



EMPLOYMENT TRIBUNALS

Claimant

Miss MG Kingsford

v

Respondent

Busy Bees Day Nurseries Limited

Heard at: Watford (by CVP)

On: 20 May 2021

Before: Employment Judge M Bloom

Appearances

For the Claimant: Ms J O'Neill (McKenzie Friend).

For the Respondent: Ms R Kight (Counsel).

JUDGMENT

1. The Claimant's claims of Age Discrimination and Pregnancy/Maternity Discrimination are all out of time. It is not just and equitable in all the circumstances to extend the statutory time period. Those claims are therefore dismissed.
2. The Claimant does not fall within the definition of a disabled person. Consequently the claim of Disability Discrimination is dismissed.
3. The Claimant's claims of Unfair Dismissal and Breach of Contract shall proceed and shall be heard at the Watford Employment Tribunal on 1st and 2nd November 2021.

REASONS

1. The Claimant was represented by a McKenzie Friend, Ms O'Neill. The Respondents were represented by Counsel Ms R Kight.
2. On 6th April 2020 the Claimant presented a number of claims to the Employment Tribunal consisting of claims of Unfair Dismissal, Breach of Contract (failure to pay statutory notice pay), Disability Discrimination, Age Discrimination and Pregnancy/Maternity Discrimination. The Claimant was employed as a Nursery Assistant by the Respondent between 11th August 2016 and the date her employment was terminated on 23rd December 2019.

3. The matter came before Employment Judge Warren on two occasions via Telephone Preliminary Hearings namely on 17th December 2020 and again on 11th March 2021. On the first of those two Preliminary Hearings Employment Judge Warren noted that in respect of the Disability Discrimination claim the Claimant was relying on a mental impairment of depression and anxiety as amounting to a disability within the meaning of Section 6 Equality Act 2010. He also made a number of Orders requiring the Claimant to submit further information regarding her various discrimination claims. Those Orders included the necessity for the Claimant to submit an impact statement and appropriate evidence dealing with the issue of whether or not she was a disabled person. When the matter returned before Employment Judge Warren, again he expressed his disappointment that some of the Orders he had made at the first Preliminary Hearing had not been actioned. There was the distinct absence of a detailed impact statement dealing with the Claimant's issue of alleged disability. He took the opportunity during the course of the Hearing of identifying the Disability Discrimination claims (paragraphs 6.1, 6.2 and 6.3 of the Note following that Preliminary Hearing). He identified issues relating to both the Age Discrimination claim and the discrimination based on the protected characteristic of Pregnancy/Maternity and identified the fact that, on the face of it, those claims were out of time. He ordered that an open Preliminary Hearing should take place on 20th May 2021 to deal with the issues of whether or not the claims of Age and Pregnancy/Maternity Discrimination should be dismissed because they were out of time and additionally for the Tribunal to determine whether or not the Claimant was a disabled person at the material time, i.e. as of the date her employment was terminated in December 2019.

Age Discrimination and Pregnancy/Maternity Discrimination Claims

4. I dealt with these matters first before dealing with the issue of whether or not the Claimant was a disabled person. Insofar as the Age Discrimination claims were concerned the Claimant identified four specific claims of less favourable treatment. They were as follows:-
 - (1) An allegation that the Respondent failed to permit the Claimant to be absent from work for a period of five hours each week to attend an NVQ training course. The Claimant alleged that another employee (Melissa Bayes) was allowed such time out. Miss Bayes was slightly older than the Claimant. She was 24 years old at the time.
 - (2) The Claimant alleges that she was not given the opportunity of attending a 14 day visit to another nursery in The Netherlands in or around March 2017. Miss Bayes however was offered and took up that opportunity.
 - (3) The Claimant was not offered a full-time contract in March 2017 whereas Miss Bayes was offered a full-time contract.

