



EMPLOYMENT TRIBUNALS

Claimant: Ms F Ekwebelem

Respondent: London Borough of Waltham Forest

RECORD OF A PRELIMINARY HEARING

Heard at: East London Hearing Centre (in private; [by telephone])

On: 6 January 2021

Before: Regional Employment Judge Taylor

Appearances

For the claimant: In person

For the respondent: Mr S Thakerar, Counsel

JUDGMENT having been sent to the parties on 7 January 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant brought claims for unfair dismissal, damages for breach of contract and disability discrimination. These claims were dismissed because an Employment Tribunal has no jurisdiction to hear them.
2. The claim has been brought out of time because it was not presented within the period of three months following the effective termination of the Claimant's contract of employment on 4 August 2020. It was not lodged within the extended time limit which applies in relation to the ACAS early conciliation provisions.
3. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 3 November 2020 may not have been brought in time.

4. The hearing was listed to consider were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010. The Tribunal will decide, if not, were the claims made within a further period that the Tribunal thinks is just and equitable. The Tribunal will decide why were the complaints not made to the Tribunal in time or in any event, whether is it just and equitable in all the circumstances to extend time.
5. The Tribunal will also decide were the claims of unfair dismissal or unauthorised deductions made within the time limit in section 111 and 23 of the Employment Rights Act 1996. The Tribunal will decide whether it was reasonably practicable for the claim to be made to the Tribunal within the time limit. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period.

The applicable law

6. The time limit for both unfair dismissal and discrimination complaints is three months. In respect of unfair dismissal claims, an extension of time may be granted under section 111(2)(b) of the Employment Rights Act 1996. This provides:

“(2) Subject to the following provisions of this section, 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.”

7. Guidance has been provided to employment tribunals that whether or not it is reasonably practicable for a claim to be presented in time is primarily a question of fact and common sense in each case. The burden is on the claimant to show that it was not reasonably practicable to present the claim in time. Reasonably practicable does not mean “reasonable” nor “physically possible”. It means “reasonably feasible”: *Palmer v Southend on Sea BC [1984] ICR 372*. Whilst the existence of an internal appeal cannot be said to be irrelevant, it may in some cases be relevant to the question of whether the employee could reasonably be expected to be aware of, or to have made enquiries in respect of, time limit. *John Lewis Partnership v Charman UKEAT/0079/11*.

8. In discrimination claims, the employment tribunal has a broad discretion to extend time under section 123(1)(b) of the Equality Act 2010:

“(1) ... 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.”

9. It may be useful for a Tribunal in exercising its discretion in discrimination cases to consider the list of factors specified in section 33(3) of the Limitation Act 1980 such as the length of, and reasons for, the delay (see *British Coal Corporation v Keeble* [1997] IRLR 336). The Court of Appeal has made it clear that the Tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account (*Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800 , paragraph 33.)
10. In arriving at its decision, the Tribunal found the following facts.
 - 10.1 The Claimant began working for the Respondent as a care assistant in 2002.
 - 10.2 The Claimant was absent from work for 594 days over 19 separate occasions between September 2019 and November 2021.
 - 10.3 The Claimant was therefore required by the Respondent to attend a final formal managing sickness hearing on 10 July 2020.
 - 10.4 The Claimant was supported at the hearing by her trade union representative (UNITE).
 - 10.5 The Claimant intended to present a claim to the employment tribunal if she was dismissed following the managing sickness hearing. Therefore, she asked her UNITE representative both before and after the hearing if he could refer her to the employment tribunal. He told her that UNITE had informed him that legal advice would not be made available unless a case was presented to the employment tribunal.
 - 10.6 The result of the hearing was sent to the claimant on 4 August 2020. It was confirmed to her that a decision had been taken to dismiss her because her record of sickness absence was unacceptable. (The claimant was subsequently placed on the respondent's redeployment register.)
 - 10.7 In response the Claimant appealed against the decision, with help from her union representative. The Claimant completed the necessary papers to progress the internal appeal. At the same time, the Claimant asked her representative to give her the forms she needed to bring a claim to the employment tribunal.
 - 10.8 The Claimant's representative informed her in September 2020 that the union would not help her to bring a claim to the employment tribunal because they considered she did not have a reasonable chance of success.
 - 10.9 The Claimant's appeal was dismissed, and the Claimant was informed of the failed appeal in a letter dated 2 October 2021.
 - 10.10 The Claimant gave evidence that her representative told her she should wait for the appeal outcome before presenting a claim. However, the Claimant did not satisfy the Tribunal that her trade union representative

advised her to delay sending an application at this stage, because she did not refer to that in the witness statement she prepared for this hearing (53 to 55). In her statement the Claimant stated that after the appeal failed she enquired of her trade union representative how her application to the employment tribunal was going. The Claimant had already been informed that the trade union would not be helping her, therefore, the Tribunal is unclear why the Claimant would think a claim had been presented on her behalf. The Claimant either hoped that it had been sent, or mistakenly believed that a claim form had already been presented to the employment tribunal.

