



EMPLOYMENT TRIBUNALS

Claimant: Susan Ellis

Respondent: The London Borough of Bexley

Heard at: London South Employment Tribunal by video

On: 5 September 2022

Before: Employment Judge L Burge

Appearances

For the Claimant: Mr Squires (Claimant's son)

For the Respondents: Mr Amunwa (Counsel)

OPEN PRELIMINARY HEARING RESERVED JUDGMENT

It is the Judgment of the Tribunal that:

1. The Tribunal does not have jurisdiction to hear the Claimant's claim of unfair dismissal as it was brought outside of the applicable time limits and it was reasonably practicable for the Claimant to have brought it in time.
2. It is just and equitable to extend time in respect of the Claimant's claims of age and disability discrimination.
3. The Claimant's claims of direct disability discrimination, health and safety, redundancy, breach of contract and "other payments" are dismissed upon withdrawal.

REASONS

1. On 6 June 2022 a Preliminary Hearing took place before EJ Street who listed a further Preliminary Hearing:

- (A) To determine whether the Tribunal has jurisdiction in respect of the claims made, as explained below
 - (B) To determine whether the claims made that are potentially within the jurisdiction of the Employment Tribunal are made within the prescribed time limit, so that the Tribunal has in fact jurisdiction to consider them; and if not, whether time limits may be extended to admit the claims for hearing
 - (C) If the claimant applies for permission to amend the claim, to consider that application
 - (D) To identify the issues of law and fact that the Tribunal will need to decide and
 - (E) To give final case management Orders necessary for the conduct of the hearing.
2. Following a lengthy discussion Mr Squires confirmed that the claims that the Claimant was bringing were:
- a. Unfair dismissal
 - b. Age discrimination; and
 - c. Disability discrimination (sections 15, 20, 21 and 26 Equality Act 2010).

Time limits

- 3. I heard evidence from the Claimant and on her behalf from Mr Squires (her son and representative) and Mr Klarman.
- 4. For the Respondent, I heard evidence from Mr Tosswell (Employee Relations and HR Policy Manager).
- 5. I was provided with a bundle of documents and I read those pages to which I was taken in evidence and submissions.
- 6. Both Mr Squires and Mr Amunwa provided written and oral closing submissions.

Findings of fact

- 7. The findings of fact are findings for the purposes of this hearing only, they are not intended to bind the Tribunal who decide the final hearing.
- 8. The Claimant was employed by the Respondent as a Financial Technician on 29 March 1999. On 1 January 2017 she was promoted to Finance Accountant.
- 9. The Claimant was off sick from 18 June 2019 with chest infections, viral infections and multiple presentations, and then from 31 July with anxiety and depression. The Respondent commenced its sickness absence procedure which culminated with notice of dismissal on 30 July 2020 (with the effective date of termination being 22 (or 28) October 2020).

