



EMPLOYMENT TRIBUNALS

Claimant: Ms L Stevens
Respondent: Autism East Midlands
Heard at: Nottingham
On: 2 June 2017
Before: Employment Judge Ahmed (sitting alone)

Representation

Claimant: Mr Steven Flynn of Counsel
Respondent: Mr John Peel, Consultant

JUDGMENT

The judgment of the Tribunal is that:-

1. The complaints of unfair dismissal (both 'ordinary' unfair dismissal and automatic dismissal and for having made a protected disclosure) and detriment for having made a protected disclosure were presented out of time but that it was not reasonably practicable for those complaints to have been presented in time. They have been presented within a further reasonable period. Time is therefore extended and the Claimant is able to pursue those three complaints.
2. The complaints of disability discrimination were presented out of time but it is just and equitable to extend time. The Claimant is permitted to proceed with her complaints of disability discrimination.
3. The Claimant was at all material times a disabled person within the meaning of Section 6 of the Equality Act 2010.

REASONS

1. This Preliminary Hearing (adjourned from 9 March 2017) was convened to determine out of time issues and to consider whether the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 ("EA 2010"). During the course of the hearing, after the Claimant had given her evidence, the Respondent conceded that the Claimant was at all material times a

disabled person by reason of anxiety and depression. That issue did not therefore need to be determined.

2. The circumstances in which the out of time issues arise are highly unusual. Ms Stevens was employed by the Respondent from 1 March 2002 until her resignation (and the effective date of termination) on 6 November 2014 as a Residential Support Worker. She claims that she was constructively and unfairly dismissed partly because she had made protected disclosures. She brings various complaints of disability discrimination. There are ongoing proceedings in relation to a personal injury claim in the county court between the parties.

3. Following her resignation, the Claimant contacted ACAS in order to comply with the early conciliation requirements. In or around the January or beginning of February 2015, she visited the Employment Tribunal in Nottingham to observe a live case. There she met Mr Darren Martin who was representing a party on a different case. Mr Martin introduced himself as a Solicitor and said he could assist the Claimant with her case. He gave her his contact details. Mr Martin did not apparently have any office premises, or at least none which the Claimant was aware of, but she was told he was hiring community rooms in a church in Derby where he held regular 'surgeries every fortnight or so.

4. Ms Stevens agreed that Mr Martin could represent her in the claim to the tribunal which she had already lodged on 2 February 2015. It is now clear that she had applied for remission (now called 'help with fees') so that she would not need to pay the usual fees on issue. A Claim is not accepted unless a fee is paid or a Claimant is granted remission. Ms Stevens signed an agreement with Mr Martin and formally instructed him on her behalf. Mr Martin placed himself on the Tribunal record and as a consequence all correspondence thereafter was sent to him from the office that deals with fees. Ms Stevens also recommended a friend of hers to Mr Martin and took her to go and see him at one of his surgeries. Mr Martin agreed to take on her case too.

5. After several months without any communication from Mr Martin, Ms Stevens telephoned to find out what was happening. On the occasions she was able to speak to him Mr Martin said that there was no news on her case. She telephoned several times afterwards and on each occasion was given the same information. On one such occasion Mr Martin effectively told her to leave it with him and if she didn't hear anything it was because there was nothing to report. On some occasions she was unable to even get through to Mr Martin and spoke only to his Assistant or left a message on the answering machine. Ms Stevens' friend was however not as patient and after failing to contact Mr Martin on several occasions she decided to pass her case to someone else. Ms Stevens however trusted Mr Martin and continued to wait for news. Eventually, Ms Stevens decided to pay Mr Martin a visit to one of his surgeries. When she got there she discovered that Mr Martin had ceased holding such surgeries at the church premises for some time without leaving any contact details and his present whereabouts could not be ascertained.

6. On 30 June 2016 Ms Stevens contacted the Nottingham Tribunal explaining that she had instructed Mr Martin to act for her but she had not heard anything for some time and was uncontactable. She was told that the records showed her claim had been struck out. She confirmed the position in writing so that further enquiries could be made. Ms Stevens did so by an email of 4 July 2016.

