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EMPLOYMENT TRIBUNALS

Claimant: Ms L O'Brien

Respondent: Tro

Heard at: London Central **On:** 20 November 2017

Before: Regional Employment Judge Potter

Representation

Claimant: Ms E George, Counsel
Respondent: Mr D Chapman, Solicitor

JUDGMENT

The Judgment of the Tribunal is that the case is dismissed because:

(i) It was reasonably practicable for the claim of unfair dismissal to have been presented before the end of the period of three months beginning with the effective date of termination; and

(ii) The discrimination claims having not been brought within 3 months of the date of the acts complained about it is not just and equitable to extend time to validate the claims.

REASONS

1. This is a Preliminary Hearing to consider whether whether time should be extended to permit the Claimant's claims of unfair dismissal, sex discrimination and pregnancy discrimination to proceed.

Applicable Law

2. In considering the matter the Employment Judge had regard to Section 111(2) Employment Rights Act 1996 which provides as follows in relation to the applicable test for unfair dismissal:

"…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, 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."

3. In relation to discrimination she had regard to Section 123 (1) of Equality Act 2010 which provides as follows:

"…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."

4. The Employment Judge was referred to a number of well known authorities on the proposition that for the purposes of an unfair dismissal claim, where the claimant has skilled advisers who are at fault it is usually reasonably practicable for the claim to have been presented in time: she took into account in particular *Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379*.

5. In relation to exercise of the just and equitable discretion to extend time in discrimination cases the Judge took account of *Bexley Community v Robertson [2003] EWCA 576* emphasising that exercise of the discretion is the exception rather than the rule and *British Coal Corporation v Keeble [1997] IRLR 336* emphasising the breadth of the Tribunal's discretion as under Section 33 Limitation Act 1980. She also noted *Hawkins v Ball and Barclays Bank plc [1996] IRLR 258* on when it might not be perverse to extend time in a discrimination case on account of incorrect advice from a solicitor.

Findings of Fact

6. The Employment Judge had the benefit of a witness statement from the Claimant, although the Claimant was not present to be cross examined in relation to that statement, and there were detailed skeleton arguments prepared by both parties, supported in subsequent oral argument. The Employment Judge would note specifically that although issues arose as to what might have gone on in discussions with legal advisers and with ACAS, there was no waiver of privilege in relation to such discussions and therefore it was not open to the Judge to make detailed findings as to what might have occurred in such exchanges.

7. On the evidence available the Employment Judge found that the Claimant was dismissed without warning on 3 January 2017. She was pregnant at

the time and unfortunately suffered a miscarriage in the days immediately following. After these traumatic events she attended her GP regularly from late January onwards and was diagnosed initially with low mood. She returned to work in February but found this hard and by late February she was on medication and had been referred for counselling. She noted in her witness statement that as at that point she found it difficult to get things done and they took longer. However, her witness statement recorded that on 15 March 2017 she felt capable of seeking legal advice about her dismissal. The Employment Judge notes that this date was well within the primary 3 month period from a dismissal on 3 January 2017.

8. The Claimant's witness statement shows she was fully aware of the 3 month time limit and that she brought her concerns in that regard to the attention of the solicitor that she chose to instruct at this point and felt that she was reassured that there was more time, because he misquoted the law and claimed that she had 4 weeks longer than she thought she did.

9. The Claimant's witness statement shows active engagement with the case from 15 March through April to May, although by late May her GP notes referred for the first time to "Anxiety and depression" and her medication levels had increased. She emailed documents to the solicitor, she posted documents, she chased the solicitor and she ultimately complained about his conduct of her case.

10. The solicitor only applied to ACAS for early conciliation on 26 April 2017 well outside the primary time limit, i.e. at a point when ACAS notification could no longer stop the clock.

11. The Claimant's engagement with the proceedings was again demonstrated on 2 May when the Respondent sent a draft letter of claim. The Claimant's witness statement comments that she picked up on the fact that there was a wrong name and job title in that document.

12. The Claimant's concern about lack of progress brought matters with that solicitor to a head on 16 May: she ceased to instruct him and went elsewhere. The Judge noted that the time gap in instructing another solicitor was again relatively short, 2 days, until she went to Yess Law on 18 May. Her witness statement indicates that she was told clearly at that point that she was out of time, but the witness statement indicates that she agreed with the Yess Law Solicitor that if they could try and achieve a settlement that would be the best course.

13. The Tribunal Judge notes that she does not have available any evidence to go behind the terms of what it is said in the Claimant's witness statement on this point. With Yess involvement, an extension was agreed to ACAS conciliation and it appears that settlement talks proceeded until on the 6 June the Respondent's solicitors identified that the claim was out of time and ceased to participate in settlement discussions, resulting in ACAS bringing conciliation to an end and issuing a certificate on 7 June.

14. The Claimant had been aware throughout that Yess Law were not able to institute proceedings and again moved relatively quickly by 9 June to instruct a third set of advisors. Again, there was then a period of relatively

quick activity with the Claimant supplying documents over the weekend 9-13 June, a draft claim being provided to her for approval on 13 June and the claim then lodged on 14 June. The Judge notes that that lodging on 14 June was over 2 months outside the primary time limit expiring on 3 April.

