



EMPLOYMENT TRIBUNALS

Claimant

Ms D Zenfler

Respondent

Cranswick Convenience Foods Ltd

PRELIMINARY HEARING IN PUBLIC

Heard at: Leeds by CVP

On: 25 October 2023

Before: Employment Judge Davies

Appearances

For the Claimant:

In person with Ms Marciniak (her daughter)

For the Respondent:

Ms Forrest (solicitor)

Interpreter

Ms I Budzynska

RESERVED JUDGMENT

1. The complaint of sex discrimination is dismissed on withdrawal by the Claimant.
2. The complaint of unfair dismissal is struck out because it was not presented within the time limit in the Employment Rights Act 1996 and it was reasonably practicable to do so. The Tribunal therefore does not have jurisdiction to hear the claim.
3. The complaint of failure to make reasonable adjustments for disability is struck out because it was not presented within the time limit in the Equality Act 2010 and it is not just and equitable to extend time for bringing it. The Tribunal therefore does not have jurisdiction to hear the claim.
4. The complaint that the Claimant's dismissal was unfavourable treatment because of something arising in consequence of disability was not presented within the primary time limit in the Equality Act 2010 but it is just and equitable to extend time for bringing it. That claim will proceed.

REASONS

Introduction

1. This was a preliminary hearing in public to decide whether the Claimant's claims should be struck out because they were not presented within the Tribunal time limits, or whether those time limits should be extended.

2. The Claimant represented herself with help from her daughter, Ms Marciniak. Ms Forrest (solicitor) represented the Respondent. Ms Budzynska was the Polish interpreter. The Claimant has poor mental health and we discussed reasonable adjustments for her at the start of the hearing. We agreed that she should ask for a break if she needed one and she did so.
3. Ms Forrest had prepared a PDF file of the relevant documents and everybody had a copy of that. Ms Zenfler and Ms Marciniak both gave evidence.

Findings of fact

4. I found both the Claimant and Ms Marciniak were honest witnesses doing their best to give accurate evidence. The following findings of fact are based on their evidence and the documents from the time.
5. The Claimant worked for the Respondent as a production operative in its Barnsley cooked meat production facility from at least 2009. She was experiencing some physical ill health in 2021, which she attributed to the working environment. The factory was cold and the Claimant had to stand to perform her role. It involved some heavy lifting. On 14 May 2021 her Consultant Rheumatologist wrote that she had osteoarthritis in her feet and asked for consideration to be given to providing her with a chair at work. Her complaint of failure to make reasonable adjustments for disability dates back to that time. She says she should have been provided with a chair and a warmer working environment from May 2021 onwards.
6. Throughout the events referred to below, the Claimant was assisted by her daughter. The Claimant does not speak good English and she had poor physical and mental health. She relied heavily on Ms Marciniak. Ms Marciniak does speak English.
7. On 18 July 2022 the Claimant was signed off work for a week with “back pain.” On 20 July 2022 she was signed off for two months with “finger joints painful and back pain.” That fit note was due to expire on 19 September 2022. On 14 September 2022, the Claimant was signed off for a further eight-week period. The fit note said that she was awaiting an appointment with MSK (the musculo-skeletal team). The fit note ran to 8 November 2022.
8. The Claimant was seen twice by Occupational Health, in August and September 2022. In addition to her back pain and finger pain, she had Reynaud’s disease and was experiencing depression and anxiety. She told me that she had been on medication for her mental health, with some breaks, since 2021.
9. On 19 October 2022 the Respondent conducted a telephone meeting with the Claimant about her absence. Ms Marciniak assisted her mother. She is recorded as saying that it did not appear that her mother was likely to be fit to work for as much as 6 months at that stage. In a letter dated 24 October 2022, the Claimant was dismissed. The letter said that the reason was capability due to ill health. The letter said that the Claimant’s termination date would be 25 October 2022 and that she could appeal within 5 days of the date on the letter.

