



EMPLOYMENT TRIBUNALS

Claimant: Mrs Armelle Tohou

Respondent: Hampshire County Council

Heard at: Bristol (via CVP video On: 19th August 2021 hearing)

Before: Employment Judge P Cadney

Representation:

Claimant: Mr P Wareing
Respondent: Ms A Weatherley

PRELIMINARY HEARING JUDGMENT

The Judgment of the Tribunal is that:-

- i) The claimant's claims of unfair dismissal and unpaid holiday pay are dismissed as having been presented out of time.
- ii) Time is extended for the presentation of the claimant's claims of disability discrimination and associative disability discrimination which will proceed to hearing.

Reasons

1. By a claim presented on 14th April 2020 the claimant brought claims of unfair dismissal; unpaid holiday pay; disability discrimination; and pregnancy/maternity discrimination which the claimant subsequently confirmed had been submitted in error.
2. Representation – Although Mr Wareing is a member of the bar he has confirmed that he is representing the claimant in the capacity of a lay representative and that he has been advised by the Bar

Standards Board that it is permissible and acceptable for him to do so.

3. Claims - The case came before EJ Roper on 8th December 2020 and he gave the following summary of the claims.

“By way of general background, the claimant was employed by the respondent as a care assistant at its Emsworth House care home from 1 November 2015 until 2 December 2019 when she was dismissed by reason of capability (ill-health). The claimant has now instructed a professional legal representative, and it was confirmed today on behalf of the claimant that she brings the following claims: unfair dismissal; direct disability discrimination (relying on her own physical impairments namely (i) hypertensive cardiomyopathy with previous arterial hypertension, and (ii) asthma); direct associative disability discrimination (relying on her daughter Vicky’s mental health impairment); and for accrued but unpaid holiday pay.”

4. He listed the case for a 1 day Preliminary Hearing to determine:
 - (1) Whether the claimant’s unfair dismissal and accrued holiday pay claims were presented in time, and if not, whether it was not reasonably practicable to have done so and whether the claims were then presented within such further time as was reasonable (see section 111(1) and (2) of the Employment Rights Act 1996 and Regulation 30(2)(a) and (b) of the Working Time Regulations 1998); and
 - (2) Whether the claimant’s discrimination claims were presented in time, and if not, whether it would be just and equitable to extend the time limit (see section 123(1) of the Equality Act 2010).

Facts

5. The claimant was summarily dismissed on 2nd December 2019. The primary time limit for bringing the claims of unfair dismissal, holiday pay and disability discrimination relating to herself was 1st March 2020. The claims of associative discrimination relate to events of 12th September 2019 and the week preceding 20th November 2019, and thus (if arguably forming part of a continuing act) the primary time limit expired on 19th February 2020 at the latest. The ACAS EC certificate gives the commencement date (date A) as 24th March 2020 and the conclusion (date B) as 30th March 2020. As the date of 24th March 2020 is outside the primary limitation period for all claims she does not get the benefit of any extension of time.
6. It follows that all the claimant’s claims were presented out of time and the question before me is whether time should be extended in respect of all or any of them.

Unfair Dismissal / Holiday Pay

7. The questions in respect of both claims is whether it was reasonably practicable to have presented the claims in time and if not whether they were presented in such further thereafter as was reasonable. The claimant relies on three factual assertions to support the extension of time:
 - i) *Anxiety regarding an appointment with her cardiologist;*
 - ii) *Anxiety regarding the well-being of her disabled daughter who suffers from arrange of conditions including severe epilepsy and Autistic Spectrum Disorder and who is in consequence of severe mental health issues under the care of the local CMHT;*
 - iii) *Being unsupported in her life as her husband was abroad on business in the Ivory Coast at the material times. (C skeleton argument para 4)*
8. The evidential basis for those assertions is relatively scant. In her application to the tribunal the claimant states “*I did not submit my application earlier to the tribunal because I was very sick and alone,. There was nobody to help me. I even thought I would die from blood pressure and my heart conditions.*” The claimant was unable for technical reasons to join the CVP hearing and I asked Mr Wareing whether he intended to call her to give oral evidence to clarify and amplify those assertions. He said he was not and that he was happy to proceed in her absence. Similarly Ms Weatherley indicated that she was happy to proceed without cross-examining the claimant. As both parties were content to do so I proceeded with the hearing and made my decision on the basis of the information before me.
9. There is no medical evidence in support of the contentions outlined above, and I considered the following authorities: Wall's Meat Co v Khan [1978] IRLR 499, Porter v Bandridge Ltd [1978] IRLR 271 CA and Cullinane v Balfour Beattie Engineering Services Ltd UAEAT/0537/10 and the test in Palmer and Saunders v Southend-on-Sea BC [1984] IRLR 119 was applied. Ordinarily medical evidence would be required to show that an illness prevented a claimant from presenting a claim in time, although it was not absolutely essential (Norbert Dentressangle Logistics Ltd v Hutton EATS 0011/13).
10. In his submissions Mr Wareing does not distinguish between the separate tests for the unfair dismissal / unpaid holiday pay claims and the discrimination claims (see below) and contends that the matters outlined above satisfy both tests. The difficulty is that in my judgment none of the facts as set out above in and of themselves demonstrate that it was not reasonably practicable to have presented

