



EMPLOYMENT TRIBUNALS

Claimant: Miss C Hagston

Respondent: Tesco Stores Limited

HELD AT: Hull

ON: 8 February 2019

BEFORE: Employment Judge Brain

REPRESENTATION:

Claimant: In person assisted by Mrs C Coop

Respondent: Mr R Fitzpatrick of Counsel

JUDGMENT having been sent to the parties on 1 March and written reasons having been requested in accordance with Rule 62(3) of Sch. 1 to the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are supplied at the request of the respondent's solicitors.
2. The claimant presented her claim form on 4 September 2018. Before doing so she entered into mandatory early conciliation as required by section 18A of the Employment Tribunals Act 1996. She contacted ACAS to commence mandatory early conciliation on 1 August 2018. ACAS issued the early conciliation certificate on 15 August 2018.
3. The claimant brought the following complaints:
 - 3.1. Disability discrimination.
 - 3.2. Unlawful deduction from wages. This concerns non-payment of a staff bonus.
 - 3.3. Compensation for holiday accrued but untaken at the effective date of termination.

- 3.4. Constructive wrongful dismissal.
4. The holiday pay and unlawful deduction from wages claims were withdrawn by the claimant today. Therefore, nothing further needs to be said about them.
5. The claimant was employed by the respondent as a customer assistant between 11 July 2017 and 22 April 2018. Upon the latter day, she informed the respondent that she was resigning from their employment with immediate effect. She did not give the one week's notice as required by her contract of employment. The claimant's case is that she was wrongfully constructively dismissed, the respondent being in repudiatory breach of contract, and that she was therefore entitled to bring the contract of employment to an end without notice. She says that the respondent was in repudiatory breach because it discriminated against her contrary to the provisions of the Equality Act 2010.
6. The respondent concedes that at all material times the claimant was a disabled person with the meaning of section 6 of the 2010 Act because of her condition of anxiety.
7. The claimant pursues the following complaints of disability discrimination:
 - 7.1. That the respondent failed to comply with the duty to make reasonable adjustments.
 - 7.2. That the respondent treated the claimant unfavourably for something arising in consequence of disability.
 - 7.3. That the respondent harassed the claimant and that the alleged harassment was related to the protected characteristic of disability.
 - 7.4. Victimisation.
8. All of these acts are prohibited conduct. They are made unlawful in the workplace pursuant to provisions to be found in Part 5 of the 2010 Act.
9. No acts of discrimination postdate 22 April 2018 (being the effective date of termination of the contract of employment). Pursuant to section 123 of the 2010 Act, the limitation period for the presentation of her claim to the Employment Tribunal is a period of three months from 22 April 2018 (being the end of the period of the conduct complained of). Therefore, the limitation period expired on 21 July 2018.
10. Pursuant to section 140B of the 2010 Act the claimant was required to commence mandatory early conciliation as required by the 1996 Act within the primary limitation period in section 123 of the 2010 Act. She did not do so. Hence, her complaints under the 2010 Act have been presented outside the limitation period. It follows therefore that the Tribunal has no jurisdiction to consider them unless the Tribunal considers it just and equitable to extend time.
11. Section 123 grants a wide discretion to the Tribunal in determining whether to extend time for presentation of a complaint. That said, while the Tribunal has a wide discretion to allow an extension of time it does not necessarily follow that exercise of the discretion is a foregone conclusion. There is no presumption that the Tribunal should do so. It is for the complainant to satisfy the Tribunal that it is just and equitable to extend time. The exercise of the discretion is the exception rather than the rule. The onus is upon the complainant to convince the Tribunal that it is just and equitable to extend time. Exceptional circumstances are not