10. I accept the Claimant's, Mr Squires' and Mr Klarman's evidence that the Claimant was unable to pursue her own complaints. She was suffering from anxiety and depression and was not able to make basic decisions or understand complex information. She no longer drove, she stayed at home, she was not able to cope with the process or paperwork. At first she was supported by an elderly neighbour who had been a trade union representative and then she was supported by her son, Mr Squires.
11. Mr Squires is a very busy man with competing demands on his time. He works in a school as an assistant head in an area of poverty and has responsibility for welfare of the students. At the time the Claimant was dismissed he was extremely busy at work, part of it being sick with covid, fatigued with covid, working during a lockdown and dealing with safeguarding and welfare issues at school as well as home schooling and caring for his own four children. He was also supporting his mother, the Claimant, during her illness and dismissal.
12. On 30 July 2020 a Stage 2 Sickness Review took place. The Claimant was dismissed on capability grounds and the outcome was communicated by letter of 5 August 2020.
13. Mr Squires raised a grievance on the Claimant's behalf on 10 August 2020 and in his email said that he was "notifying ACAS today that we intend to take Bexley Council and One Source to an employment tribunal".
14. Mr Squires notified ACAS of the Claimant's potential claim on 11 August 2020 and a certificate was issued on 25 September 2020.
15. The Claimant and Mr Squires had a video appointment with a legal adviser to talk about the Claimant's complaints but the Tribunal accepts Mr Squires' oral evidence that time limits were not discussed.
16. The Claimant's grievance hearing took place on 25 September 2020 following which the grievance was investigated further.
17. The Claimant's employment ended on 22 (or 28) October 2020 following her notice period.
18. On 9 November 2020 the outcome of the Claimant's grievance was issued and her complaints were not upheld. She was given the right of appeal and Mr Squires appealed on her behalf.
19. Mr Squires was unwell during December 2020, at first with suspected covid and then with covid displayed in a positive test. On Christmas Day he only joined the family for half an hour and spent the rest of the day in bed.
20. On 29 December 2020 Mr Squires emailed the Respondent apologising for the delay but explaining his whole family had covid and set out his concerns about his mother's treatment at the Respondent. He invited the Respondent to have a telephone conversation with him that week.

21. On 20 January 2021 Mr Tosswell agreed to postpone the appeal hearing and to explore resolution.
22. On 21 February 2021 Mr Tosswell wrote to Mr Squires reporting that the Respondent was not willing to resolve the dispute.
23. On 16 March 2021 Mr Squires contacted ACAS again because he found out that the previous ACAS certificate had expired and a second certificate was issued.
24. On the same date, 16 March 2021, Mr Squires submitted the Claimant's ET1.
25. The Claimant's appeal was heard on 13 April 2021 and was refused by Nickie Morris (Deputy Director, Finance & Property) on 9 July 2021.
26. On 1 September 2021 the Claimant's appeal against her dismissal was heard and was dismissed on 22 September 2021.

Relevant law

Time limits for unfair dismissal

27. The relevant parts of S.111 Employment Rights Act 1996 ("ERA") provide:

"(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(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."

28. The primary limitation period has been amended by s. 207B ERA so as to allow an extension of time for the ACAS Early Conciliation period:

"..(2)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..."

29. In *Bodha v Hampshire Area Health Authority* 1982 ICR 200 the existence of an internal appeal alone was likely to be insufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit.
30. In *Cygnnet Behavioural Health Ltd v Britton* [2022] EAT 108 the Employment Appeal Tribunal decided that, against findings that the claimant was able to do a great many other things during the period after his dismissal, it was perverse for the Employment Tribunal to find that the claimant's mental health problems and dyslexia and his focus on the professional body investigation meant that it was not reasonably practicable for him to make himself aware of the time limits. "A person who is considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits that apply; it is their responsibility to do so" (paragraph 53).

Time Limits for discrimination

31. Section 123 of the Equality Act 2010 ("EqA") provides that no complaint may be brought after the end of:

(2) "(a) the period of three 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 that period
(b) failure to do something is to be treated as occurring when the person in question decided on it."

32. An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the claimant. Where there are numerous allegations of discriminatory acts or omissions, the claimant must prove that (a) the incidents are linked to each other, and (b) that they are evidence of a "continuing discriminatory state of affairs". The focus should be on the substance of the complaints to determine whether there was an ongoing situation/continuing state of affairs as distinct from a succession of unconnected or isolated specific acts.

33. s.140B EqA 2010 provides an extension of time to allow for ACAS conciliation:

"...(2) 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 the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) 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...

34. If the claim is presented after the relevant time limit, the tribunal may still have jurisdiction if, in all the circumstances, it is “just and equitable” to extend time. The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time.
35. In *Southwark London Borough Council v Afolabi* 2003 ICR 800, CA, the Court of Appeal suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).
36. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* 2021 ICR D5, CA, the Court of Appeal said that the best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular the length of, and the reasons for, the delay.
37. The discretion conferred on tribunals is wide. In *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132, the EAT has held that, when considering whether it was just and equitable to extend the time limit for presenting discrimination complaints, or to grant an application to amend to add a further out of time discrimination complaint, the tribunal was entitled to weigh in the balance its assessment that the merits of the proposed complaints were weak.

