant began early conciliation on 21 January 2021. The claimant received the ACAS certificate on 4 March 2021. The claimant lodged the

Employment Tribunal claim for unfair dismissal, unlawful deduction from wages, breach of contract, direct sexual orientation discrimination and indirect sex discrimination on 19 May 2021.

3. The respondent submitted a response on 11 June 2021 denying the claims.
4. There was a case management preliminary hearing on 6 September 2022 at which the claimant attended but the respondent did not. Employment Judge Slater listed the matter for final hearing from 21 November 2023 – 23 November 2023. Employment Judge Slater determined that the question of whether the claims had been brought within the prescribed time limits would be dealt with at the final hearing.
5. On 8 September 2022 the claims of unfair dismissal and direct sexual orientation discrimination were dismissed on withdrawal.
6. On 2 November 2023 the Tribunal issued a strike out warning to the respondent for failing to comply with the case management orders issued by Employment Judge Slater on 6 September 2022.
7. The respondent responded to the strike out warning. Employment Judge Allen subsequently determined that the issue of the strike out of the response would be determined at the outset of the final hearing.
8. On 15 November 2023 the respondent made an application to strike out the claims. On 16 November 2023 Employment Judge Howard determined that the respondent's application would be determined at the outset of the final hearing.
9. On 17 November 2023 the claimant applied for reinstatement of her claim for unfair dismissal.
10. At the outset of the final hearing, the Tribunal decided that it would determine the preliminary issue of whether the claims had been brought within the prescribed time limits before determining the applications to strike out the claim and the response.

Relevant Law

11. In accordance with section 23 of the Employment Rights Act 1996 any claim for unlawful deduction from wages must be presented to the Employment Tribunal before the end of the period of three months beginning with the last deduction.
12. Section 23(4) also determines that if it was not reasonably practicable for a complaint to be presented within that three month period, the Tribunal may consider the complaint if presented within such further period as the Tribunal considers to be reasonable.
13. The burden of proof is on the claimant to establish that it was not reasonably practicable to comply with the time limit. In the case of **Palmer and another v Southend-on-Sea Borough Council 1984 ICR 372, CA**, the Court of Appeal determined that reasonably practicable means "reasonably feasible". In **Asda Stores Ltd v Kauser EAT 0165/07**, the Employment Appeals Tribunal determined

that reasonably practicable also meant that which it was reasonable to expect possible to have been done.

14. It is not enough for a claimant to say that they were ignorant of any time limits. Any ignorance of such time limits must be reasonable in accordance with the circumstances of the case.

15. Section 123 of the Equality Act 2010 similarly provides that a claim must be lodged within three months of the last discriminatory act. The Tribunal has a discretion to extend time beyond the original time limit if it is just and equitable to do so.

16. In the case of **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434 CA**, the Court of Appeal determined that a Tribunal will not hear a claim unless the claimant convinces the Tribunal that it would be just and equitable to extend time. The Court of Appeal confirmed that the exercise of the discretion is the exception rather than the rule.

17. When considering whether to exercise the discretion, a Tribunal should have regard to the factors set out in section 33 of the Limitation Act 1980. Such factors include: length and reasons for delay; extent to which the cogency of evidence will be affected by delay and the steps taken by the claimant to obtain advice.

18. The Tribunal should also consider the potential merits of any claim and balance the prejudice to each party of exercising the discretion or not as the case may be.

19. Section 207B(2) of the Employment Rights Act 1996 provides that:

“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.”

20. If the original time limit expires between the date on which a party started ACAS early conciliation and one month after the date on which the party receives the

ACAS early conciliation certificate, time for submitting a claim will expire at the end of that period.

21. Similarly, section 140B of the Equality Act 2010 confirms that any such claim should be lodged within one month of the receipt of the ACAS early conciliation certificate if the original time limit expires during the period in which ACAS early conciliation was started and one month after receipt of the certificate.

Preliminary Issues

22. The issues for the Tribunal to determine were as follows:

- (1) Was it reasonably practicable for the claimant to submit the claims for unlawful deduction from wages and breach of contract within the relevant time limits?
- (2) If not, did the claimant submit those claims within a further reasonable period thereafter?
- (3) Did the claimant submit the claim for indirect sex discrimination within the relevant time limit?
- (4) If not, would it be just and equitable to extend time for the submission of the claim for indirect sex discrimination?

Evidence

23. Prior to the preliminary hearing the claimant raised concerns about attending the Tribunal through fear of seeing the respondent. As a result, the Tribunal deployed the special measures of allowing the claimant to enter the hearing room before the respondent and sit behind a screen for the duration of the hearing.

24. The Tribunal considered the claimant's witness statement and supporting documents and heard evidence from the claimant. The respondent was given an opportunity to ask questions of the claimant arising from her witness statement and documentary evidence via the Tribunal by way of special measures. The Tribunal also had the opportunity to ask the claimant questions. Both parties were then given an opportunity to make submissions.

Relevant Facts

25. The claimant commenced employment with the respondent on 17 August 2020. The claimant's last day of employment was 28 December 2020.

