EMPLOYMENT TRIBUNALS

Claimant: **Respondent:**
Miss V Paletta **v** **MacDonald Hotels Limited**

OPEN PRELIMINARY HEARING

Heard at: **Reading** **On: 18 December 2019**

Before: **Employment Judge R Lewis (sitting alone)**

Appearances
For the Claimant: **No attendance or representation**
For the Respondent: **Mr J Cook of Counsel**

JUDGMENT

1. The claimant's application for adjournment is refused.

2. The claimant's claims are struck out. They were presented out of time and no grounds for extension of time have been shown.

REASONS

1. I give these reasons of my own initiative because it is in the interests of justice to do so.

Procedural history

2. The claimant was employed by the respondent as a waitress for some months. It was agreed that employment ended on 12 May 2017.

3. The claimant gave birth to her daughter on 21 July 2017.

4. The claimant entered into early conciliation on 10 January 2018. Day B was the same day and her claim was presented on 17 January 2018.

5. The claim was subsequently identified as encompassing a claim of automatically unfair dismissal; of dismissal on grounds of sex/pregnancy; and claims for arrears of pay. The claims were denied.

6. The first preliminary hearing took place on 25 September 2018 (Employment Judge Gumbiti-Zimuto), and a detailed order was sent on 18 October 2018.

7. Judge Gumbiti-Zimuto identified and explained that the claim appeared out of time. He identified the issues.

8. He ordered the claimant by 20 November 2018 "to provide … medical evidence or other evidence on which she relies in support of her contention that she was unfit to commence proceedings between 21 July 2017 and 17 January 2018."

9. I accept Mr Cook's reply that the claimant had not, by the start of this hearing, submitted any material in compliance with that order.

10. Judge Gumbiti-Zimuto listed the case for full hearing on 29 and 30 July 2019, at which determination of the limitation issue would take place.

11. The respondent made a further application for a preliminary hearing, which was listed to take place on 29 April 2019. In the course of April, the claimant stated that she was unaware of that listing, and it was accordingly postponed.

12. An attempt was made to list the 29 July hearing to determine the limitation point, but that could not proceed due to lack of judicial resource. The present hearing was listed on 31 August 2019, as a preliminary hearing to determine limitation/jurisdiction.

13. On 17 December, the parties were informed that due to judicial resource, the hearing might have to be located at Watford, not Reading. The claimant indicated that she could not attend Watford. The parties were therefore told on the afternoon of 17 December that the hearing would proceed, as originally listed on 31 August, at Reading.

14. Shortly before 5pm that day, the claimant telephoned the tribunal office and said that she would not attend. She gave no reason. She was asked to write in.

15. By email sent at 8.30pm, the claimant wrote to the tribunal and the respondent's solicitors as follows: "I can't attend Reading tomorrow because my daughter's babysitter called sick tonight at about 4pm. After many

attempts, I couldn't find any alternative childcare cover. I would be much obliged if this hearing could be rearranged for a more convenient date."

Discussion of adjournment

16. At the start of this hearing, Mr Cook said that the application to adjourn was resisted. The information available to me was that the first available date for a hearing of less than one day in Reading was 16 June 2020, nearly three years before the end of the pregnancy which this case concerns. Delays in the system are such that the full hearing would, if allowed to proceed, thereafter not take place until 2021.

17. Adjournment, given the history of this matter, did not seem to me in the interests of justice.

18. I attached weight to the claimant's continued failure to comply with the Order of September 2018 (made some 14 months before this hearing).

19. Accepting the baby sitting difficulty, (and accepting that there was no friend or relative or other available child minder) and while I understand the burden and inconvenience which might have followed, the claimant showed no indication of considering one obvious alternative open to her, namely attending the hearing with her daughter (by now 29 months old) and seeking the assistance of the tribunal in managing the day's work. Given the history of delay, and the need for determination, it seems to me that both Mr Cook and the tribunal would have made every effort to meet this challenge.

The time issue: reasonably practicable

20. On the substance, Mr Cook had submitted a detailed and thoughtful skeleton in support of strike out. The dates set out above indicate that the claim was presented out of time.

21. The tribunal must go on to consider if the claimant has shown that it was not reasonably practicable for the claim to have been presented within time; and if not, whether the claim was presented in a further reasonable time scale.

22. The only material before me which might indicate a factual basis for finding that it was not reasonably practicable for the claimant to have presented her case in time was a witness statement written by the claimant and signed 25 September 2018 (42-43 in today's bundle). It was because of the evident shortcomings in that statement, according to Mr Cook, that Judge Gumbiti-Zimuto had on that day made the order for further medical information. The bundle contained correspondence written on the claimant's behalf to healthcare providers, seeking evidence of the claimant's ill-health and potential incapacity during 2017, but no documentation appeared in response. The witness statement was the only matter before me.

23. On the claimant's own account, she had full knowledge of the facts and matters upon which she wished to base her complaints on 12 May 2017. She refers to having had the support of a partner and she refers to having made some attempt to contact the CAB.

24. There is no material or evidence which supports that she was medically incapacitated from the relatively simple tasks of enquiring about her rights (available online) and then contacting ACAS (likewise online) and presenting an ET1 (likewise online).

25. The tribunal has considerable experience of members of the public, often working in a second or third language, who at a difficult time in their lives, are able to undertake all of those matters sufficiently. The formal standard required at each stage is very limited.

26. I accept Mr Cook's submission that the burden rests on the claimant to show that it was not reasonably practicable to present the claim in time. I do not consider that she has sufficiently done so on the material presented in her statement of 25 September 2018. She has presented no other material. Accordingly, her claims of unfair dismissal, failure to pay maternity pay, for holiday pay, and notice pay, are dismissed. They have all been presented out of time. The claimant has not shown the tribunal that it was not reasonably practicable for them to have been presented within the statutory time limit.

The time issue: just and equitable

27. A different test applies to the claim for discrimination, which is whether it is just and equitable to extend time. On the material before me, I find that it is not just and equitable to extend time. I base this finding on the following points.

    27.1 That the claimant has, despite the lapse of 15 months since the order made at the hearing on 25 September 2018, failed to supply any additional or medical evidence;

    27.2 That the claim was presented about six months out of time: primary limitation expired on 11 August 2017; time was not extended by stop the clock and the claim was presented on 17 January 2018). While in abstract six months is a relatively short time, it is twice the limitation period;

    27.3 I accept the respondent's submission that it is prejudiced by the subsequent departure from its employment of the alleged discriminator, Mr Attolico;

27.4 It is an agreed fact that the claimant discussed her rights and her position with Mr Gavin Webster of management on 6 July 2017 (the claimant alleges by telephone and the respondent in person). That discussion is compelling evidence to indicate that even within the primary limitation period, the claimant had an awareness of her rights and was capable of addressing the issues which she had identified;

27.5 The claimant appears to have conducted this case with no sense of urgency or expedition at any stage; and in particular to have shown no sense of urgency or expedition in the 15 months available to her to address the issues drawn to her attention by Employment Judge Gumbiti-Zimuto.

Costs

28. After I had given judgment, Mr Cook applied for costs, limiting the application to his brief fee for this hearing. I asked if the claimant had been put on notice of the application and he said that she had not. That being so, I have declined to hear the application, and it remains open to the respondent to pursue the matter if so advised. If the respondent does hereafter apply for costs, it should, in making its application, state whether it agrees that the application may be decided on the papers without need of a hearing. The claimant will then be asked to agree the same, and if both sides agree, I will decide the costs application without need of a further hearing.

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Employment Judge R Lewis

Date: …15 January 2020……..

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office