10. The Claimant says that she did not receive the letter on 25 October 2022 but a day or two later, and I accept her evidence about that. She says that she presented a “grievance” on 1 November 2022. That appears to have been in practice an appeal against her dismissal. It was written by Ms Marciniak. The Respondent says that it did not receive the appeal. The Claimant had a copy of it. She said that it was sent by post to the Respondent’s Meadow Close address. Ms Marciniak agreed. I accept the Claimant’s evidence that she sent the grievance/appeal. It was suggested to her that she missed the 5 day window for appealing. That was difficult for her because she did not receive the letter on the date it was sent. Anyway, the Respondent’s case was that it did not receive the appeal, not that the appeal was late.
11. For the purposes of time limits, I assume at this stage that the Claimant’s effective date of termination was around 25 October 2022, possibly a day or two later depending when she received the dismissal letter.
12. The Claimant did not hear anything from the Respondent about her grievance/appeal. She did not contact them again herself. Her evidence was that she did not think they were interested in her. She did not believe they were going to have an appeal because they were not interested in her. I find that she came to that view after she did not hear back from the Respondent. It was about a month after her dismissal that she had concluded that the Respondent was not going to progress her appeal.
13. With help from Ms Marciniak, the Claimant applied for Universal Credit after her dismissal. She was awarded payments on 17 November 2022. She was also awarded Personal Independence Payments on 23 November 2023. At this time she needed assistance with her personal care. She did not really leave the house. She struggled to dress herself and to prepare food. Her mental health declined too and her medication dose was increased. It is clear that her dismissal had a significant impact on her mental health. She described it as traumatic. Ms Marciniak explained that she helped her mother to make a claim for Universal Credit when she was dismissed because her mother was struggling with panic attacks and depression. She needed to make sure that she was going to be able to feed herself and not be in debt. That was the priority.
14. With help from Ms Marciniak, the Claimant eventually sought advice from the Citizens Advice Bureau about her dismissal. That was done online. They referred her to ACAS. She contacted ACAS just after Christmas 2022 and Citizens Advice not long before that. ACAS sent an email with information, including information about time limits. Ms Marciniak thought she was aware of the three-month time limit by January 2023. It seems to me likely that information about time limits was provided to the Claimant and Ms Marciniak *before* the primary time limit (for the unfair dismissal and unfavourable treatment) complaints had expired. That time limit expired on 24 January 2023, or a day or two later (depending when the dismissal took effect). It appears that contact with ACAS was made much earlier in January, and information was provided by ACAS by email fairly soon after that.
15. With Ms Marciniak’s help, the Claimant obtained an Early Conciliation certificate in February 2023. The certificate says that early conciliation started and finished

on 13 February 2023. Ms Marciniak and the Claimant were aware when they obtained the ACAS certificate on 13 February 2023 that the claim was already late.

16. With Ms Marciniak's help, the Claimant presented a Tribunal claim, the "first claim", on 17 March 2023.
17. The Claimant was asked why it took her a month after she obtained the Early Conciliation certificate to present the first claim, even though she knew that it was already late. She said that she was not able to deal with it and was waiting for help from her daughter.
18. Ms Marciniak was also asked why the first claim was not presented until 17 March 2023. She said that it was because her mother's health situation was really bad. She and her sister had to take it in turns to look after her mother. Ms Marciniak covered the weekends. She had to do shopping for her mother, help with her washing, make sure she was taking her medication, do cooking and other tasks. She was working 10 hours per day five days per week on weekdays in her own job and then looking after her mother all weekend. It was really hard for her to meet the timescale. With her mother's condition, her own life and long working hours, it was hard to find the time.
19. In the event, the first claim was rejected by the Tribunal in an email sent on 11 April 2023. On 2 May 2023 the Claimant emailed the Tribunal to say that she was obtaining another Early Conciliation certificate. On 4 May 2023 the Tribunal emailed the Claimant to say that there had been a mistake in the letter telling her that her claim was rejected. The letter should have said that the Claimant's name in the Early Conciliation certificate did not match the Claimant's name given in the claim form.
20. With the help of Ms Marciniak, the Claimant obtained a second Early Conciliation certificate. The certificate says that early conciliation started on 5 May 2023 and ended on 9 May 2023. On 15 May 2023, again with her daughter's help, the Claimant presented a fresh Tribunal claim. That is the claim that was the subject of this hearing, claim number 6000863/2023 ("the second claim"). The Tribunal served the second claim on the Respondent on 17 July 2023.
21. Ms Marciniak was asked about the delays in presenting the second claim, between 11 April 2023, when the first claim was rejected, and 15 May 2023 when the second claim was presented. She said that it was again the difficulty of finding time when she was working such long hours herself and then spending all weekend caring for her mother.

Legal principles

Time limits for unfair dismissal claims

22. The time limit for bringing a complaint of unfair dismissal is set out in s 111 Employment Rights Act 1996. Section 111(2) says that the complaint must be presented before the end of the period of three months beginning with the

effective date of termination of employment (plus any extension for early conciliation).

23. If the claim was not brought in time, the Claimant must satisfy the Tribunal that it was not reasonably practicable to bring her complaint within the time limit and that it was brought within a reasonable period. Reasonably practicable means something between “reasonable” and “physically possible”: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] ICR 372, CA. It is a question of fact for the Tribunal whether it was reasonably practicable for the complaint to be brought in time. The factors to be considered may include the manner of, and reason for, the dismissal; whether the employer’s conciliation machinery has been used; the substantial cause of the Claimant’s failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether and if so when, the Claimant knew of her rights; whether the employer misrepresented any relevant matter to the employee; whether the Claimant has been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the Claimant or her adviser which led to the failure to present the complaint in time: see *Palmer and Saunders*.
24. If the Tribunal finds that it was not reasonably practicable for the claim to be presented in time, it must then consider whether it was brought within a reasonable period after that. This requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for the proceedings to be instituted, having regard to the strong public interest in claims being brought promptly, and against a background where the primary time limit is three months: see *Cullinane v Balfour Beatty Engineering Services Ltd* UKEAT/0537/10 (5 April 2011, unreported).