26. The claimant contacted ACAS on 29 December 2020 and was told about time limits.

27. The relevant time limit for lodging the claims expired on 27 March 2021.

28. The claimant started ACAS Early Conciliation on 21 January 2021 and received the certificate on 4 March 2021. One month after this date was 4 April 2021. The relevant time limit therefore expired during the period beginning with the

date on which the claimant started Early Conciliation and one month after she received the certificate.

29. On 22 March 2021 the claimant attended Wigan Magistrates Court to face criminal charges. The claimant was found not guilty.

30. On 5 May 2021 the claimant's partner, a professional rugby player, injured himself. On 15 May 2021 the claimant's partner had a surgical procedure under general anaesthetic to repair a quadriceps tendon.

31. Between January 2021 – July 2021 the claimant pursued enforcement of a separate Employment Tribunal judgment. The claimant was assisted by a friend who worked in the human resources department for the Fire and Rescue Service.

32. In January 2021 the claimant commenced new employment as a retail assistant.

33. In May 2021 the claimant was prescribed antihistamines to control a skin condition.

34. On 19 May 2021 the claimant submitted her Employment Tribunal claim form.

Discussion and Conclusions

Unfair dismissal claim

35. The Tribunal determined that the claimant did not have two years length of service in accordance with section 108 of the Employment Rights Act 1996 to pursue a claim for unfair dismissal. The claimant confirmed under oath that she was not pursuing a claim for automatic unfair dismissal. Therefore, the claim for unfair dismissal was not reinstated.

Breach of contract and unlawful deduction from wages claims

36. The claimant sought payment of her notice pay and payment of accrued but untaken holiday pay. The Tribunal considered whether it was reasonably practicable for the claimant to bring those claims by the 4 April 2021.

37. Between the claimant's termination of employment and the expiry of the relevant time limit the claimant was capable of dealing with two sets of legal proceedings. The claimant was also capable of researching how to start an Employment Tribunal claim and to speak to ACAS. The claimant admitted under oath that the ACAS conciliator probably told her about time limits.

38. The Tribunal determined that the claimant was capable of understanding the research about time limits and to understand the ACAS advice. The claimant also had previous experience from dealing with an earlier Employment Tribunal claim.

39. The Tribunal was not provided with any medical evidence to suggest that the severity of the claimant's medical condition was such that she was incapable of conducting such research or understanding the ACAS advice.

40. In addition, in January 2021, the claimant was capable of applying for, and starting a new job. The Tribunal has therefore determined that it was reasonably feasible for the claimant to lodge the claim within the relevant time limit. Given the claimant's abilities and access to resources and advice, the Tribunal has determined that it was reasonable to expect the claimant to have taken the necessary steps to establish the relevant time limit and lodge the claim within that time limit.

41. The claims for breach of contract and unlawful deduction from wages are therefore out of time and are dismissed.

Indirect sex discrimination claim

42. The Tribunal has subsequently determined that that indirect sex discrimination complaint should have been lodged on or before 4 April 2021 and is out of time.

43. The Tribunal therefore considered whether it would be just and equitable to extend time. In so doing, the Tribunal was mindful that the onus was on the claimant to convince the Tribunal that it would be just and equitable to extend time and that the exercise of the discretion was the exception rather than the rule.

44. The claimant was required to lodge the claim between 4 March 2021 and 4 April 2021. By 4 March 2021 the claimant had spoken to ACAS and had been told about time limits and had taken part in Early Conciliation.

45. The claimant was capable of dealing with criminal proceedings up until 22 March 2021. Whilst the claimant was chasing enforcement of a separate Employment Tribunal judgment, she had the assistance of a friend who specialised in human resources who she could also have spoken to about this claim.

46. After the conclusion of the criminal proceedings and whilst seeking to enforce the separate judgment, the claimant had approximately ten days to consolidate her understanding of the time limits and lodge the claim.

47. The claimant's partner did not injure himself until 5 May 2021 and therefore the claimant did not have to contend with his injury or treatment at the time the claim should have been lodged.

48. The claimant has not provided medical evidence to suggest that she was incapacitated by a skin condition prior to the 4 April 2021.

49. From January 2021 the claimant was also capable of applying for work and starting a new job.

50. For these reasons, the Tribunal does not accept that the claimant was reasonably ignorant of the time limit. The claimant had the opportunity to research the ACAS advice and take advice from her friend or otherwise from an independent adviser. The criminal proceedings had concluded, and the claimant's partner was in good health.

51. The Tribunal determined that the merits of the indirect sex discrimination claim were arguable. The claimant contended that the respondent required her to return from furlough at short notice but she was unable to do so because of a lack of childcare. The respondent denied that the request to return to work from furlough

was discriminatory but rather sought to justify the request on the basis of the needs of the respondent's business.

52. The Tribunal determined that the exercise of the discretion would prejudice the respondent more than not exercising the discretion would prejudice the claimant because the claim was not ready for a final hearing. Neither party had served evidence in sufficient time. The final hearing would take place in late 2024. There was a real risk that there would not be a fair hearing four years after the events, such that the respondent would not have a fair opportunity to respond to the claim.

53. The Tribunal therefore determined that it would not be just and equitable to extend time and the claim of indirect sex discrimination is dismissed.

Employment Judge Ainscough

Date: 21 February 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
Date: 12 March 2024

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