



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Collins

**Respondent:** Rotherham Metropolitan Borough Council

## OPEN PRELIMINARY HEARING

**Heard at:** Leeds (by video) **On:** 3 February 2022

**Before:** Employment Judge C H O'Rourke

### Representation

Claimant: Ms Goodman - counsel

Respondent: Mr Flood – counsel

## JUDGMENT

The Claimant's claims of unfair dismissal and automatic unfair dismissal and detriment in respect of a protected disclosure are dismissed, for want of jurisdiction.

## REASONS

### Background and Issues

1. The Claimant was employed by the Respondent as a social worker, until her dismissal, with immediate effect, on 16 November 2020. There is no dispute that the primary limitation period for presenting her claims expired on 15 February 2021. The Claimant entered into early conciliation with ACAS on 24 April and the certificate was issued on 3 June 2021. The claims were presented on 2 July 2021, so some four and half months out of time.
2. This hearing was therefore listed to determine, as a preliminary issue, whether or not the Tribunal had jurisdiction to consider these claims.

## The Law

3. It was agreed that the same statutory test applied to all claims, as set out in ss.48(3) and (4) and 111(2) of the Employment Rights Act 1996, namely:

*(2) Subject to the following provisions of this section, 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 that period of three months.*

4. I was referred by both parties to the guidance in the cases of **Wall's Meat Co Ltd v Khan [1979] ICR 52, EWCA**, as to the Tribunal's discretion in such matters and also that as stated in **Porter v Bandridge Ltd [1978] ICR 943, EWCA**., the burden of proof is upon the Claimant. Mr Flood's skeleton argument also referred to various authorities, to which I shall in turn refer (as I consider relevant) below.

## The Facts

5. I heard evidence from the Claimant and both counsel made submissions.
6. **'Not Reasonably Practicable'**. I summarise the Claimant's evidence on this point as follows:
  - a. She had been in a long-running dispute with the Respondent, which culminated in disciplinary proceedings against her and her summary dismissal on 16 November 2020. The subject matter of the dispute is not something I need to consider.
  - b. She had been represented by her union, until Christmas 2019, but she was not satisfied, on the death of her then union representative, that his or her replacement was capable of representing her.
  - c. She had approached a firm of solicitors for advice, in or about October 2019, but could not recall the detail as to what issues she sought advice in respect of, but agreed that the *'gist was where I stood and what he (the solicitor) could do'*. She stated that she may have had consultations with that firm on five occasions in 2020.
  - d. As to her own knowledge of her rights, she stated that as an experienced social worker she *'was quite clued up on employment rights and human rights and know where to get the information from'*. She agreed that she knew both of her rights to bring her claims and that she needed to do so within three months. She also stated that she had previously brought an unfair dismissal claim to the Employment Tribunal, she thought perhaps ten years ago.

- e. Following her dismissal, she was *'incensed'* that she had been treated unfairly and wrote to the Council Leader and the Chief Executive the next day and brought an appeal on 20 November 2020.
- f. The appeal hearing was subsequently arranged for 2 February 2021. In an email from her of 31 December 2020, chasing the fixing of this date, she stated that, as part of her urgency that *'I am currently receiving no pay whilst awaiting this appeal.'* [65]. She stated in evidence that she was convinced that her appeal would be upheld, as it was to be heard by three independent councillors and thus, by implication, it seemed to me that she felt that she would be re-instated, with her salary backdated. She also said that because of this belief, she had decided that she would not take a Tribunal claim until after the outcome of her appeal, if unsuccessful, but would first give the Respondent *'a chance'*.
- g. In or about mid-October 2020, the Claimant's mother became seriously ill and was diagnosed with cancer. In November, the Claimant was heavily involved in home care for her mother, until she was hospitalized at the end of that month. Her mother's last days in hospital were very distressing for both her and the Claimant, exacerbated by COVID restrictions. All of this took, the Claimant said, a severe toll on her physical and mental health, although she did not, at that point, seek medical care, but just *'coped and carried on'*. Her mother sadly passed away on 8 January 2021 and the funeral was on 23 January.
- h. The appeal hearing took place on 2 February 2021, at which the Claimant attended and which lasted approximately six hours. She was informed of the decision not to uphold her appeal at the hearing's conclusion and received the written confirmation of that decision, as well as the rationale, on 10 February.
- i. She was shocked at that outcome and said that following the hearing, for the first time it *'began to dawn on me that not only had I lost my mother without having had the opportunity to grieve properly'* but now she had also lost her job. She said these realisations hit her *'like a tonne of bricks'* and that thereafter *'it was as if my brain began to shut down. I lost concentration, went into a deep depression ...'* and was *'going into a breakdown'* and her *'brain was closing down'*. She couldn't *'tackle the things I wanted to tackle – I wanted to run away'*. At the stage that the primary limitation period was reached, on 15 February 2021, she was not cognisant of it, being *'deep into it (her depression) at that point'*.
- j. She consulted with her GP, by telephone, on 8 and 22 February 2021. She accepted that the contents of his notes [71] did not reflect the true severity of her condition, as she had stated in her witness evidence. He recorded a depressed mood, low motivation, but that she was *'chatty, lucid'* and *had no reported thoughts of DSH (deliberate self-harm)*. On 22 February, it was recorded that the prescribed medication had assisted with sleeping and appetite,