15. As a final event, the Employment Judge notes that the Claimant's ESA examination in August 2017 indicated that she remained unable to work on account of her mental health issues.

Submissions

16. Against this factual background, for the Claimant it was contended that she could not issue her claim until 7 June because she had no ACAS Certificate. Her illness made it not practicable for her to issue while she was dealing with both physical and serious psychological conditions; emphasis is put on the severity of the condition by reference to the heavy medication the Claimant was on and the prolonged period for which the ill health has continued. It is said that she acted as soon as there was an ACAS Certificate and settlement talks stalled in issuing proceedings. In those circumstances it was said that the claim had been issued as soon as was reasonably practicable.

17. On just and equitable, it is said again that the Claimant needed an Early Conciliation Certificate before she could lodge proceedings; she was suffering from serious mental illness which had been brought on not only by the miscarriage but by the fact and manner of dismissal by the Respondent. It was reasonable for her to try and settle the case until the Respondent broke off the negotiations, it should not be laid at her door that, having sought prompt legal advice, she received wrong legal advice on two occasions. There is significant prejudice to her in being deprived of the right to seek an effective remedy for potentially serious discrimination via this Tribunal, rather than in the more risky and expensive environment of a negligence action against advisors.

18. For the Respondent it is said that it was reasonably practicable for the claim to have been presented before 3 April when the Claimant consulted a lawyer on 15 March. She was not ignorant of the time limit and was able to seek advice. She consulted a skilled advisor who gave wrong advice and failed to promptly obtain an ACAS Certificate and lodge a claim in time. Further, it is said that it was not within a reasonable time after expiry of the primary time limit that proceedings were in fact issued. There was significant delay in going to the second firm, the second firm told her she was out of time, but the claim was not lodged until 26 days thereafter and there was further delay before a third firm was instructed on 9 June leading to the issue of proceedings on 14 June.

19. In relation to just and equitable, the Respondent says that the discretion should not be exercised in circumstances where the Claimant had obtained legal advice from two sets of advisors and there was a long period of delay. Further, the Claimant chose to negotiate and not to issue proceedings in May. She should not be allowed to use those settlement negotiations as an exonerating feature, nor should she be permitted to use the delays in seeking an ACAS Conciliation Certificate and the extensions of time that

were granted in relation to the conciliation process. The medical evidence the Respondent says shows that in the key period from March to June 2017, the Claimant was active in pursuit of her claim and was not shown to be prevented from active participation by her medical condition.

20. In all the circumstances, it is said by the Respondent that the prejudice to the Claimant of not being permitted to pursue proceedings should be treated as outweighed by the prejudice to the Respondent when the delay was so long and was attributable to bad advice from not one but two sets of advisors.

Conclusion

21. The conclusion of the Employment Judge by reference to the evidence and the applicable law is as follows:

22. In relation to unfair dismissal, the conclusion is that it was reasonably practicable on the evidence for the claim to have been submitted in time. A solicitor had the necessary instructions on 15 March, well before the 3 April deadline; there was plenty of time to obtain an ACAS Certificate and to lodge proceedings. In reaching that decision, the Tribunal Judge also noted that this was a Claimant who knew she was up against time limits and instructed a skilled advisor,who got it wrong. There was no evidence that her medical condition impeded her from putting the solicitor in a position to lodge a timely claim.

23. Looking then, for the avoidance of doubt, at whether the claim was lodged within a reasonable time after expiry of the time limit, the simple position is that there was very protracted delay from 3 April to 14 June. This was not a reasonable time period; ACAS extensions, settlement efforts, changes of lawyers were not a sufficient justification to warrant such a further delay.

24. Moving on to the just and equitable test, the Employment Judge accepts that there is prejudice to the Claimant in not being able to pursue her claim, but she finds that there is also in the current circumstances very significant prejudice to the Respondent in being required to defend a claim lodged nearly 2½ months out of time, when the medical evidence presented by the Claimant, although showing she was ill, does not show that she was impeded from active pursuit of the claim, contacting lawyers, chasing lawyers, understanding time limits, choosing to pursue settlement, turning things round promptly with a series of lawyers.

25. The Employment Judge accepted that if this had been the situation where the claim had been lodged after one set of wrong advice then the situation might have been finely balanced, but that was not the factual position here. This Claimant went to a second advisor who told her clearly that the claim was out of time and against that background the Claimant and the lawyer chose to negotiate for a further period before the ACAS process was brought to an end, a third set of advisers were instructed and proceedings were initiated.

26. Finally, it is the view of the Employment Judge that the protraction of the ACAS process and settlement negotiations are common features in litigation, not justifying the exceptionally significant delay that occurred in this case, particularly because ACAS were involved after stop the clock could operate to extend the primary time limit.

27. In all the circumstances, the claim is dismissed on the basis that the Tribunal does not have jurisdiction.

Employment Judge Potter on 23 November 2017