



EMPLOYMENT TRIBUNALS

Claimant

Mrs O Hooper

Respondents

Whitbread Group PLC

v

Heard at: Bury St Edmunds

On: 14 June 2024

Before: Employment Judge S Moore

Appearances

For the Claimant: In person

For the Respondent: Ms E Jones, solicitor

JUDGMENT ON PRELIMINARY ISSUES

- (1) On the assumption there was conduct extending over a period ending with the last act of alleged discrimination, it would be just and equitable to extend the time limit in respect of the complaints of disability discrimination and victimization meaning that they have been brought in time and the Tribunal has jurisdiction to hear them.

- (2) It was not reasonably practicable to present the complaint for unfair dismissal in time and it was presented within such other period as was reasonable meaning the Tribunal has jurisdiction to hear that complaint.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a receptionist between 7 July 2015 and 28 April 2023 at London Greenford Premier Inn.

2. Early Conciliation (EC) took place between 6 July 2023 and 17 August 2023.
3. A claim form was lodged making complaints of constructive unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments, indirect disability discrimination and victimisation. The claim form is date-stamped 18 September 2023.
4. It appears to have been accepted at a Preliminary Hearing on 10 April 2024 that the claim, which had been lodged by post, had been presented on the date it was date-stamped (18 September 2023) which, for complaints relating to the Claimant's alleged dismissal on 28 April 2023, was one day outside the primary 3-month time limit as extended by the ACAS early conciliation process.
5. At that Preliminary Hearing the matter was set down for hearing today to consider:
 - (i) In relation to the Claimant's complaint of disability discrimination and victimization: would it be just and equitable to extend the time limit, the judge to assume that there was conduct over a period ending with the last alleged act of discrimination?
 - (ii) In relation to the complaint of unfair dismissal: was it reasonably practicable to present the complaint of unfair dismissal within the time limit? If not, was it presented within a reasonable period thereafter?

Evidence

6. The Claimant provided a witness statement and was cross-examined.
7. On 25 August 2023 she was made aware by her legal representative that the ACAS certificate had been issued and she had to submit her claim by 17 September 2023. She diarized 16 September 2023 as the last date to submit her claim to have time to deal with any problems that arose. She had some assistance with drafting the Particulars of Claim and the detail for box 8.2 was sent to her on 14 September 2023. That same day her legal representative informed her there was an issue with the Tribunal's online submission service and there was no known date when it would be operating again.
8. The Claimant completed the claim form on 14 September 2023 and continually tried to submit the form until just before 3.00am on 15 September 2023. Unfortunately, the system was down and the Claimant continually received the error page. She took a photo to show it was not working which is in the bundle. The relevant page which she photographed states:

“Our online Employment Tribunal service is temporarily unavailable.
You can hand deliver your claim form to your local Employment Tribunal office, which can be found in the following judicial guidance documents:

....

Alternatively you can issue your claim in England and Wales by post to:
[address of central office].

9. It is an accepted fact that there were technical difficulties with the Tribunal's online submission service between 6 and 15 September 2023 and that it commenced working again at some (unknown) point on 15 September 2023.
10. At approximately 3am on 15th September 2023 (a Friday) the Claimant made enquiries of both FedEx and the 24-hr postal service and was told they did not deliver to a PO box because there was no person to sign for the delivery. However, the Claimant was advised by the 24-hr postal service that if she posted the form first class it would arrive on Saturday 16th September and she believed that would be sufficient to comply with the deadline, not anticipating that (assuming it arrived on time) the form would remain unacknowledged at the Employment Tribunal office until the following Monday morning. Accordingly, the Claimant posted the claim form by first class post at 7.30am (on 15 September 2023). The date on which it actually arrived at the Employment Tribunal office is unknown but since the form is date-stamped 18 September 2023 the case has proceeded on the basis that the claim was presented one day late.
11. For the purposes of the unfair dismissal claim, Ms Jones submitted that it would have been reasonably practicable for the Claimant to have submitted the claim form in time. The Claimant had left it until the last moment to submit the form (despite having had legal advice since 2 March 2023 and being aware of the deadline) and had she not done so she would not have encountered problems with the online system. Further, when she did encounter those problems, she should have delivered the form by hand to her local Employment Tribunal.
12. For the same reasons Ms Jones submitted that it would not be just and equitable to extend time for the purposes of the discrimination and victimization claims.

