



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms M Rudnicka

v UK Household Property Management Ltd

HELD AT: London Central

ON: 1 May 2024

BEFORE: Employment Judge Brown (Sitting alone)

Representation:

For Claimant: Miss S Quinn, Solicitor

For Respondent: Mr James Lister, Solicitor

Interpreter: Ms M Nawrocka

JUDGMENT AT A PUBLIC PRELIMINARY HEARING

The Judgment of the Tribunal is that:

1. The Claimant failed to present her claim for unfair dismissal to the Employment Tribunal before the end of the time limit in s.111(2)(a) Employment Rights Acts 1996. It was reasonably practicable for the complaint to be presented in time and so the Tribunal does not grant any extension of time for its presentation under s.111(2)(b) Employment Rights Acts 1996.
2. The Claimant presented her indirect race discrimination complaint out of time. It is not just and equitable to extend time for it.
3. Accordingly, the Tribunal has no jurisdiction to consider the Claimant's complaints of unfair dismissal and indirect race discrimination. Those complaints are dismissed.
4. No judgment is made dismissing the Claimant's breach of contract and unlawful deductions from wages claims, although they have been withdrawn from the Claimant's Employment Tribunal claim.

REASONS

Preliminary Matters

1. By a claim form presented on 20 July 2023 the Claimant brought complaints of unfair dismissal, indirect race discrimination, failure to pay notice pay, failure to pay holiday pay and unlawful deductions from wages against the Respondent, her former employer. It is not in dispute that the Claimant presented her unfair dismissal complaint 1 day beyond the time limit for presenting it.
2. I heard evidence from the Claimant and from her granddaughter, Ms M Jasinska, both of whom submitted witness statements. Both parties made submissions.
3. The issues in the claim were identified by Tribunal Judge McGrade at a Preliminary Hearing on 31 October 2023. The indirect race discrimination complaint concerned alleged failures to provide a Polish interpreter at the investigatory and disciplinary hearings.
4. EJ McGrade identified that the breach of contract complaint related to both a failure to pay notice pay and a failure to pay holiday pay. The unauthorised deductions complaint related to a failure to pay holiday pay.
5. By email of 9 November 2023 the Claimant withdrew the breach of contract complaint, but asked that it not be dismissed, pending the Claimant issuing a claim in the County Court in respect of the same matters. At today's hearing, Ms Quinn, for the Claimant, confirmed that the withdrawal related also to the unlawful deductions from wages complaint. The Claimant asks that a dismissal judgment is not issued on, either, the unlawful deductions from wages, or the breach of contract, complaints.
6. It is therefore the Claimant's complaints of unfair dismissal and indirect race discrimination complaints which are to be considered for the purposes of the time limits. Her indirect discrimination complaint relates, at the latest, to the disciplinary hearing, which took place on 21 March 2023, 2 days before the Claimant's on dismissal 23 March 2023.

Findings of Fact

7. My findings are for the purposes of this preliminary hearing only.
8. On the evidence I found as follows.
9. The Claimant was dismissed by the Respondent on 23 March 2023. She contacted ACAS (Day A) on 28 April 2023. A certificate was issued (Day B) on 25 May 2023. There were 26 days between one day after Day A and day B. It was agreed that the last day for presentation of the unfair dismissal complaint in time was 19 July 2023.
10. The Claimant's first language is Polish. She can speak some English.

11. The Claimant consulted her legal advisers, KL Law Limited, very shortly after she was dismissed. She instructed them to write a letter before action to the Respondent, sent on 30 March 2023. The Claimant was aware of her employment rights. She believed that she would need to bring a claim against the Respondent in the Employment Tribunal in order to challenge the dismissal decision.

12. In March 2023, she gave detailed instructions to her legal adviser about the facts of her dispute with the Respondent. Her legal adviser was fluent in Polish. The legal adviser's firm's website is in Polish and many of the firm's other legal advisers are also fluent in Polish. The firm specialises in giving advice to the Polish community.

13. The Claimant also instructed her legal advisers to commence Early Conciliation through ACAS on her behalf, in April 2023.