7. Enquiries were then made by the tribunal. It was discovered that the claim had never reached the tribunal from Arnhem House where such claims are initially processed due to non-payment of the issue fee. The documents unearthed included an application for fee remission. On 8 July 2016 the Tribunal wrote to the Claimant as follows:-

“The papers from Employment Tribunals Central Office indicate that in accordance with rule 11 of the Rules of Procedure the claim was rejected because of non provision of remission information at first and then failing to pay the issue fee by the notice deadline set out in their letter and the claim was returned to Darren Martin. There is no power under the rules for a Judge to re-consider a rejection under rule 11. That is an administration decision for Employment Tribunals Central Office. All you can do is to re-apply with a new claim and go through the process again. There will then clearly be a time issue to be determined in due course once the new claim has been lodged.”

8. As the above letter makes clear, the claim form had been rejected because the Tribunal had written to Mr Martin at his professional address (on 3 February 2015) indicating that the Claimant’s application for fee remission had been refused. Attached to the fee remission form was a letter from HM Courts and Tribunals Service (‘HMCTS’) making it clear that unless payment of the issue fee was made by 19 February 2015 the claim would be dismissed for non-payment. In fact all that was missing on the application form was an answer to a question asking whether the disposable capital of the Claimant was below the threshold level. As it was the answer was yes. It was a simple omission of one piece of information. A short telephone call to the Claimant by Mr Martin would have established the position. The re-submission of the completed form, again a very simple and straightforward task, would not only have granted the Claimant remission from fees but also allowed her Claim Form to proceed in the usual way. Ms Stevens was unaware that any such request for information or query had been raised by HMCTS. Moreover, during the period February to May 2015 she had seen Mr Martin at his surgery several times and on each occasion Mr Martin had informed her that there was no news about her application.

9. Following the letter of the Tribunal of 8 July 2016 the Claimant decided to instruct solicitors. Her partner knew a solicitor personally at Messrs Andrew and Co who presently represent the Claimant. On 21 October 2016 they submitted a new claim form on her behalf which was accepted. They continue to represent her in these proceedings.

10. Enquiries made by Andrew and Co for this hearing revealed that Mr Martin was not registered with the Solicitors Regulation Authority or the Bar Council. They have produced photocopies from Mr Martin’s professional website as well as various company searches. An e-mail from the Bar Council confirms that according to their records Mr Martin was called to the Bar in November 2012 and is currently on their records as an ‘unregistered Barrister’ which means that he does not need to hold a practicing certificate. I have also been shown an e-mail from the Solicitors Regulation Authority dated 31 March in which it is confirmed that there is no Solicitor on the roll in the name of Darren Martin.

11. I have been shown copies of pages from a website of Community Legal Representation CIC which is apparently the name of the company through which Mr Martin offers his services. It shows a photo of Mr Martin – as identified by the Claimant - in Barristers’ robes. The narrative on the web page states, inter alia:

“My name is Darren Martin, I am academically trained as a Barrister and I have represented people in their benefits claims or appeals for over 6 years.”

12. I have also been taken to various documents lodged at Companies House in respect of Mr Martin and company searches which have been undertaken by Andrew and Co. They show Mr Martin to have been a Director of five dissolved companies the names of which I do not need to set out here. 'Community Legal Representation CIC', is the company that apparently offers the services and is an active company having its registered office at 27 Old Gloucester Street, London.

THE LAW

13. Section 111 of the Employment Rights Act 1996 ("ERA 1996"), so far as is relevant, states:-

"(1) A claim 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.

(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."

14. Section 123 of EA 2010 (so far as is relevant) states:-

"(1) Subject to sections 140A and 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."

15. I have been referred to the following cases: **Dedman v British Building and Engineering Appliances Limited** [1974] ICR 53, **Chohan v Derby Law Centre** [2004] IRLR 685, **Steeds v Peverill Management Services Limited** [2001] EWCA Civ 419 and **Robinson v Bowskill practising as Fairhill Medical Practice** (UK EAT/313/12, unreported).

CONCLUSIONS

16. I will deal firstly with the unfair dismissal and detriment complaints where the applicable extension is the 'reasonably practicable' test under section 111 ERA 1996. I need to consider whether the **Dedman** principle applies. That principle in broad terms is that if a Claimant puts her case in the hands of a skilled adviser then any default on the part of the adviser is a relevant factor in determining whether it was reasonably practicable for the Claim to have been presented in time. Ordinarily, once a Claimant has instructed a skilled adviser any fault on the part of the adviser does not normally mean that it was not reasonably practicable to lodge the claim in time.

