



EMPLOYMENT TRIBUNALS

Claimant: Ms H Smitherman

Respondent: Royal Mail

Heard at: East London Hearing Centre

On: 11 November 2021

Before: Employment Judge Jones

Representation

Claimant: Mr Wayman, Counsel, with the claimant,
accompanied by her mother

Respondent: Mr Hartley, Solicitor

RESERVED JUDGMENT

The complaints of unfair dismissal, failure to pay holiday pay, failure to pay notice pay and unlawful deduction of wages were issued outside of the relevant statutory time limits. The Tribunal does not have jurisdiction to consider these claims and they are struck out.

The complaints of disability discrimination were issued outside of the relevant statutory time limit.

It is this Tribunal's judgment that it is just and equitable to extend time under section 123 Equality Act 2010 to enable the Tribunal to consider the claimant's complaints of disability discrimination.

The Tribunal made case management orders which are set out below.

REASONS

The matter was listed for hearing today for the tribunal to consider whether it has jurisdiction to hear the claimant's complaints as it appeared from the claim that she issued her ET1 claim form outside of the statutory time limits.

The tribunal heard today from the claimant in evidence and from her mother, Mrs P Smitherman. Both parties made submissions and referred to the appropriate law. The tribunal considered the following law.

Law

The claimant claims complaints of unfair dismissal, disability discrimination, failure to pay notice pay, failure to pay holiday pay and arrears of pay.

Section 23 Employment Rights Act 1996, Regulation 30 Working Time Regulations and Article 7, Employment Tribunals (Extension of Jurisdiction (England and Wales) Order 1994 all stipulate that the claimant must bring her claim to the employment tribunal for arrears of pay, notice pay and holiday pay, within three months less one day of the date on which they expected to be paid.

Section 111(1) and (2) Employment Rights Act 1996 states that an unfair dismissal complaint may be presented against an employer and that an employment tribunal shall not consider such a complaint unless it is presented to the tribunal before the end of three months beginning with the effective date of termination or 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.

Where a tribunal is satisfied that it was not reasonably practicable for a complaint under those sections to be presented before the end of the relevant period of three months (as extended by the early conciliation process), the tribunal may consider the complaint if it is presented within such further period as a Tribunal considers reasonable.

The law states that the question of what was or was not reasonably practicable is essentially one of fact for the employment tribunal to decide. In any assessment of whether it was not reasonably practicable to meet the primary time limit the first question is why that time limit was missed. The burden of proof is on the employee to show a reason or reasons which rendered it not reasonably practicable to meet the limitation period. The correct enquiry is into '*what was the substantial cause of the employee's failure to comply*'. (*London International College v Sen* [1993] IRLR 333). Once the tribunal has done that, the focus will then be on whether, in light of the substantial cause, it was not reasonably practicable to meet the time limit.

The tribunal has to firstly carefully analyse the chronology leading to the missed deadline, including to consider whether any factor that might have made it not reasonably practicable to lodge the claimant time has been superseded by a reason that does not qualify, or vice versa. When asking itself whether it is reasonably practicable to lodge a claim within three months, although the overall limitation period is to be considered, attention will in the ordinary way focus on the closing rather than the early stages of that period of time. As such, tribunals should consider carefully any change in the claimant's circumstances throughout

that primary limitation period, and at which point of limitation those changes occurred. (*Shultz v Esso Petroleum* [1999] IRLR 488).

How does a tribunal decide whether it was reasonably practicable to present a claim in time? And if it was not, what is a reasonable time thereafter?

In the case of *Walls Meat Co Ltd v Khan* [1979] ICR 52 CA Lord Denning explained the test like this:

'It is simply to ask this question: had the man just because or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights -- or ignorance of the time limit -- is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his all their fault and he must take the consequences '.