14. Her legal advisers told her that the time limit for presenting her claim in time would be 19 July 2023. The Claimant did not diarise the date. Her witness statement suggested that she had misunderstood the date. However, in evidence at the Tribunal, she confirmed that she knew that the date was 19 July 2023, but that she was saying that ill health prevented her from complying with the date.

15. The Claimant communicated with her legal advisers by email, which she received on her mobile telephone. She has great difficulty using a mobile phone. Her home internet signal is intermittent. Her mobile phone signal is not good in her home. She often locks herself out of her phone. Her granddaughter has to help her to use her telephone and to access her emails.

16. Nevertheless, email was the method by which the Claimant and her legal advisers communicated, when they communicated in writing. It did not appear that the Claimant considered asking her legal advisers to communicate by letter, rather than email, or to alert her granddaughter when they had sent any communications.

17. I found that the Claimant was aware that the method of communication which she was using with her advisers was unreliable. She was aware that she would not necessarily receive communications from them promptly.

18. The Claimant confirmed to her legal adviser on 18 July 2023 that she wished to proceed with her claim. Her legal adviser sent her a client care letter by email that day, for her to complete. She did not open that document until 20 July, when her granddaughter assisted her to access her email.

19. While the Claimant told her legal adviser to issue the claim on 18 July, the Claimant did not take the necessary steps to instruct them formally until 20 July 2023. On that day, she instructed her legal adviser to present her claim. The claim had a detailed, 29 paragraph Particulars of Claim attached. The Claimant's granddaughter did not assist the Claimant to do this. Her granddaughter only helped her to access her emails and read the client care letter. The Claimant then communicated with her legal adviser directly, in order to issue the claim.

20. The Claimant has a number of health conditions. Between the date of her dismissal and 20 July 2023 she was taking the following medication for the following conditions:

- a. From 8 March 2023 - Rivaroxaban (trade name Xarelto medication), to treat and prevent blood clots as she had been diagnosed with superficial thrombophlebitis in 2021, and later on in September 2023 with deep vein thrombosis of her lower leg, and from November 2023 non-superficial thrombophlebitis.
- b. From 13 May 2023 - Naproxen, for swelling, in her leg(s).
- c. From 13 May 2023 - Lansoprazole, for treatment/reduction of stomach acid.
- d. From 27 June 2023 - Codeine, for pain relief.

21. The Claimant told me that she was substantially impeded from presenting her claim because of a depression condition. She did not produce contemporaneous medical evidence, in the form of GP notes, which supported her evidence about her mental ill health during the period between March and July 2023. While the Claimant was prescribed Naproxen, Lansoprazole and Codeine during this time, there were no notes of her attending her GP, or seeking advice in relation to depression at the time.

22. On 23 November 2023, p62, the Claimant attended the Tooting and Clapham Clinic, where a Psychiatrist recorded that the Claimant had been “feeling worse from February 2023” and that her condition was “slowly getting worse”. The Psychiatrist said that the Claimant had been diagnosed with “an adjustment disorder – depressed type” and said that she must start to use antidepressants.

23. The Claimant and her granddaughter gave evidence that, in July 2023, the Claimant was confused and forgetful because of her depression and, particularly, the Codeine medication she was taking. Her granddaughter told the Tribunal that Claimant was very ill during this time and was often bedridden.

24. There was a substantial dispute of fact about the Claimant’s level of mental acuity, due to her depression and the effects of medication, in July 2023.

25. I agreed with the Respondent that the Claimant’s prompt action on 20 July 2023, giving instructions to present a detailed claim with a 29 paragraph Particulars of Claim that day, indicated that she was able, both, to give instructions for a detailed claim and to act quickly when she did so. That did not support a finding that she was confused and forgetful, at the time, to the extent that she was hampered from acting on the legal advice she was receiving.

26. The facts of the Claimant’s actions on 20 July, combined with the lack of contemporaneous medical evidence to corroborate the Claimant’s assertion that she was hindered by a depression condition and/or the effects of medication, from giving instructions to present her claim, led me to conclude that the Claimant was not significantly impeded by any health condition in presenting her claim in July 2023.