Time limits for disability discrimination claims

25. The time limits for bringing claims of disability discrimination and failure to make reasonable adjustments are set out in s 123 Equality Act 2010, which provides, so far as material, as follows:

123 Time limits

(1) Subject to section 140B, 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.

...

(3) For the purposes of this section -

- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

- (a) when P does an act inconsistent with doing it; or
- (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

26. Under s 123(3)(a), conduct extending over a period is treated as being done at the end of the period. A distinction is drawn between a continuing act and an act that has continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle, such a practice will amount to an act extending over a period. Where there is no such regime, rule, practice or principle, an act that affects an employee will not be treated as continuing, even though it has consequences that extend over a period of time: see *Barclays Bank plc v Kapur* [1991] ICR 208, HL. The focus of the inquiry is not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against, including the claimant, was treated less favourably: see *Hendricks v Metropolitan Police Commissioner* [2003] ICR 530, CA.
27. In the case of a failure to make reasonable adjustments, the Court of Appeal has made clear such a failure is to be regarded as an omission rather than an act: see *Matuszowicz v Kingston upon Hull City Council* [2009] IRLR 1170, CA. In cases where the employer was not deliberately failing to comply with the duty, it is to be treated as having decided upon the omission at an “artificial” date. The Tribunal must decide when, if the employer had been acting reasonably, it would have made the adjustments. It is to be noted that an omission can be continuing, as the Court of Appeal found was the case in *Matuszowicz*.
28. As regards extending time, the Tribunal has a wide discretion under s 123(1)(b) to do what it thinks is just and equitable in the circumstances. The Claimant must persuade the Tribunal that it is just and equitable to extend time: see *Robertson v Bexley Community Centre* [2003] IRLR 434, CA. It is a question of fact and judgment, to be answered case by case by the Tribunal: see *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327, CA. The Tribunal must consider all the relevant factors in deciding whether it is just and equitable to extend time. Those factors will always include (a) the length of and reasons for the delay; and (b) any prejudice arising from the delay, but the Tribunal must take into account all relevant matters: *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] IRLR 1050 (CA); *Adedeji v University Hospital Birmingham NHS Foundation Trust* [2021] ICR D5 (CA). That may include the merits of the claims.
29. In the case of failure to make reasonable adjustments, Tribunals are expected to have sympathetic regard to the difficulty that may arise by the application of s 123(4)(b): see *Matuszowicz*. The period in which the employer might reasonably have been expected to comply with its duty ought in principle to be assessed from the Claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the Claimant at the relevant time: see *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194.

Application of the law to the facts

30. I start with the unfair dismissal complaint. The deadline for presenting the claim (or starting early conciliation) was around 24 January 2023. The claim was successfully presented on 15 May 2023. That was more than three months outside the time limit.

31. The test for extending the time limit in an unfair dismissal is a two-stage test. The first step is to decide whether it was reasonably practicable to present the claim within the time limit. If it was not, it is not necessary to go onto the second step. The time limit cannot be extended and the Tribunal does not have jurisdiction to hear the claim.
32. As set out above, “reasonably practicable” means something between “reasonable” and “physically possible.” I have decided that it was reasonably practicable for the unfair dismissal claim to be presented within the Tribunal time limit. In reaching that view, I have taken into account the following:
 - 32.1 For about a month the Claimant thought that the Respondent would deal with her appeal against her dismissal. However, the time limit runs from the date of the original dismissal, even if the employee appeals.
 - 32.2 As set out above, the Claimant was in poor physical and mental health in the run up to her dismissal and in the aftermath of it and she does not speak good English. For those reasons, I find that she was not in a position to present her claim without assistance prior to 15 May 2023.
 - 32.3 However, she did have assistance from her daughter. With that assistance, she obtained advice from the Citizens Advice Bureau and from ACAS within the three-month time limit, and she was made aware of the three-month time limit before it had expired.
 - 32.4 I accept that Ms Marciniak had a lot to deal with and was working long hours in her own job, dealing with her own life, physically caring for her mother all weekend and trying to assist her with the consequences of her dismissal. I quite understand why she prioritised helping her mother to apply for Universal Credit, because that was about ensuring that she had money to pay the bills and put food on the table.
 - 32.5 However, by December she was able to help her mother obtain advice from Citizens Advice and ACAS and they had found out about the time limit before it had expired. The remaining steps, of obtaining an Early Conciliation certificate and presenting a Tribunal claim could be done online. The claim form that was eventually presented was brief – the claim was set out in half a page. I find that taking those steps before 24 January 2023 was reasonably practicable, i.e. more than physically possible, it was reasonably feasible to have done it.
33. That means that the Tribunal does not have jurisdiction to deal with the unfair dismissal complaint and it is struck out.
34. I turn next to the complaint of failure to make reasonable adjustments. As set out above, that dates back to May 2021. This does not seem to me to be a case of a continuing act, but of a failure to take action in response to the request and medical evidence in May 2021. Applying the principles in *Matuszowicz* set out above, any failure to make adjustments happened on the date when the Respondent would have made the adjustments, if it had been acting reasonably. That is when the time limit starts to run. Assuming that adjustments ought reasonably to have been made in response to the request and evidence in May 2021, on any view it would have been reasonable for that to be done within a matter of weeks or, perhaps, a small number of months. The time limit must, at the latest, have started to run by the end of 2021. The complaint was therefore