Conclusions

38. There was little evidence before me about what the Claimant’s effective date of termination was. In submissions, Mr Amunwa stated that the Claimant had been given 12 weeks’ statutory notice, whereas Mr Squires said that she had been given 3 months’ notice, although he was prepared to accept that it could have been 12 weeks. I have decided that it was 12 weeks and so the effective date of termination was 22 October 2020. Even if I am wrong about that, the difference in the Respondent’s date and the Claimant’s date is only 6 days (28 October rather than 22 October) and so it would make no difference to my decision.
39. On 30 July 2020 the Respondent decided to dismiss the Claimant and the outcome was communicated by letter of 5 August 2020. The Claimant, and Mr Squires on her behalf, were unhappy with the way that the Claimant had been treated during the sickness absence and by the decision to dismiss her and so raised a grievance and notified ACAS on 11 August 2020. He also referred to bringing Employment Tribunal proceedings on 10 August 2020. The ACAS certificate was issued on 25 September 2020. The effective date of termination was the culmination of what the Claimant says was her poor treatment and an unfair/discriminatory decision itself. The effective date of dismissal was 22 October 2020 and so the three month limitation period started to run then. The

ACAS conciliation period did not affect the three month time limit because it expired prior to the effective date of termination. So the Claimant had 3 months to bring her claims to the Tribunal - the last day for issuing her claim was 21 January 2021. However, she did not bring her claim until 16 March 2021, just under 8 weeks later.

40. The Claimant did not need another ACAS conciliation certificate, the existing one was sufficient to enable her to bring her claims and time had already expired so having a second certificate did not have any effect on time limits.
41. The Claimant was, and still is, very unwell. She still has capacity but was unable to pursue her own complaints. She was suffering from anxiety and depression and was not able to make basic decisions or understand complex information, she could not cope with the process or paperwork. The Claimant relied entirely on her son, Mr Squires, in relation to her dispute at work. Mr Squires, helped her but he had competing demands on his time. In evidence to the Tribunal he said that he did not know what the time limits were. I have sympathy for him and the demands upon him at that time but he could have posed a simple question in an internet search engine and found the answer very easily. He could have asked the legal adviser about time limits. He had assumed responsibility for her claims and should have found out the time limit. He was unwell with covid in December 2020 but on 29 December 2020 wrote a detailed email of complaint to the Respondent. He could have spent that time looking up what was required to bring a claim. I conclude that it was reasonably practicable for him to have presented the claim on the Claimant's behalf before the end of the period of three months ie by 21 January 2021. As such the unfair dismissal claim is out of time and the Tribunal has no jurisdiction to hear it.
42. The "just and equitable" test is different. I should assess all the factors in the particular case that I consider relevant, including in particular the length of, and the reasons for, the delay (*Adedeji*). The Claimant was not, and is not, well. She relied on her son who had other important and competing demands. They were ignorant of the time limits. The delay was not extensive, it was just under 8 weeks. Importantly, the internal procedures were still ongoing. On 21 February 2021 the Respondent said it was not willing to resolve the dispute. The claim was entered on 16 March 2021. It was a few months before the internal procedures were complete - the appeal was heard on 13 April 2021, was refused on 9 July 2021, on 1 September 2021 the Claimant's appeal against her dismissal was heard and was dismissed on 22 September 2021. The Respondent knew what the Claimant's complaints were, was still investigating matters and so was not prejudiced by the delay. It is therefore just and equitable for time to be extended.

EJ L Burge
16 September 2022

Case Number: 2301032/2021

Sent to the parties on:
21 September 2022

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For the Tribunal Office:

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