The matter was again part of the decision in the case of *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] 1 All ER 945. In that case May LJ reviewed the authorities and stated as follows: *"reasonably practicable" means more than merely what is reasonably capable physically of being done..... Perhaps to read the word "practicable" as the equivalent of "feasible" And to ask colloquially and untrammelled by too much legal logic -- was it reasonably feasible to present the complaint to the employment tribunal within the relevant three months?"-- Is the best approach to the correct application of the relevant subsection".*

Where the failure to issue the claimant time was due to ignorance or mistake, on the part of the claimant, for example in relation to the existence of the limitation period, the approach that should be taken by the tribunal is to consider whether, in light of the evidence about that ignorance or mistake, it was reasonably feasible for the litigant to have presented the complaint to the employment tribunal within the relevant primary period. Where the mistake or ignorance on the part of the litigant was not the result of any faulty professional advice then the question for the tribunal is whether the litigant's mistake or ignorance was reasonable (*Walls meat Co Ltd v Khan*).

The claimant submitted that it was the first principle of analysis of the escape clause that the question of what is reasonably practicable should be given 'a liberal interpretation in favour of the employee'. (*Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ 470).

Where the claimant satisfies the tribunal that it was not reasonably practicable to present his claimant time, the tribunal must then go on to consider whether it was presented within a reasonable time thereafter. In making this assessment the tribunal must exercise its discretion reasonably and with due regard to the circumstances of the delay the tribunal has to look at the particular circumstances of each case and make a decision.

In the case of *James W Cook & Co. (Wivenhoe) Ltd v Tipper* (1990) IRLR 386 – a period of two weeks was held to be reasonable and in the case of *Walls Meat* referred to above, four weeks was held to be reasonable on the particular facts of that case.

Section 123 of the Equality Act 2010 states that the employment tribunal can consider a complaint brought within the period of three months starting with the date of the act to which the complaint relates or some other period as the employment Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period.

If the claimant's complaints are judged to be out of time and not part of any continuing act, subsection 123(1)(b) gives the Tribunal the discretion to consider extending the date by which the complaints should have been brought to such other period as it thinks just and equitable.

There is no presumption that an employment tribunal should exercise the discretion unless they can justify a failure to do so: "*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*" (*Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434, CA at [25]).

Tribunals may have regard to the factors in section 33 of the Limitation Act 1980, which include:

- a. The length of and reasons for the delay;
- b. The extent to which the cogency of evidence is likely to be affected by the delay;
- c. The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action;
- d. The steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

However, tribunals should not rigidly adhere to the checklist of potentially relevant factors; the best approach is to assess all the relevant factors in a particular case (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 at [37]).

Having heard sworn evidence from the claimant and from her mother, Ms Patricia Smitherman, and considered the documentary evidence, the Tribunal drew the following conclusions. The Tribunal has been mindful to only make findings on facts as they relate to the issues to be determined in this hearing and not to bind any other Tribunal in relation to other facts.

Findings of fact

The claimant worked for the Post Office from 1997 up to the date of her dismissal, on 9 December 2020. When her employment ended the claimant was a postwoman (Operational Postal Grade) based at Romford Delivery Office. The claimant is a disabled person for the purposes of the Equality Act 2010 and the respondent accepts that it had knowledge of disability. The claimant has autism, diabetes, Crohns disease, asthma and Rheumatoid arthritis. In the hearing the claimant added that she suffered from anxiety. Her witness statement confirmed that she first began to experience mental health problems related to work issued in 2006. She was diagnosed with reactive depression in August 2006.

The claimant's evidence today was that the dismissal came as shock to her. She was telephoned and informed of her dismissal. The respondent's reason for dismissing the claimant was because it decided that it could not sustain the level of the claimant's absence from work. Her mother, Patricia Smitherman was with the claimant at the time that she got the call and described the claimant as '*falling apart*' when she heard the news. The claimant described the period right after she was informed of her dismissal as a time when she was mostly in a dark room, in tears and unable to do anything; completely reliant on her mother.

It is likely that the claimant received the telephone call notifying her of the termination of her employment on 8 December 2020. The letter of dismissal was dated 8 December 2020. The claimant received it on the following day, 9 December 2020. The letter was written by Jordan Ogles, Romford Delivery Office Manager. He enclosed a form that could be used to appeal against the decision to dismiss. The claimant's mother assisted her in completing that form, which the claimant signed. It was submitted on 10 December. In her appeal the claimant alleged disability discrimination, unfair dismissal, a failure to deal with her grievance and a failure of reasonable adjustments. The letter of dismissal gave details of a lump sum payment due to the claimant which was to be paid to her on 18 December.