presented more than two years late. Although the Claimant was experiencing some mental ill health in 2021 and did not speak good English, the situation was not the same as when she was dismissed. Her physical and mental health were both worse by then. No particular reasons for not bringing this part of the claim sooner were identified. There would be substantial prejudice to the Respondent in allowing this claim to proceed so long after the event. People will inevitably struggle to remember what they did at the time and why. Although the Claimant would be prejudiced by not being able to bring this part of the complaint, that must be set against the prejudice to the Respondent and the very substantial delay. Weighing all the relevant factors, I find that it would not be just and equitable to extend the time limit for bringing this part of the claim.

35. That leaves the complaint of unfavourable treatment. The unfavourable treatment complained of is the Claimant's dismissal, so the deadline for presenting the complaint is, like the unfair dismissal complaint, around 24 January 2023. Again, the delay is more than three months. However, the test for extending the time limit is different and less stringent in a discrimination complaint. The question is whether it is just and equitable in all the circumstances to extend the time limit to 15 May 2023. I have concluded, weighing all the relevant factors, that it is. The claim was presented more than three months late. Coupled with the fact that the original time limit is only three months, that weighs heavily against an extension of time. So too does the prejudice to the Respondent, which would have to face an otherwise out of time complaint, with the time and expense that entails. However, the prejudice to the Respondent is significantly less than in the reasonable adjustments complaint. These events will still be relatively fresh in people's minds. The claim is likely to turn on whether the Claimant's dismissal was a proportionate means of achieving a legitimate aim. Evidence about that is not quite the same as recollections of what precisely was said or done on a particular day. The cogency of the evidence is likely to be unaffected or not significantly affected by the delay.
36. The apparent merits of the complaint can be relevant in deciding whether it is just and equitable to extend the time limit. Here, I do not accept the Respondent's submission that the complaint is obviously weak. The Tribunal will have to hear evidence and reach conclusions about whether the Claimant's dismissal was a proportionate means of achieving a legitimate aim. Her length of service, the Respondent's ability to have her work done by others, its turnover of staff, how long it was reasonable to wait to see whether the Claimant's health improved, and other such factors will be relevant. It is not possible without hearing evidence about those matters to conclude that the claim is weak. This is therefore a relatively neutral factor.
37. On the other side of the balance, I have concluded that the Claimant was not able to present a claim without assistance at any point prior to 15 May 2023, because of her physical and mental health and the fact that she does not speak good English. I have referred to the assistance she had from her daughter, and to her daughter's reasons for not helping her to present the first or the second claim sooner. Whilst I have concluded that it was reasonably practicable to present the claim in time, that means that it was reasonably feasible. It does not mean that it was reasonable. Ms Marciniak was doing her utmost to help her

mother, on top of working long hours herself. That started with addressing her mother's physical needs and supporting her in her daily life. Helping her to bring a Tribunal claim was another task on top of that. If there had not been an issue with the Early Conciliation certificate, the claim would have been about 6 weeks late. The issue with the certificate led to a further 8 weeks' delay. No doubt it would have been physically possible to act with more urgency, but that is not the test. I have to weigh all the relevant factors. If the time limit is not extended, the Claimant will be prevented from having her complaint determined, in the circumstances in which she could not do it herself without assistance and where her daughter was struggling to find time to deal with the Tribunal claim on top of her own job and everything else she was doing to support her mother. The prejudice to the Claimant in those circumstances is greater than the prejudice to the Respondent if the time limit is extended. In my view the balance lies in favour of extending the time limit in respect of this part of the claim.

Employment Judge Davies

Date: 8th November 2023

Sent to the parties on:

Date: 10th November 2023

.....
For the Tribunal:

.....