the claim in time. Given that it is not challenged, I accept that the claimant was suffering from anxiety as to her own health and that of her daughter, and that those anxieties might be exacerbated by the absence of her husband. However there is no medical evidence that her mental capacity was so affected that it was not reasonably practicable for her to present the claim or to do so without the assistance of her husband; and the claimant was able to contact ACAS by 24th March 2020 which is some three weeks from the expiry of the limitation period. There is no evidence before me that anything had changed and if so what in those three weeks. In my judgment there is simply insufficient evidence before me to allow me to conclude that it was not reasonably practicable to have presented these claims in time.

11. These claims will therefore be dismissed on the basis that they were presented out of time.

Discrimination Claims

12. The burden of proving that it is just and equitable to extend time to enable a claim to proceed is on the person seeking the extension. In Robertson v Bexley Community Centre t/a Leisure Link (2003) IRLR 434, the Court of Appeal stated that when employment tribunals consider exercising the discretion under s123 Equality Act 2010, '*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.*'
13. Some relevant factors can be derived from s33 Limitation Act 1980 (as identified in British Coal Corporation v Keeble (1997) IRLR 336). S33 Limitation Act 1980 requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to -
 - (a) *the length of and reasons for the delay;*
 - (b) *the extent to which the cogency of the evidence is likely to be affected by the delay;*
 - (c) *the extent to which the party sued had co-operated with any requests for information.*
 - (d) *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.*

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

14. However, the ET has a broad discretion and those factors should not be considered or applied mechanically; as is set out in Adedeji v University Hospitals Birmingham NHS Trust (2021) EWCA Civ 23:- *“Keeble did no more than suggest that a comparison with the requirements of section 33 might help “illuminate” the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and “the Keeble factors” and “the Keeble principles” still regularly feature as the starting-point for tribunals’ approach to decisions under section 123 (1) (b). I do not regard this as healthy... “ and “Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion... The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular “the length of, and the reasons for, the delay”. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking” .*
15. Overall, in relation to the discrimination claims, the cases of Robertson v Bexley Community Service IRLR 434 CA, Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA, Pathan v South London Islamic Centre EAT 0312/13, Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 and Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 were considered.
16. The claimant relies specifically on the judgement of Leggatt LJ in the Abertawe case above (para 25) specifically in relation to the fact that it is not necessary for there to be a good reason for the delay nor that time cannot be extended in the absence of an explanation of the delay from the claimant.
17. In my judgement the most significant factors in the claimant’s favour are that firstly the delay is not for a significantly lengthy period. Secondly that I can identify no specific prejudice caused by a relatively short delay. In the respondent’s written submissions there is a general assertion that delay will cause memories to fade and affect the cogency of the evidence; but no specific assertion as to the effect on the evidence in this case. In my judgement there is no evidence that the ability of the respondent to defend the claims has been significantly prejudiced, or indeed prejudiced at all by the delay. The most significant factor in the respondent’s favour is that I accept that there is no good reason for the delay as, accepting as I do that the claimant is correct as to the reasons for the delay they do not appear to me to suggest any significant impediment to lodging the claims in time.

18. Balancing those factors in my judgment favours the claimant; the prejudice to her of refusing to extend time outweighs that to the respondent of doing so and time is extended on the basis that it is just and equitable to do so in respect of the discrimination claims.

Further Directions

19. As was agreed orally the parties are directed to lodge within 14 days (marked FAO EJ Cadney):
- i) An agreed time estimate for the final hearing together with an indication of the number of witnesses they intend to call;
 - ii) Inconvenient dates for the final hearing;
 - iii) Draft directions.

Note; For further assistance in relation to the requirements of these directions and in order to prepare themselves for the final hearing, the parties are referred to the *Presidential Guidance - General Case Management* which can be found at;

<http://www.justice.gov.uk/downloads/tribunals/employment/rules-legislation/presidential-guidance-general-case-management.pdf>

Note; online publication of judgments and reasons

The ET is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at:

<https://www.gov.uk/employment-tribunal-decisions>.

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge P Cadney
Dated: 4th September 2021

.....