required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

12. Section 123 of the 2010 Act does not specify any list of factors to which a Tribunal is to have regard in exercising the discretion whether to extend time for just and equitable reasons. In **British Coal Co-operation v Keeble & Others** [1997] IRLR 336, EAT, it was suggested that in determining whether to exercise discretion to allow the late submission of a discrimination claim, Employment Tribunals would be assisted by considering the factors listed in section 33(3) of the Limitation Act 1980. The 1980 Act deals (amongst other things) with the exercise of discretion in civil courts in personal injury cases to extend the limitation period. Section 33(3) of the 1980 Act requires the court to consider: the prejudice which each party would suffer as a result of the decision reached, 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, the extent to which the parties have co-operated with any requests for information, the promptness with which the claimant acted once he or she 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.
13. The Tribunal does not have to slavishly adhere to the factors in section 33(3) of the 1980 Act. It is not a legal requirement to go through it as it is only a guide. The Tribunal is only required to have regard to those factors of significance upon the facts of the case. In particular, the length of and reasons for the delay and whether the delay has prejudiced the respondent will almost always be particularly important factors. With these principles in mind, I now turn to make the necessary factual findings. After doing so, I will then apply these principles to the facts as found.
14. I heard evidence from the claimant. The respondent called evidence from Lorna Boak. She is employed by the respondent as a 'people partner' based at the respondent's head office in Welwyn Garden City. Neither party raised any points of the other by way of cross-examination.
15. (On 2 December 2018, the claimant presented a document to the Tribunal. This was in three sections consisting of:
 - 15.1. Submissions on time limits.
 - 15.2. The basis upon which the claimant says she is a disabled person under section 6 of the 2010 Act.
 - 15.3. Submissions about holiday pay.
16. The third section need not concern us given that the claimant withdrew her holiday pay claim. However, the first two sections are pertinent to the question of extension of time under the 2010 Act. These two sections were treated for today's purposes as the claimant's witness statement).
17. In essence, the claimant's case is that from October 2017 onwards the respondent required her to work on the customer service desk. She says that because of her disability this placed her at a substantial disadvantage in comparison with persons who are not disabled in that other employees not affected by the mental impairment of anxiety would not be disadvantaged by being required to undertake customer service desk duties. The claimant says that she was affected by panic attacks in dealing with customers when she was alone with them and when using the telephone or the tannoy. This, in summary, is the factual basis for the reasonable

adjustment complaint and the complaint of unfavourable treatment for something arising in consequence of disability. The harassment and victimisation complaints arise from the claimant's efforts to raise her concerns about these issues.

18. Matters culminated in the claimant's resignation on 22 April 2018. The letter of resignation is at page 90 of the preliminary hearing bundle. She said that she felt *"like I cannot continue under the stress I feel each week coming into work knowing I will have an anxiety attack. I am sorry for the inconvenience caused but I cannot work at Tesco any longer. I am aware that I am supposed to give a week's notice but I honestly do not want to. I feel uncomfortable in this work environment and no longer wish to put myself through that"*.
19. (I should add that I makes these factual findings upon the basis of the claimant's unchallenged evidence. At a preliminary hearing in order to determine a limitation point it is not always apt for there to be a cross-examination of the claimant upon the factual basis of her claim. The evidence given at a preliminary hearing has to be kept within proportionate bounds to avoid the preliminary hearing effectively airing the issues more apt for a final hearing. It will be open to the respondent to challenge her evidence at the final hearing).
20. There is little in dispute between the parties about the post-resignation events. The claimant made a complaint to the respondent through Protector Line on 31 May 2018. This is a service provided by the respondent in order to investigate employees' complaints.
21. The claimant contacted Protector Line at the end of May 2018 following correspondence and communication that month. This arose out of concerns which the claimant had about her pay.
22. The lead up to her contacting the Protector Line was as follows. On 4 May 2018 she had been notified that she was to receive no pay for the period up to 22 April 2018. This was upon the basis that she had in fact overtaken her holiday entitlement. She had taken the first three weeks of April 2018 as annual leave before resigning on 22 April. She had therefore overtaken her annual holiday entitlement, the holiday year commencing on 1 April of each year.
23. The claimant says that on 9 May 2018 she emailed the respondent's customer services department. She received a reply that day from Rebecca O'Rourke who asked her for further information. Rebecca O'Rourke's email said that, *"If you wish to take this further with no contact from the store I would advise you to go to the citizens advice or the union"*. The claimant followed up on this email the following day, 10 May 2018. She sought the assistance of the respondent's HR department failing which she intimated an intention to contact the citizens advice bureau.
24. The claimant then gives evidence about attempting to obtain an appointment with CAB. She attempted to do this on 14 May 2018. She said that, *"this was an extremely stressful and triggering process. I had no understanding of what CAB was and as an unknown experience this was very triggering of my anxiety. As a result it took me nearly a whole week to do as every time I went to ring I had a panic attack about not only using the phone with a stranger but also discussing the situation at Tesco which itself made me anxious"*.
25. She had no success in getting an appointment with CAB. Her account is that she telephoned four times but received no answer. She says that, *"I could not access the drop in [at the CAB] because the prospect of going on the bus to a place I was*