- 10.11 The Claimant clearly understood by 2 October 2020 that a claim form had not been sent on her behalf to the employment tribunal. The claimant telephoned the trade union's offices in order to contact the legal department for an explanation of the reasons why it had decided not to offer her help with this. The Claimant was not put through to the legal department directly and left messages with the offices switch board.
- 10.12 The Claimant realised that she would need to pursue a claim without the help of the trade union. The Claimant asked for friend's help in October 2020 to help her and her husband print some documents. The Claimant showed these documents to the Tribunal. They were about appealing a grievance and were not about presenting a claim to the employment tribunal, so these did not progress her case.
- 10.13 The Claimant contacted her sister, who returned from travelling abroad in either October or November and asked her for help. The Claimant is not computer literate. Her sister asked a friend to print out an ET1 form. The Claimant then arranged for the same friend to send the ET1 form to her by taxi to ensure she received it without delay, paying £15 fare. The form was received in either late October or early November. The Claimant did not complete and send the form to the employment tribunal straight away. The Claimant could not explain why having ensured the form was sent to her as a matter of urgency she did not then complete it and send it to the employment tribunal.
- 10.14 The Claimant gave evidence that she contacted Acas on 2 November 2020 and asked about the time limit for bringing a claim. She was told by an Acas officer that time for presenting a claim ended that same day. However, the Claimant's recollection is mistaken because had she contacted Acas on that day an Acas certificate would have been issued to her.
- 10.15 The Claimant received a letter from Unite on 16 November 2020 (86). This letter informed her why the union was not going to support her claim. It informed her that it was necessary to contact ACAS and enter into early conciliation before a claim could be registered. In this letter the Claimant was mistakenly informed that the relevant time limit for her case was 29 December 2020.

- 10.16 The Tribunal finds that the Claimant contacted Acas on 2 December 2020, the date of the Acas certificate. The Tribunal consider that given the claim should have been presented on 3 November 2021 the Claimant was informed that the claim would be out of time and she should present an application to the employment tribunal straight away. Acas issued the certificate on the same day.
- 10.17 The Claimant sent the application form to the Tribunal which was received on 29 December 2020.

The submissions

11. The Claimant submitted that she had tried her best to put in an application when she was told by the trade union that it would not help her. She could not access an ET1 form from anywhere. Her sister said she had a friend to ask. When she did receive it she tried to fill it out but she is not a lawyer or an administrator.
12. The Respondent provided written submissions which were taken into consideration. The Respondent submitted that the Claimant had been told to bring the claim immediately and there was still a significant delay. The Claimant did nothing for over two months after speaking to her trade union representative even though she knew she wanted to bring a claim. The Claimant has kept the Respondent and the Tribunal in the dark about her reasons for the delay. The Claimant was not ignorant about the right to bring a claim. It was reasonably practicable for her to present her claim of unfair dismissal and the Claimant had not established any factors that might justify and extension of time to present a disability discrimination claim.

The Tribunal's conclusion

13. The Claimant knew in July 2020 that she wanted to bring a claim to the employment tribunal. The Claimant has a trade union representative and knew or ought to have known there was a time limit. The tribunal find that the Claimant know about the 3 month time limit and that is why when she finally obtained a claim form in October or early November she had it delivered to her by taxi. Inexplicably, the Claimant did not complete the form immediately. Had she done this the claim would likely have been in time. The Claimant did not send the claim to the Tribunal until 29 December 2020 and provided no explanation for her inaction.
14. Even if it was not possible for the Claimant to bring the claim before the time limit expired, it was still possible for her to send it on 2 December 2020 after she had been informed by Acas it was out of time.
15. The Claimant was advised by union that the deadline was 29 December 2020. The Tribunal finds that the Claimant could not reasonably rely on this after her contact with Acas when she was informed that her claim was out of time. The Claimant could have brought the claim immediately and without further delay.
16. The Tribunal is satisfied that it was reasonably practicable for the Claimant to bring her claim within the primary time limit. The Claimant delayed presenting

the claim, without any reason and the Tribunal finds that for that reason it does not have jurisdiction to consider her complaint of unfair dismissal and her money claims.

17. The Tribunal has a wide discretion when considering whether to extend time for a claim of unlawful discrimination to be presented, however that discretion must be exercised judicially and relevant factors taken into account. A claimant should have no expectation that an extension of time will be granted. In this case the Claimant provided no explanation why a delay happened in the circumstances. Given that the Claimant wanted to bring a claim in July 2020 and knew in time that she would have to present the claim herself, the Claimant did not do anything about it until October. Having regard to the facts found, the Claimant cannot be said to have acted promptly. The Tribunal therefore concludes that it would not be just and equitable to extend time and the claim of disability discrimination is dismissed.

**Regional Employment Judge Taylor
Dated: 23 February 2022**