The claimant wanted her job back and it was clear that she loved her job. In a long email to the respondent sent at 2.30am on 10 December the claimant expressed her upset and distress at being dismissed. The email also demonstrated her mental state at the time as it is rambling and could be described as a stream of consciousness.

The primary time limit for a complaint of unfair dismissal and complaints of a discriminatory dismissal ended on 7 March 2021, to be within the three-month time limit.

Unfortunately, a number of other upsetting events happened to the claimant around the same time as her dismissal, i.e. at the end of 2020 – beginning of 2021. In December, the claimant's cat, which she has had for the past 18 years, became ill and was diagnosed with cancer. Later in December, the claimant was advised to have the cat put down, which she refused.

The claimant was reluctant to touch the lumpsum payment from the respondent because she was hopeful that she would be reinstated on appeal and knew that if that happened, she would have to repay the money back to the respondent. This meant that following her dismissal, the claimant lived off state benefits and her

savings. Around 22 December, the claimant was informed that she had lost the PIP (Personal Independence Payments), which was the main state benefit that she was entitled to as a disabled person and which she relied on to cover her living expenses.

During December the claimant felt very anxious and unwell. The claimant's evidence was that she was feeling suicidal around this time. There were records of a text conversation that she had with an advisor at *Shout*, a mental health charity, in the bundle of documents during the week in which she was informed of her dismissal. It was difficult to read the words in the text messages sent between her and the advisor, but the Tribunal concluded that it was unlikely that she would have used that service if she had not been experiencing an extremely stressful time.

Her evidence was that in December she had difficulty sleeping and began to take Diazepam. In the bundle there were excerpts from a worry diary that she kept around this time. The claimant also sent a few emails to the respondent on 10 and 11 December which show how upset and distressed she was about her dismissal. A note in the bundle confirms that her mother called NHS Direct on or around 11 December seeking advice because the claimant had taken 10 Tylenol tablets together with other medication over the previous 24 hours and because she was worried about her. The doctor recorded that the claimant denied the intention to harm herself.

In January 2021, the respondent wrote to the claimant to inform her that her grievance had not been upheld. She decided not to appeal against that decision. Also, around the end of January, the claimant's cat was put down, which was upsetting for her.

There was copy correspondence in the bundle between the claimant and Leanne Andrews and Phil Fay, both managers, in January/February 2021. In contrast with the 10 December email described above, the claimant was coherent and clear in her communication with these managers as she tried to find out who is going to deal with her appeal.

Patricia Smitherman contacted a solicitor, through her house insurance in December, to find out what could be done. Her evidence was that she did this either a few days after they were notified that the claimant had been dismissed or when they received the package with the letter confirming dismissal and information on how to appeal. That would have been in early December. She remembered being advised about '*three months less one day*' but at the hearing she could not recall what that related to and thought that it might have been that the claimant had to stay in touch with the respondent for that period of time. She spoke to the solicitors a few times, although not to the same person.

Mrs Smitherman also assisted the claimant in appealing against the refusal of the PIP claim.

Mrs Smitherman was advised by the solicitors that the claimant needed to contact ACAS to behalf to begin the early conciliation process. Mrs Smitherman is not comfortable with using the internet so once she spoke to ACAS on the phone and realised that this process had to be done online, she told the claimant that she would have to do it. The claimant contacted ACAS on 3 February 2021.

The early conciliation process was unsuccessful, and the date of the certificate is also 3 February 2021.

The email of the same date, which accompanied the ACAS certificate was in today's hearing bundle. It was sent to the claimant's email address. It stated as follows:

“your certificate is attached;

Your certificate number is R109687/21/77. If you make a tribunal claim you must use this number in full.

If you do not use the full number above, including the last two digits, your claim may be rejected by the tribunal.

The certificate is evidence that you notified ACAS before making a tribunal application. Please keep it safe.

It is your responsibility to ensure that any tribunal claim is submitted on time.

ACAS cannot advise you about when a tribunal claim should be submitted....”