unfamiliar with to discuss my personal mental health and the issues caused by Tesco was too much for me to deal with”.

26. The claimant sent another email to Rebecca O'Rourke on 16 May 2018. It was this email that prompted a suggestion from Ms O'Rourke of the claimant contacting Protector Line. The claimant did so at the end of May 2018.
27. Following the claimant so doing, the respondent investigated the claimant's complaints and wrote to her on 2 July 2018. The claimant was unhappy with the respondent's response. Ms Boak, who had conducted the investigation, suggested referral of the matter to the respondent's colleague relations team. The claimant asked her for the necessary contact details. The exchanges between Ms Boak and the claimant took place on 3 July 2018.
28. The claimant heard nothing from the customer relations team. She therefore emailed Rachel Holmes on 15 July 2018. (Ms Boak had in fact passed on details of the claimant's complaint to Rachel Holmes in the meantime after 2 July). Ms Holmes replied on 16 July 2018 to say that she was going to review matters upon behalf of the respondent. She did so and on 19 July 2018 emailed the claimant again. She upheld the outcome of Ms Boak's investigation. The claimant emailed on 22 July 2018 to complain that she did not consider that her case had been fairly heard. However, the claimant heard nothing further.
29. The claimant then went to see CAB. She managed to get an appointment for 31 July 2018. She says that the advisor who she saw told her that there were time limits for bringing claims before the Employment Tribunal. The claimant's evidence is that this is the first time that she became aware of time limits. Acting upon advice, she contacted ACAS to undergo mandatory early conciliation under the 1996 Act the next day, 1 August 2018. The claimant understood that by doing this she would benefit from an extension of time pursuant to the provisions of section 140B of the 2010 Act.
30. I now move on to the application of the relevant principles when exercising the just and equitable discretion to the facts as found. The first and possibly most important consideration is to weigh the relative prejudice that extending time would cause to the respondent when compared with the prejudice to the claimant by refusing so to do. It is plain that a Tribunal considering whether it is just and equitable to extend time will err if the focus is solely on whether the claimant ought to have submitted the claim on time. The test is not one of reasonable practicability as would apply for other types of claims of which the Tribunal has jurisdiction (such as a complaint of unfair dismissal).
31. The prejudice to the claimant of refusing to extend time is to drive her from the judgment seat. Her complaints of discrimination would not be capable of being pursued. I accept of course that some prejudice will always be caused to the employer if an extension of time is granted given that the case would otherwise be dismissed. However, the prejudice caused needs to amount to more than simply that. If that were to be sufficient to cause prejudice preventing an extension then the provision enabling an extension of time would be largely emasculated.
32. There was no suggestion upon the part of the respondent that the cogency of the evidence has been affected by the delay. On the contrary, this is a case that is well documented and the relevant witnesses for the respondent are still available to give evidence. On any view therefore, the balance of prejudice favours the claimant.