- (4) When the Claimant became pregnant she asked to move to a different room so she did not have to sit on the floor with the children in her care. This application, she alleges, was refused whereas another employee (Jessica Cloud, aged 35 years) was allowed to move to a different room. The Claimant alleged that that particular act of discrimination took place in August 2017.
 - (5) Insofar as the claims of Pregnancy/Maternity Discrimination are concerned the Claimant made two specific allegations as follows:-
 - (1) In August 2017 she was made to sit on the floor caring for young children despite having had advice from a doctor that she should move to another room.
 - (2) In August 2017 the Claimant alleges that she was not paid her full pay and/or statutory sick pay whilst she was off due to a pregnancy related matter.
5. The last of these acts of discrimination both in terms of Age Discrimination and/or Pregnancy/Maternity Discrimination took place, as stated, sometime in August 2017. Section 123 Equality Act 2010 requires any claim for discrimination to be submitted within a statutory time period of three months. That three month time limit can be extended as a result of the requirement to undertake the ACAS early conciliation process. Nevertheless the claims that were subsequently presented by the Claimant in April 2020 were well over two years out of time. It was accepted by the Claimant and her representative that the claims were presented out of time. I was invited to exercise my discretion as to whether or not it was just and equitable to extend the relevant time period.
6. In this regard I was referred to a Bundle of Documents consisting of some 108 pages which included a record of attendances of the Claimant's attendances at her local Citizens Advice Bureau. The Claimant had waived privilege in respect of those documents by including them within the Joint Bundle. Those records showed that the Claimant first contacted the CAB on 5th September 2017 regarding the possibility of bringing discrimination claims. She was advised to raise a grievance with her employer and was advised in addition to contact ACAS. She did neither. It is worth noting that at no stage did the Claimant ever raise written grievances regarding any allegation of Unlawful Discrimination. On the same day namely 5th September 2017 the CAB advised the Claimant there were strict time limits on bringing discrimination claims. The Claimant accepted that she was given this advice but could not recall whether or not she was told the specific three month time limit. In reaching my decision I conclude that she was because it is inconceivable that the CAB would tell her that there was a time limit without actually telling her what that time limit was. She returned to the CAB on 8th September 2017 again to discuss the same matters. She was again advised to raise a grievance. On 7th August 2019 she returned to the CAB which was some two years after she had last sought their advice. On this occasion she sought their

advice regarding an overpayment of wages she had received at that time which the Respondents required to be repaid. Again, issues relating to the potential of discrimination claims were discussed. On 23rd December 2019 the Claimant's employment was summarily dismissed as a result of allegations that she had failed to comply with the Respondent's absence reporting procedure; she had failed to supply up to date fit notes; she had failed to attend a disciplinary hearing as instructed and had failed to appeal against a subsequent decision taken to terminate her employment. She did not immediately go back to the CAB but attended their offices again on 7th February 2020. At that stage the CAB notes state that the Claimant was not "initially pursuing Unfair Dismissal". There was no reference to the Claimant's desire to bring any discrimination claims. On 6th March 2020 she sought their advice again and was reminded of time limits applicable to Employment Tribunal claims presumably having then decided to bring the Unfair Dismissal claim. She was advised that she would have to contact ACAS in order to present any claim and this she did on 6th March 2020. The certificate was issued on 11th March 2020 but, as already noted, she did not present the claims until 6th April 2020. There is no dispute that the claims of Unfair Dismissal and Breach of Contract were presented in time.

7. In or around 2017 the Claimant sought help from her GP with regard to what was subsequently described by her doctor as "stress at work/anxiety". I shall make reference to that medical condition further in this Judgment when dealing with the issue of disability. The Claimant had periods of absence from work but also long periods when she was able to attend work. The Claimant was pregnant from around March/April 2017 and gave birth to her son in late December 2017. During her pregnancy she alleges that the acts referred to above occurred with respect to the discrimination claims. The pregnancy was not without its difficulties and on two occasions the Claimant was admitted to hospital both in November and shortly before her child was born in December 2017. However, notwithstanding those health difficulties, I find no reason why the Claimant was not able, particularly having received advice from the CAB regarding the merits of the claim and particularly on time limits, to not be in a position to present those claims within the required statutory time period. As stated the Claimant's child was born in December 2017. She continued taking her maternity leave and went back to work with the Respondent in September 2018. She was obviously fit and able to return to work at that time. Thereafter there do not appear to have been any particular difficulties at work although the Claimant continued to see her GP experiencing stress/anxiety symptoms. It is worth noting that having considered all the evidence a significant contributory factor towards the Claimant's condition was undoubtedly the fact that she was a young mother (aged about 20 at the time), a single parent (she was not living at the time with the child's father) and was undoubtedly stressed as a result. This does not follow that the primary cause was the situation at her place of work. The Claimant did nothing further regarding the presentation of any discrimination claim until she contacted ACAS in March 2020 some two and a half years after the last act complained of. As noted she had