but that she still felt 'down', although her mood was no worse than before. She said that these notes were just providing the '*bare facts*' and didn't mention her loss of consciousness and focus. She accepted that the notes were accurate, to the extent they went, but were not the whole picture. She said that her concentration was '*still not there. I couldn't boil an egg.*'

7. Conclusion on 'not reasonably practicable' test. I heard submissions from both counsel, summarised as follows:

- a. Respondent. Mr Flood referred to his skeleton argument and submitted that it was reasonably practicable for the Claimant to submit her claim by 15 February 2021. He made the following submissions:
  - i. Following her dismissal the Claimant was quite clear, in her own mind that she had been unfairly dismissed. She knew she could bring a claim and the time limit for doing so.
  - ii. Despite her mother's ill-health, the Claimant was able to pursue her appeal, write to both the Respondent and individual councillors and attend a lengthy hearing and was therefore '*able to fight her corner*'.
  - iii. The medical evidence does not reflect the Claimant's evidence as to the severity of her condition. It is a matter for the Tribunal as to what weight is given to the Claimant's account.
  - iv. In the absence, for some time, of a fixed date for her appeal hearing, it was not reasonable of her to simply await the outcome of the appeal, before bringing any claim.
  - v. On the Claimant's evidence, the point at which the greatest difficulty arises for her is almost at the point of expiry of the time limit.
- b. Claimant. Ms Goodman made the following submissions, as to why it was not reasonably practicable for the Claimant to bring her claim:
  - i. The mere fact that the Claimant may have been able to do other things (such as chase her appeal hearing date) is not enough to render it reasonably practicable for her to submit her claim in time, if her mental health was poor (**University Hospitals Bristol NHS Foundation Trust v Williams** **UKEAT/0291/12**).
  - ii. While waiting for an appeal outcome would not, of itself, meet the test, it is a factor that can be taken into account. The Claimant wanted to exhaust the internal procedure, as she trusted in it and asked for the process to be sped up. She saw it as the end of the process. Confirmation of the

hearing was only received seventeen days in advance of the limitation date.

- iii. The Claimant's evidence is that while her mother was dying, all other considerations, to include an ET claim, '*went out the window*'. Her evidence at this hearing was honest and straightforward and she did her best to remember events, stating so if she couldn't.
- iv. Between 16 November and 2 February there were only fleeting moments when she may have an opportunity to consider her claim, but after the appeal outcome, her depression descended and as she said, her '*brain closed down*'. As in the **Williams** case, she did what she could, but it wasn't enough.

c. Finding. I find that it was not reasonably practicable for the Claimant to present her claim by 15 February 2021, for the following reasons:

- i. The combination of events of the Claimant's mother's relatively sudden death (particularly taking into account COVID restrictions on hospital visits and contact), her dismissal and her failed appeal, did, I accept, have the effect upon her she described. I found her evidence on this point compelling and entirely credible.
- ii. It is true that the medical evidence does not match the severity of what the Claimant described in respect of her mental state, but I consider that due to, firstly, the consultation being over the phone, rather than face to face and secondly to what I perceive to be a degree of self-containment on her part, of 'coping', when in fact she couldn't and therefore she perhaps failed to fully communicate her mental state to the doctor. Looking at the history of her dispute with her employer she is clearly quite a determined person and perhaps therefore only belatedly willing to admit to herself her frailty at that time.
- iii. I'm also satisfied that she did genuinely consider that the appeal would exonerate her and that there would be no need, therefore, for any tribunal claim. While, of itself, waiting for an appeal outcome would not justify delay, it is nonetheless a factor I can consider in the overall assessment.