27. I noted that the Psychiatrist note was dated November 2023, a long time after July 2023.

28. On 9 November 2023, the Claimant's representative, KL Law limited, wrote to the Tribunal saying, "The Claimant wishes to withdraw her complaint for breach of contract and objects to its dismissal. She wishes to commence fresh proceedings before the High Court or at the county court. The claim should not be dismissed, as this could potentially give rise to an argument of issue estoppel and/or res judicata. There has been no litigation of this part of the complaint, the Respondent did not incur any additional or otherwise costs having to deal with it, given the complaint relates to failure to pay notice pay and as such may form part of the compensatory award for unfair dismissal. There is therefore no prejudice or hardship posed to the Respondent by this withdrawal, on the other hand to dismiss could lead to the Claimant being deprived her access to Court, contrary to Article 6 of the ECHR and inevitably generate satellite litigation in the other court if such dismissal

Relevant Law

29. The time limits for presenting complaints of unfair dismissal to an Employment Tribunal are set out in *s111 Employment Rights Act 1996*. By *s111(2)ERA 1996*, "... 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 the period of three months."

30. Where a Claimant fails to present his claim in time and seeks an extension of time, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests on the Claimant, *Porter v Bandridge Ltd* [1978] IRLR 271, [1978] ICR 943, CA. If he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was, in fact, presented was reasonable.

31. The question of whether it was reasonably practicable for the complaint to be presented is one of fact for the Employment Tribunal, taking into account all the relevant factors *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] 1 All ER 945, [1984] IRLR 119, [1984] ICR 372, CA. Relevant factors can include the manner of, and reason for, the dismissal; whether the employer's conciliation machinery had 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 his rights; whether the employer had misrepresented any relevant matter to the employee; whether the claimant had 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 his adviser which led to the failure to present the complaint in time.

32. By *s123 Equality Act 2010*, complaints of discrimination in relation to employment may not be brought after the end of the period of three months starting

with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable.

33. The Court of Appeal made clear in *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434, CA at [23]: “If the claim is out of time, there is no jurisdiction to consider it unless the Tribunal considers that it is just and equitable in the circumstances to do so”.

34. The power to extend time for the consideration of a complaint have been held to give Tribunals 'a wide discretion to do what it thinks is just and equitable in the circumstances ... they entitle the [employment] tribunal to take into account anything which it judges to be relevant', *Hutchison v Westward Television Ltd* [1977] IRLR 69, [1977] ICR 279, EAT. The discretion is broader than that given to tribunals under the 'not reasonably practicable' formula: *British Coal Corp v Keeble* [1997] IRLR 336; *DPP v Marshall* [1998] ICR 518, EAT. Factors which can be taken into account include the prejudice each party would suffer as a result of the decision reached and all the circumstances of the case, including the length of and reasons for the delay; the extent to which the cogency of 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 once he 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.

35. However, notwithstanding the breadth of the discretion, there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion. The onus is always on the Claimant to convince the tribunal that it is just and equitable to extend time, *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, [2003] IRLR 434, at para 25, per Auld LJ.

36. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 11943 the Court of Appeal considered that:

“...factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”

“There are also some essential legal considerations that flow from the statutory time limits framework itself, that form part of the general backcloth in every case, in particular, the inherent importance attached to observance of time limits for litigating, and finality in litigation, even where, as here, there is considerable flexibility in the test that the tribunal must apply when deciding whether or not to extend time...” per HHJ Auerbach in *Wells Cathedral School Ltd v Souter*, EA-2020-000801-JOJ at [32].

37. Regarding prejudice to the Respondent, prejudice faced by a Respondent, in *Miller and Others v The Ministry of Justice and Others* UKEAT/0003/15/LA at §§12-13 Laing J said:

“12. ... There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses...”

13. ... DCA v Jones also makes clear (at paragraph 44) that the prejudice to a Respondent of losing a limitation defence is “customarily relevant” to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be “crucially relevant” in the exercise of the discretion, telling against an extension of time. It may well be decisive. But, as Mr Bourne put it in his oral submissions in the second appeal, the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET’s assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts; and the facts are for the ET...” .

Discussion and Decision **Unfair Dismissal Complaint**

38. On all the evidence, I did not accept that the Claimant was impeded by mental ill health and/or medication from bringing her claim in July 2023, or at any time between her dismissal and July 2023. I did not accept her evidence on this issue.