been advised concerning those claims back in 2017 and thereafter had received specific advice regarding the relevant time period. Section 123(1) Equality Act 2010 stipulates that any discrimination claim may not be brought after the end of the period of three months starting with the date of the act of which the complaint relates or “such other period as the Employment Tribunal thinks just and equitable”. Such a term provides me with a discretion as to whether or not to permit claims that have been presented out of time at a later date. In exercising such discretion I have to take into account a number of judicial authorities dealing with the point. Such authorities include the Court of Appeal Judgments in the cases of Robinson v Bexley Community Care Centre (2003) IRLR 434 and the more recent Court of Appeal Judgment in the case of Adedeji v University Hospitals Birmingham NHS Foundation Trust A2/2020/0025. Lord Justice Underhill reminded Tribunals in the latter case that the best approach for a Tribunal in considering the exercise of such a discretion is to assess all the factors in the particular case including the length of and reasons for the delay. It is not just a question of addressing one’s mind to the relevant “list” contained in Section 33 Limitation Act 1980, although some of the factors contained in that list are helpful in reaching such a decision. Of primary consideration in determining such an issue is the prejudice that each party would suffer as a result of a decision either to extend the time limit or to refuse to exercise the discretion. There is obviously a prejudice as far as the Claimant is concerned because such a decision would prevent her pursuing those claims. However, in my judgment the prejudice to the Respondent is that much greater in this case. The substantive Hearing has been listed to take place in early November 2021. That is over four years since the relevant events complained of. Inevitably the ability of witnesses to recall events that took place many years prior to the Hearing are going to be severely restricted. Another great difficulty in this case is that the two persons against whom the Claimant alleges were the perpetrators of those acts of discrimination have both left the Claimant’s employment. One left on 8th September 2017 (Julie Edwards the Nursery Manager) and the other on 1st September 2017 (Charlotte Kent the Deputy Nursery Manager). They are no longer in the Respondent’s employment and no contact has been had with them since they left their employment nearly four years ago. It is unreasonable in my judgment and prejudicial to the Respondent to expect them now some four years or so after the relevant events to require witnesses who long ago left their employment to deal with issues which they may well not recall in any event. It is also apparent to me that for a number of years after the relevant events the Claimant had no intention of pursuing the claims. Had she done so I have no doubt the claim would have been presented prior to April 2020. It was only after her employment was terminated that the Claimant decided to add those claims to the claim of Unfair Dismissal.

8. In my judgment it is not just and equitable to exercise a discretion in the Claimant’s favour to extend the time period. The claims of Age Discrimination and Pregnancy/Maternity Discrimination are out of time and, as a result, are dismissed.

Disability Discrimination

9. The Claimant, as stated, also brings a claim of Disability Discrimination. One act complained of is the dismissal itself on 23rd December 2019. There is no dispute that that claim is in time along with the Unfair Dismissal and Breach of Contract claims. The issue to be determined at this Preliminary Hearing was whether or not the Claimant falls within the definition of a disabled person as defined in Section 6 Equality Act 2010. Section 6 Equality Act 2020 states – “a person (P) has a disability if P has a physical or mental impairment and the impairment has a substantial and long term adverse effect on P’s ability to carry out normal day to day activities”.

10. In this case there was no dispute that the Claimant had, at the material time, a mental impairment. She was experiencing stress/anxiety symptoms. Careful examination was undertaken during the course of this Preliminary Hearing with regard to the Claimant’s medical records. On 10th July 2017 she was diagnosed with “stress at work”. No medication was prescribed. On 16th August 2017 the Claimant again saw her doctor and again was diagnosed with “stress at work”. No medication was prescribed. Two weeks later she returned to see her doctor and again the stress symptoms were recognised. She visited her doctor again on 6th November 2018. In that consultation medication and therapy were discussed. The doctor’s note records the fact that the Claimant would “like to hold off these at the moment”. She therefore was not prescribed any medication. She visited the doctor again on 19th March 2019 when again stress was diagnosed. A review one or two weeks later was suggested but the Claimant failed to take up that appointment. Again, no medication was prescribed. She saw her doctor with unrelated matters on 11th June 2019 but visited the doctor again on 12th August 2019 when again “stress at work” was diagnosed. On this occasion the doctor prescribed medication. However the Claimant did not take the medication. It is later recorded in the doctor’s notes on 2nd September 2019 that she had lost the prescription. In late August 2019 the Claimant went on holiday for a week with a friend. On 10th December 2019 the Claimant visited the doctor again when again stress was recognised and, it appears, medication was prescribed. The Claimant’s employment was terminated on 23rd December 2019. Some eleven months later on 2nd November 2020 her doctor diagnosed both anxiety and “generalised anxiety disorder”. The issue to be determined by me is whether or not the Claimant fell within the definition of a disabled person as of 23rd December 2019 not what the position may have been in November 2020.