33. It is important for the party seeking an extension of time to provide an explanation for the delay. Essentially, the claimant's explanation is that she sought to resolve matters internally with the respondent before having recourse to the Employment Tribunal. I find as a fact that the claimant was seeking to resolve matters internally. Within a very short time of being notified that she was not going to be paid anything in early May 2018 she sought to avail herself of the respondent's internal procedures. The respondent then took the whole of June 2018 to investigate the claimant's complaints. Furthermore, the respondent made no contact with the claimant between 3 and 14 July 2018. Rachel Holmes only reviewed Lorna Boak's investigation at the instigation of the claimant. In addition, the respondent did not reply to the claimant's email of 22 July 2018 at which point the claimant acted quickly to obtain legal advice.
34. On any view, the claimant has a reasonable explanation for the delay. There is no general principle that it will be just and equitable to extend the time limit where the claimant was seeking re-dress through the employer's internal grievance procedure before embarking upon legal proceedings. However, a delay caused by a claimant awaiting completion of an internal procedure may justify an extension of the time limit albeit that it is only one factor to be considered.
35. The claimant also contends that she was ignorant of her rights and the applicable time limits. I agree with the respondent's counsel that this explanation can only exonerate the claimant's delay until 31 July 2018 given that even on her own case she was told by the CAB that there were time limits for bringing Employment Tribunal cases. That said, I accept that the claimant has a reasonable explanation for the delay between the end of July 2018 and 4 September 2018 given that she mistakenly thought that going through the early conciliation process would bring with it an extension of the time limit under section 140B of the 2010 Act. The claimant of course does not benefit from that extension of time given that the primary time limit had expired before she entered mandatory early conciliation.
36. Whereas incorrect advice by a solicitor or other advisor or a wholly understandable misconception of the law is unlikely to save a late Tribunal claim in an unfair dismissal case the same is not necessarily true when the claim is one of discrimination. The claimant should not be disadvantaged because of the fault of her advisors for otherwise the respondent would be in receipt of a windfall. It appears that the claimant was not made aware that she would not benefit from the extension of time provisions in section 140B of the 2010 Act and mistakenly thought that she would benefit from such an extension once the early conciliation process had been commenced by her. This is a wholly understandable misconception about a somewhat difficult area of the law and the claimant was acting under the advice and guidance of the CAB at the time. In my judgment therefore, the delay between the end of July 2018 and 4 September 2018 is excusable and reasonable.
37. I agree with the claimant's submission that the period of the delay was short. The limitation period expired on 21 July 2018. The claimant presented her complaint on 4 September 2018. She was therefore around one-and-a-half months out of time. This in reality links in with the balance of prejudice as the delay has caused the respondent no prejudice and the claimant is the only one prejudiced by the delay in issuing proceedings.
38. I also take account of the fact that this is a complaint of discrimination related to the protected characteristic of disability. The claimant's anxiety, according to her

unchallenged evidence, played a part in the delays in her receiving advice from the CAB.

39. Given all the circumstances it is my judgment that it is just and equitable to extend time in order to vest the Tribunal with jurisdiction to consider the claimant's disability discrimination claims. The balance of prejudice favours the claimant. The length of the delay was short causing no prejudice to the respondent. A period of around two months was occupied between mid-May and mid-July 2018 with the respondent dealing with the claimant's complaints internally. The claimant acted very promptly once she realised on 22 July 2018 or thereabouts that she was going to get no further with the respondent's internal processes. She acted immediately upon the CAB's advice that there were applicable time limits. She made an understandable error in thinking that she had the benefit of an extension of time under section 140B of the 2010 Act in circumstances where she did not. Further, the impact of the disability upon her contributed to the delays in her seeking legal advice.
40. There is an additional factor which is that the claimant's complaint of constructive wrongful dismissal has to be heard by the Tribunal anyway. No issue appears to have been taken by the respondent around the Tribunal's jurisdiction to entertain the claimant's complaint of constructive wrongful dismissal. The claimant says that the respondent was in repudiatory breach of contract by discriminating against her contrary to the 2010 Act. The Tribunal therefore has to hear all of the evidence in any event in order to determine whether the claimant has made out her case that the respondent acted in repudiatory breach. As the Tribunal has to hear all of the evidence anyway it is difficult to say other than it is just and equitable to extend time to enable the Tribunal to determine the claimant's discrimination complaint which arise out of the same factual nexus.
41. In all the circumstances therefore, the Tribunal extends time to 4 September 2018 and has jurisdiction to consider the claimant's complaints of disability discrimination.

Employment Judge Brain

Date 10 May 2019

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