Conclusions

Unfair dismissal

13. Section 111(2) Employment Rights Act 1996 (ERA) provides that a claim must be submitted within 3 months of the dismissal but may be extended where a tribunal finds it was not reasonably practicable to present the claim before the end of the 3-month period.
14. According to *Consignia plc (formerly the Post Office) v Sealy 2002 ICR 1193, CA*, where a claimant has done something that, in the normal course of events, would have resulted in his or her claim being presented

within the relevant time period, but owing to some unforeseen circumstance this did not happen, it will have been not reasonably practicable for the claimant to have presented the claim in time. Further if that condition mentioned is satisfied, it does not matter why the claimant waited until the last moment. These propositions are applicable not only to claims sent by post but also to electronic transmission.

15. In this case, the Claimant tried to submit her claim online on 14 September 2023, and if she had been able to do so the claim would have been presented by the deadline. The reason she was unable to do so was because the online Employment Tribunal service was not working, which was an unforeseen circumstance, and the principles set out in *Consignia* invite the conclusion that therefore it was not reasonably practicable for her to present her claim in time.
16. Indeed, applying *Consignia*, that would be the case even if the Claimant had left it to the last moment before trying to submit her claim, but she didn't, and the fact that there was still one working day (Friday 16 September) prior to the expiry of the deadline, has led the Respondent to argue that it was reasonably practicable for the claim to have been presented on time because, having encountered problems with the on-line service, the Claimant could have hand-delivered it to her local Tribunal office.
17. I do not accept that submission. Lady Smith in *Asda Stores Ltd v Kauser EAT 0165/07* stated '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, if it was reasonable to expect that which was possible to have been done'.
18. On the facts of this case, I don't consider it was reasonable to expect the Claimant to have hand delivered the form on Friday 16 September 2023. What it was reasonable for her to do has to be considered in the context of all the circumstances of the case. She had made every reasonable effort to submit the claim on time, attempting to submit it online well before the deadline, and when that failed making enquiries in the middle of the night of both FedEx and the 24-hr postal service. Having been told by the 24-hr postal service that if posted that morning the form would arrive the following day, it was reasonable for her to take that course of action believing the form would be presented on time. The Claimant was working on Friday 16 September 2023 and it would not be reasonable to expect her to have tried to take time off work, with no notice to her employer, in order to find her local Employment Tribunal Office, taking the risk that if she was unable to take time off work, or find the local Employment Tribunal Office, she would then have missed the chance – as she believed – of the claim form being presented on time through the postal system.
19. I therefore find that in the circumstances of this case it was not reasonably practicable for the claim to have been presented on time and given that the claim is date stamped as having been presented the following day that it was presented within such further period as was reasonable.

20. It follows the complaint of unfair dismissal is in time and the Tribunal has jurisdiction to hear it.

Discrimination and Victimisation

21. Section 123 Equality Act 2010 provides that claims may not be brought after the end of 3 months from the date of the act complained of or such other period as the tribunal thinks just and equitable.
22. Relevant to the exercise of the discretion to extend time on the basis of it being just and equitable to do so include factors such as 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 and the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action.
23. For the same reasons as set out above, together with the fact that the Respondent has suffered no prejudice by the delay of one day, on the assumption that there was conduct extending over a period ending with the last act of alleged discrimination, I consider it is just and equitable to extend time for the purposes of the discrimination and victimization claims.

Employment Judge S Moore

Date: 14 June 2024

Sent to the parties on: 09/08/2024

For the Tribunal Office