8. Within such further period as was reasonable. I reiterate the evidence above that is also relevant to this issue – the extent of legal advice the Claimant had already had and also her own knowledge of her rights and her experience of a previous unfair dismissal claim. In addition, the Claimant's further evidence on this point was as follows:

- a. She continued twice-weekly appointments with her GP, until April 2021 and continued to take medication (all dates hereafter 2021, unless otherwise stated). She stated that during this time her condition remained much as it had in Mid-February, resulting in her being unable to give any consideration to her tribunal claim.
- b. From mid-April she began to feel more psychologically stable and in the week commencing 20 April contacted solicitors. She agreed, in cross-examination that she knew, at this point that she'd not met the time limit, by some two months. She rang round a number of solicitors (not the firm that she had instructed in October 2019, as she considered that they may have had too strong a link with the Respondent). The first firm she spoke to confirmed to her that her claim was out of time and that she should instead consider bringing a civil claim/application for judicial review. The second firm she spoke to told her that she had mitigating circumstances as to the late presentation of a tribunal claim and that she should contact ACAS immediately. A third firm advised that she should see if a resolution could be reached with the Respondent, but did not advise her to immediately commence early conciliation.
- c. When questioned on this contact with the various firms of solicitors, she could not remember if she had told them that she wished to bring a claim, but had missed the deadline. In contradiction of that however, she later said that she had told the third firm that her claim was already out of time, but that they had advised that she should nonetheless attempt ACAS conciliation and if that was not successful, to get a certificate. She said also that the ACAS conciliator had not been impartial and had subsequently changed her mind on the issue of '*the clock stopping*' as to extending time to bring a claim.
- d. She contacted ACAS on 23 April, entering into early conciliation and the relevant certificate was issued on 3 June. She was asked why the conciliation period had been so long and said that she'd been advised by the third firm to attempt conciliation. She said that '*when the mediator told me on 28 April that I should be bringing a claim now, I told (the third firm) and they advised I should request talks (presumably with the Respondent, via ACAS).*' On issue of the certificate, she then immediately returned to the third firm with it and stated that she instructed them to present her claim. That was subsequently done on 2 July. She was asked as to why it took another month, from the issue of the certificate, to bring the claim and she said that she did what the third firm said and that they assured her that '*there would be no problem going forward*'.
- e. She agreed that she had also done her own research as to time limits, as well as being advised on this issue by the third firm. She denied that her own research would have clarified for her that in fact entering conciliation after the expiry of the primary limitation period provided no extension to the time limit, stating that she was relying on advice from the third firm and also from the Citizens' Advice Bureau.

- f. When asked why, bearing in mind her own knowledge of the procedure and past experience, she had not simply brought the claim herself as soon as possible, after her recovery in mid-April, she said it was because she had been advised by solicitors to attempt conciliation.

9. Conclusion on 'such further period as was reasonable'. Further submissions were made, as follows:

a. Respondent.

- i. The Claimant's health was no longer a significant factor by, at the latest, the third week in April. Allowing time to consult with solicitors and any short conciliation period, her claim should have been presented by the end of that month.
- ii. The picture the Claimant presents for this period of time is confused and it is far from clear what she was telling her solicitor(s).
- iii. In any event, however, applying the 'Dedman principle' (**Dedman v British Building and Engineering Appliances [1973] IRLR 379 EWCA**), per Lord Denning MR, namely that '*If a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out. His remedy is against them*', whatever fault there may have been of any of the solicitors advising the Claimant will not be a relevant factor in the exercise of the Tribunal's discretion to extend time. That principle, in relation to the consideration of 'such further period as was reasonable' was affirmed in **Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10**, per Underhill J (as he then was), who rejected the submission that the Dedman principle should apply only in respect of the primary limitation period.
- iv. Taking into account the Claimant's or her advisors' delay from her instigating action in late April, to the presentation of the claim over two months later, on 2 July, she has not presented it in such further period as was reasonable.

- b. Claimant. Ms Goodman made brief submissions to the effect that the Claimant was not in a position to deal with the claim until late April and that she had thereafter instructed solicitors. Misunderstandings arose, however, resulting in some delay but which was, nonetheless, within such further period as was reasonable.

- c. Finding. I am in no doubt that while it was not reasonably practicable for the Claimant to have presented her claim within the initial three-month time limit that she failed, however, to thereafter present it within such further period as was reasonable. I find that for the following reasons:

- i. Even accepting her evidence that she was not mentally capable of engaging with the issue until late April, there was still, thereafter, a further two months or so of additional and unreasonable delay.
- ii. She herself accepted that she was quite capable of researching her employment rights and she is clearly a more experienced litigant-in-person than the average, but nonetheless wrongly concluded that entering into ACAS conciliation would extend the time limit.
- iii. Applying the **Dedman** principle, she cannot rely on any incorrect advice that may have been given to her by her solicitors.
- iv. Even if such advice/her own research had been correct on the conciliation point (which it obviously wasn't), there is still the inordinate and inexplicable final period of a month's delay from issue of the ACAS certificate to presentation of her claim.
- v. There is a strong public interest in claims being brought promptly, against a background where the primary time limit is three months (**Cullinane v Balfour Beatty**).

### **Conclusion**

10. For these reasons, therefore, the Claimant's claims are dismissed, for want of jurisdiction.

Employment Judge O'Rourke

Date: 4 February 2022