



EMPLOYMENT TRIBUNALS

Claimant

Ms Catherine Ufoma

v

Respondent

Leeds City Council

PRELIMINARY HEARING

Heard at: Leeds

On: 11 January 2019

Before: Employment Judge R S Drake

Appearances

For the Claimant: In Person

For the Respondent: Mr R Hutchinson (Solicitor)

JUDGEMENT

1. For the purposes of Section 111 of the Employment Rights Act 1996 (“ERA”) the unfair constructive dismissal claim was not presented in time. In this case the complaint was presented outside the primary limitation period prescribed therein and the Claimant has not shown it was not reasonably practicable for her to issue within that period and nor that she issued within a reasonable time thereafter.
2. For the purposes of Section 113 of the Equality Act 2010 (“EqA”) the race and disability discrimination claims were not presented in time. In this case, the complaints were presented outside the primary limitation period prescribed therein and not within such period as this Tribunal finds just and equitable so as to extend time.
3. These proceedings are therefore dismissed in their entirety as the Tribunal may not hear them.

REASONS

- 1 Reasons for the decision having been given orally at the hearing, these written Reasons are being provided pursuant to the Claimant's request and thus in accordance with Rule 62(2) and (3) of Schedule 1 to the ETs (Constitution & Rules) Regs 2013 (The "Rules") and thus take precedence over those given orally.
- 2 The Claimant complains of unfair constructive dismissal on the basis of two incidents which occurred as long ago as 2014 and 2015 which caused her to resign and are also relied upon as bases for her complaints of unfavorable treatment in the form of being bullied for a reason in consequence of disability and an unspecified form of alleged racial discrimination by Foster Carers engaged by the Respondents. She resigned 27 April 2015 and issued her claims in Tribunal 1 October 2018. She had sought Early Conciliation via ACAS on 6 September 2018. The Respondents denied the substantive claims on their own merits but also argued that both sets of claims were out of time and that the Tribunal did not have jurisdiction to hear them because of the reasons set out below. In any event they argued they were not vicariously liable for the acts of the Foster Carers as they weren't their employers or responsible for them for the purposes of Sections 109 and 110 EqA.
- 3 The law to be considered in relation to the unfair constructive dismissal claim is as set out in Section 111 ERA provides as follows:

(1) A complaint may be presented to a tribunal against an employer by any person that he has been unfairly dismissed by the employer

*(2) An Employment Tribunal **shall not** (again my emphasis) consider a complaint under this section unless it is presented—*

*(a) before the end of the period of **three months** beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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 The burden of proving that it was not reasonably practicable to present a claim in time is a high threshold and rests firmly on the Claimant according to the guidance in **Porter v Bandridge Ltd [1978] ICR 943**.

- 5 I accept that this is not a case where it is alleged by the Claimant that she has been misadvised.
- 6 There are a number of cases I am to consider as offering guidance:-
- 6.1 **Palmer v Southend BC [1984] 1 AER 945** from which I infer that the Tribunal must consider whether the Claimant has shown it was “not reasonably feasible” to issue in time;
- 6.2 **M&S v Williams-Ryan [2005] EWCA 470** from which I note that the statute is to be given liberal interpretation but as always subject to the evidence presented;
- 6.3 **Northampton BC v Entwhistle [2010]** from which I note much the same as with Williams-Ryan;
- 7 The law to be considered in relation to the race and disability discrimination claims is at Section 123 EqA and is as follows:
- “ ... Proceedings on a complaint within Section 120 may not (my emphasis) be brought after the end of –*
- (a) *the period of three months starting with the date of the act to which the complaint relates (in this case I find as based on common ground that was the date of resignation ie 27 April 2015) (the” Primary Period”) – or*
- (b) *such period as the Employment Tribunal thinks just and equitable (the “Extended Period”) ... “*
- 8 I had a bundle of agreed documents to consider plus a written skeleton argument from the Respondent’s Solicitor to which the Claimant also spoke. I record gratitude to both sides for the detail, cogency of advocacy throughout the hearing and preparation for it.
- 9 The case law to which I was directed (and of which I was aware) included the following:-
- 9.1 **Robertson v Bexley Community Centre [2003] IRLR 434** from which I note that application of S123(b) involves the exercise of a discretion which is an exception rather than the rule;
- 9.2 **Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379** from which I note that the time limit for issue of proceedings “ ... is a jurisdictional and not a procedural issue ... “ which means that if a case is out of time and time is not extendable, the Tribunal simply has no power or jurisdiction to hear the claim; I note this case is also relevant in the context of the analysis of the Section 111 ERA arguments;
- 9.3 **British Coal v Keeble [1997] IRLR 336** from which I note inter alia that I am to consider the length and reasons given for delay, the extent to which delay

may affect cogency and recollection of evidence, any promptness of action by the Claimant once, after the Primary Period had expired, she became aware of the alleged facts which gave rise to his cause of action, the steps she took once she knew of the possibility of taking action, and lastly the balance of prejudice to the Claimant of not allowing the claim to proceed and to the Respondent in allowing it to do so;

9.4 **Palmer & Saunders v Southend BC [1984] IRLR 119** from which I note *inter alia* that I am to consider the substantial cause (if shown) of the Claimant's failure to issue within the Primary Period, whether there was any impediment preventing issuing in time, whether or not the Claimant was aware of her right to issue a claim, whether the Respondent has done anything to mislead or impede the Claimant issuing her claim, whether the Claimant had access to advice, and lastly whether delay was in any way attributable to that advice.