17. Was Mr Martin acting as a 'skilled adviser' for the Claimant? It is clear that he is not a Solicitor¹ nor is he a Barrister² with a Practising Certificate. His website page under 'CLR'³ does not actually claim that he is either a solicitor or a Barrister. In those circumstances I conclude that Mr Martin, in whatever actual capacity he represented the Claimant, was not doing so as a 'skilled adviser'. Accordingly, the **Dedman** principle does not apply for the purposes of the unfair dismissal claim.

18. I find that it was not reasonably practicable for the Claimant to present her claim. In these circumstances 'presentation' must mean meaningful presentation, that is when a claim is actually accepted not when it is lodged with an application for remission of fees at Central Office. The Claimant was blissfully unaware that any further information was required in relation to her remission application and that as a result of a failure to reply to the simplest of queries her claim had been struck out. She only became aware of the need of this information in July 2016 and presented her claim thereafter through her present solicitors. This is not a case where there is no explanation for the delay. The explanation is a failure to act on the part of her nominated representative.

19. Has the Claimant presented her claim within a further reasonable period within the meaning of section 111(2)(b) ERA 1996? There was undoubtedly some delay between the Claimant instructing her present solicitors and the ET1 ultimately being presented on 25 October 2016. However, it would be unrealistic to expect a well prepared and considered ET1 to be lodged immediately particularly where some initial investigation has to be undertaken. It is necessary for the solicitor to take instructions, seek to identify relevant facts, assess the merits of the claim and for the Claim to be approved by the client. All of that would take time particularly given the Claimant's disability. In the circumstances I am satisfied that the period between the Claimant instructing her present solicitors, some time in July 2016, and the presentation of the claim on 25 October was a reasonable period.

20. In relation to the discrimination complaints the relevant test for extension of time is whether it is 'just and equitable' to do so. The **Dedman** principle does not apply to discrimination complaints (see **Chohan v Derby Law Centre**). In **Steeds v Peveril Management Services** the Court of Appeal made it clear that a Claimant should not be disadvantaged because of the fault of her adviser as otherwise the defendant would be in receipt of a windfall. **Robinson v Bowskill** was a discrimination and unfair dismissal case where the EAT quoted Elias J (as he then was) in **Virdi v Commissioner of Police for the Metropolis and another**⁴ where the discrimination complaints were presented one day out of time against one Respondent and two and half months against the Second. The Claim was out of time but that was because the Claimant had put his claim in the hands of the Police Federation and his solicitors. Allowing the Claim out of time the EAT said that "*the errors of his solicitor should not be visited on his [the Claimant's] head*".

21. In considering whether time should be extended I have considered the various factors set out under section 33 of the Limitation Act 1980. I have looked

¹ See page 223 of the hearing bundle – page references below are also to the bundle for this preliminary hearing

² See page 228.

³ See page 231

⁴ [2007] IRLR 24

at the length and reasons for the delay. There has been a delay of approximately a year but that is not the fault of the Claimant. The Claimant has been the victim of misleading statements. Had it not been for that there is no doubt she would have progressed her claim. She was deterred from telephoning Mr Martin more often because she was told that he would contact her if there was any news. It is now clear that there was activity in the background of which she was completely unaware. I have no doubt the Claimant wanted to progress her claim and still wishes to do so.

22. It is unlikely that the cogency of the evidence will be affected by the delay. There is a concurrent personal injury claim ongoing in the County Court. The Respondent will no doubt be dealing with the employment history of the Claimant as part of that claim. The Claimant acted promptly once she knew of the need to take action and obtained professional advice immediately after the relevant facts came to light. In considering the delays I also take into account her mental state.

23. For the reasons given I am satisfied that it is just and equitable to extend time for the discrimination complaints.

24. Directions as to the future conduct of the case shall be given separately.

Employment Judge Ahmed

Date: 7 July 2017

JUDGMENT SENT TO THE PARTIES ON
12.8.17

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S.Cresswell
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FOR THE TRIBUNAL OFFICE