39. The Claimant was able to instruct legal advisers at an early stage, in March 2023, to act on her behalf in sending a letter before action and in commencing ACAS EC in April 2023.

40. I did not accept that her Polish language impeded her ability to bring her claim in time. She instructed a legal adviser who was fluent in Polish. There was no dispute that she knew of her rights to bring a claim to the Tribunal.

41. I found that she was advised of the time limit and specifically, the date of 19 July 2023, as the last day for bringing a claim.

42. The Claimant still had more than 7 weeks after the issue of the ACAS certificate in which to bring her claim. She had ample time in which to do so.

43. I concluded that the Claimant’s failure to ensure that she had a reliable means of communication with her legal advisers was of the Claimant’s own making. She did not take steps to ensure that she was in communication with her legal adviser when the time limit was approaching. I considered that she was at fault in this.

44. Taking into account everything, including:

- a. the fact that her ill health did not prevent or significantly impede the Claimant from bringing a claim, whether in July 2023, or before then;
- b. the fact that she knew the time limit and that she had Polish speaking legal advisers who were able to assist her to present a claim; but

- c. the Claimant failed to take steps, herself, to ensure that the claim was presented by that date;

I concluded that it was reasonably practicable the Claimant to bring her unfair dismissal claim in time, but that she had simply failed to do so. Therefore, I did not extend time for presentation of it. The Claimant's unfair dismissal complaint is dismissed.

Indirect Race Discrimination Complaint

45. Regarding the indirect race discrimination complaint, I considered the prejudice each party would suffer as a result of the decision reached and all the circumstances of the case, including the length of and reasons for the delay; the extent to which the cogency of 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 once he 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.

46. The Claimant was not impeded by her health conditions from bringing her claim.

47. She had been aware of her ability to bring a claim from almost immediately after her dismissal. She was aware of the Tribunal time limits and, specifically, the time limit for presenting her claim.

48. Taking account of the prejudice caused to the parties by the granting or refusal of an extension of time, I considered that the Respondent would be prejudiced by having to meet a claim which was otherwise out of time. I acknowledged that the delay in this case was very short, so that the Respondent would not be additionally prejudiced by the passage of time.

49. I took into account that the Claimant would be significantly prejudiced in that she would not be able to pursue her indirect discrimination claim.

50. Nevertheless, I concluded that there was very little to explain the Claimant's failure to bring her claim in time. The Respondent was not at fault in any way. For example, it had not misled the Claimant. Any fault was the Claimant's. It was simply not just and equitable to extend time in this claim, to allow the claim to proceed, to the detriment of the Respondent. It was for the Claimant to convince the Tribunal that time should be extended and she had failed to do so. Even in discrimination complaints, time limits are generally to be strictly applied.

51. Her indirect race discrimination claim was presented out of time. The Tribunal has no jurisdiction to consider it. It is dismissed.

No Judgment Dismissing Contract and Wages Complaints

52. The Claimant wishes to withdraw her complaints of breach of contract and unlawful deductions from wages. These claims encompass her holiday pay claims.

53. She and objects to judgment being given, dismissing them. She wishes to commence fresh proceedings before the High Court or at the county court.

54. By *r52 ET Rules of Procedure 2013*

“Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or

(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

55. The rule envisages the situation where a Claimant wishes to withdraw a claim in the Tribunal, but bring a claim on the same subject matter in the Courts.

56. A formal dismissal judgment can give rise to cause of action estoppel, preventing the Claimant from bringing further proceedings.

57. The rule allows for a judgment not to be issued in such circumstances, with the proviso that, if a Claimant does wish to bring further proceedings, they must say so at the time of withdrawal.

58. The Claimant did make clear, at the time of withdrawal, that she wished to bring other proceedings and asked that a judgment not be entered for that reason.

59. There has been no litigation of this part of the complaint. Given that I have dismissed the unfair dismissal complaint, there will not be any multiplicity of proceedings.

60. In all those circumstances I agreed not to issue a judgment dismissing the breach of contract and wages claims.

Employment Judge Brown

Dated: ...1 May 2024.....

Judgment and Reasons sent to the parties on:

7 May 2024

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For the Tribunal Office