10 I noted the evidential burden rested with the Claimant and heard her evidence given by written statement and oral testimony which included reference to paginated documents in an agreed bundle.

11 I am satisfied that the Claimant gave her evidence sincerely and believing she was stating the truth. However, I find that the Claimant failed to give me clear evidence of her medical condition upon which she sought to rely to explain her delays and that by her own admission she could have but chose not to issue her claims before she did without adequate explanation. This caused me to conclude that in the case of the Claimant in particular, her evidence of why she didn't issue within the Primary Period was in any event scant, but more importantly was equivocal and not probative to the level required to enable me to conclude I could exercise discretion in her favour.

12 In particular my findings on the evidence significant to the guidance set out above by statute and case law are as follows:

12.1 The Claimant agrees that the last date on which anything happened giving her cause for complaint was either when she resigned on 27 April 2015 or on an unremembered date in March 2018 when she gained sight of a reference given by the Respondents to an Employment Agency which referred even-handedly (as I find it to be) to an incident between the Claimant and a Foster Carer whom again I find to be engaged but not employed by the Respondent, which occurred as long ago as April 2015; she issued her claim on 1 October 2018 fully more than three years or more than 6 months respectively after the events relied on as supposed instances of unlawful discrimination;

12.2 She is a sophisticated and knowledgeable person who clearly felt with vehemence that she had been discriminated against unlawfully thus signifying that she already had in mind at a stage in March/April 2015 when she raised a grievance and also included complaint about absence of support for her dyslexia which she cited as a disability;

12.3 She had the right to pursue a claim if she thought she had been unlawfully discriminated against but has presented no evidence today to show

me she was unaware of such right but rather the opposite in saying she was physically and mentally unable to take action thus signifying she knew she had the right to take action is she thought she had valid causes for complaint;

12.4 She didn't decide to issue her claims until after a date sometime mid 2018 when she faced a judgment in civil proceedings for overpayment of wages by the respondent

12.5 She took no action after she left the Respondent's employ at all until 3 September 2018 when she approached ACAS as part of the Early Conciliation pre-claim procedure, and I find that there is no evidence of any explanation for not issuing until fully 3 years after expiry of the Primary Period on 25 September 2015 or fully 6 months after such expiry of the Period if it started when she first learned of the reference in March 2018;

12.6 I find this absence of explanation or evidence to support it troubling and not sufficiently satisfying to enable me to exercise discretion as it is clear that from an early stage the Claimant knew she could issue proceedings but didn't; she simply waited until after she was signed off from psycho-therapeutic treatment in Spring 2018;

12.7 The Claimant says the first time she realised she could issue proceedings was when she sought involvement of ACAS, but she had had sufficient presence of mind to make enquiries about procedure;

12.8 There was no evidence (medical or otherwise) before me of any obstacle preventing the Claimant from issuing her claim within the Primary Period and certainly none erected/caused by the Respondent;

12.9 The Claimant didn't give me any further explanation for her delay or for why it was so long;

12.10 When considering what is equitable, I have to take account that the Claimant's credibility is at issue given her lack of clarity of explanation and her recollection of events as recent as occurring in 2018. I am not saying she is deliberately untruthful, but I do not find her explanation of delay convincing to the extent that I am not convinced that issuing when she did was within a period I consider just and equitable or that it was not reasonably practicable to issue in time.;

13 Applying the law to these findings and taking account of the guidance referred to above I find that the Claimant's decision, conscious or otherwise, not to issue her claim before she did, was the only reason for delay in issuing in the Primary period and no cause was attributable to the Respondent. I further find that the Claimant was unconvincing in her explanation that she didn't know she could or how to present proceedings in Tribunal.

14 Therefore, the delays as long as I find them to be beyond the Primary Period is such that it would not be just or equitable to extend the Primary Period at all or that

she issued her claims within a reasonable time of the Period expiring. I have considered the balance of prejudice and though I recognise that a Claimant whose claim is struck out at this stage is disadvantaged substantially, I also recognise that a Respondent which is put to the time, trouble and cost of defending a claim based only on an assumption of nexus between things said and done and a person's gender is also substantially disadvantaged which outweighs the disadvantage to the Claimant.

15 Accordingly I find that the claims were issued out of time for not being issued within the Primary Periods for both sets of claim and that in the circumstances as found in this case, and bearing in mind the principal guidance that extending time is the exercise of a discretion which should be exceptional, she has not issued her unfair dismissal claim within a reasonable time following expiry of the Primary Period and that in relation to the discrimination claims, these have not been issued within such time as I find to be just and equitable so as to extend time beyond the Primary Period. Thus, the claim is dismissed as the Tribunal has no jurisdiction to hear it.

Employment Judge **R S Drake**

Date: 11 January 2019