11. Regrettably Witness Statements submitted by the Claimant did not deal with the issue of how her condition affected her day to day activities and in particular whether or not her condition had a substantial and long term adverse effect on her ability to undertake normal day to day activities. One long statement did not deal with the issue at all. Another submitted

only the evening before this Preliminary Hearing only barely touched on the issue. Detailed questions had to be put to the Claimant during the course of the Preliminary Hearing. I was not impressed with the Claimant's evidence. It was obvious to me that the Claimant had a lot of domestic difficulties at the time. She was a young single parent. She was struggling to cope both domestically and financially. It does not matter for the purposes of determining whether or not the Claimant was a disabled person whether or not the cause of her stress/anxiety was work related or otherwise. However, the important evidence given to me was the fact that for much of 2019 the Claimant did attend work. There were periods of absence but even during those periods, let alone the time she attended work, she was undertaking normal day to day activities without, in my judgment, any substantial or long time adverse effect. She got up with her young child particularly when she was living on her own with her son. She got them both ready in the morning. She got to work. Her son went to the same nursery. She worked throughout the day commencing at about 8:40 a.m. and finishing at about 6:00 p.m. The Claimant stated that around lunchtime she found the situation "unmanageable". I do not accept that evidence. On the Claimant's own admission she worked throughout the afternoon without difficulty and finished at the end of her shift. The fact she was able to do so cannot mean that she found the situation "unmanageable". Other staff did not experience difficulties with the Claimant at work and indeed the Respondents thought she worked well when attending. When she got home in the evening the Claimant was able to put her child to bed and when she reconciled with the child's father in or around September 2019 the child's father was able to put the child to bed enabling the Claimant to have a bath and to go to bed early at about 9:30 p.m. That is not such an unusually early time in my judgment considering the day to day stress the Claimant was under. She stated that she had difficulty in sleeping and as a result difficulty in concentrating the following day. However, she gave no extended evidence regarding the degree of apparent insomnia and was not able to give any specific examples relating to her inability to concentrate at work the following day. As stated she undertook her work duties without any difficulty. The Claimant did state that she was unable to undertake her weekly shopping on her own and had to rely on a friend to go with her. That may have been the case but I do not regard that difficulty as having a substantial and long term adverse effect on her ability to undertake day to day activities. She was able to go shopping albeit with a friend. She socialised regularly with friends and family. This includes visiting the homes of family and friends and going out to other locations. A letter produced from the Claimant's GP made no reference to disability. It simply recorded the fact that the Claimant was diagnosed, post-employment, with "generalised anxiety disorder" but made no reference to the Claimant's medical condition in or before December 2019 and whether or not her impairment of stress/anxiety had a substantial and long term adverse effect on her ability to undertake normal day to day activities. In addition to the statutory definition of disability (Section 6 Equality Act 2010) I have also taken note and have given due consideration to the Guidance about matters to be taken into account in determining the issue of disability. Stress/anxiety in

itself does not necessarily mean that an employee is disabled for the purposes of the Equality Act. That condition does not in itself constitute a disability. The burden of proof is upon the Claimant to show that the impairment has a substantial adverse effect on her ability to carry out day to day activities. The Claimant has failed to satisfy that burden. I have given a summary of the evidence she provided to me above in this Judgment. No satisfactory evidence was provided to determine that the Claimant's impairment had a substantial (i.e. more than minor or trivial) and long term adverse effect on her ability to undertake normal day to day activities. There were some things she required assistance with, e.g. her weekly shopping, but in such matters in my judgment did not result in her impairment having more than a minor or trivial effect on her ability to undertake day to day activities.

12. As a consequence I conclude that the Claimant was not a disabled person as required by the provisions of Section 6 Equality Act 2010. It therefore follows that her claims of Disability Discrimination must be dismissed.
13. The substantive Hearing had already been listed to take place at the Employment Tribunal over the course of four days on 1st – 4th November 2021. There still remains the Claimant's outstanding claims of Unfair Dismissal and Breach of Contract. Those claims shall proceed. Both parties agreed that now the issues were somewhat narrowed by this Judgment, two days should be sufficient to deal with the outstanding claims. I order therefore that the claims of Unfair Dismissal and Breach of Contract shall proceed to be heard at the Watford Employment Tribunal on 1st and 2nd November 2021. The dates of 3rd and 4th November 2021 are vacated.
14. No Case Management Orders had been made in relation to the Hearing set for November 2021, these have now been made and are contained in a separate Case Management Orders document.

Employment Judge M Bloom

Date: 28 May 2021

Sent to the parties on:

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For the Tribunal Office