The claimant's GP/medical records in the bundle were from February/March 2021. On 24 February the claimant refused to come to the telephone to speak to the doctor and her mother spoke on her behalf. The notes show that the doctor was told that the claimant was taking her employer to court for 'discrimination'. The claimant was advised to submit an econsult using anxiety and depression templates so that the GP could review her mood. The claimant agreed. Mrs Smitherman called the GP again in March and reported that the claimant was experiencing abdominal pain and issues with her stomach. A possible flare-up of her Crohn's Disease was reported at the beginning of March but her mother told the GP that she was not in the right frame of mind to discuss her bloodwork or to engage with the health services at that time.

In February, the claimant had to undergo further scans in relation to a mammogram that identified a possible issue. On 18 February, the claimant's evidence was that she broke down when speaking with her work mentor at the Department for Work and Pensions on the telephone. It is likely that they were discussing the claimant's search for new employment, which would have been upsetting for the claimant as it reinforced the fact that she was not going to return to the respondent.

The claimant's appeal against the refusal of the PIP was successful. Her mother presented the appeal on her behalf. At the end of March 2021, the claimant wrote a long letter to the GP surgery in which she attempted to explain who she was and why she was generally unable to do the regular doctors' appointments, telephone calls and blood tests as they had been expecting her to do. She described how it had been difficult for her, with her impairments, to cope with the requests being made of her by the GP surgery and that everything seemed to be going wrong with her job, health and income, making the past 13 months

'unbearable' for her. She described her mood as angry, upset, emotional and depressed, which resulted in her not sleeping or eating properly and experiencing brain fog.

Mrs Smitherman spoke to the solicitors again on 11 April and was reminded of the need to issue her ET1 claim at the employment tribunal. The claimant issued her claim on the following day, 12 April 2021.

Decision

Unfair Dismissal

It is this Tribunal's conclusion that the claimant is a person with physical and mental impairments and that she has lived with those for some time. She has been a manager with the respondent while being a person with mental health impairment in the form of anxiety and depression as well as physical impairments. It is this Tribunal's judgment that the claimant's mother, Mrs Smitherman would often assist her with her interactions with the GP, the NHS and other official bodies. The claimant's GP were clearly prepared to discuss the claimant's health and treatment with Mrs Smitherman when the Tribunal takes judicial notice that they would usually insist on the patient communicating with them on confidential matters.

The claimant was able to perform as a manager with the respondent while being a person with anxiety and depression. The respondent's stated reason for dismissing her was her absence. There was nothing in the papers about her performance in the job and it is likely that there were no issues with her performance.

It is this Tribunal's judgment that the claimant suffered additional stress and anxiety in December after she was informed that the respondent had terminated her employment. It would not have been possible for her to issue her employment tribunal claim at that time. However, it is this Tribunal's judgment that Mrs Smitherman had been told by the solicitors that she consulted quite soon after the dismissal, that the claim had to be issued in the employment tribunal within three months less one day of the day of dismissal. As Mrs Smitherman was acting on the claimant's behalf, the Tribunal concludes that the claimant knew or ought to have known of that deadline at the time.

It is likely that the claimant and her mother were focussed on her getting her job back, which included submitting the appeal on time and chasing for an appeal hearing.

During that time, Mrs Smitherman kept in touch with the solicitors and it is likely that she was reminded of the three-month time limit in those conversations. It was her evidence that she spoke to the solicitors on more than one occasion during the period December to April.

By February 2021 the claimant was well enough to start the ACAS early conciliation process. The letter that ACAS sent to her with the certificate made it clear, in bold and in larger lettering, that the claimant was responsible for issuing her claim in the employment tribunal and that she was responsible for checking the date by which that should be done. It would have been clear to her from reading the letter that the tribunal claim had not yet been issued and that this was

something that she had to do if she wanted to bring a case against the respondent.

Although the claimant had other issues with her health and money in February and March 2021, it is this Tribunal's judgment that she was able to conduct correspondence with managers at work and was able to contact ACAS and to function. The claimant has mental impairments as well as physical impairments. It is likely that her mother frequently assists her with doing some things and that she does others for herself. Mrs Smitherman presented the appeal for her against the refusal of her claim for the PIP benefit. The claimant wrote to the respondent to chase her appeal. The claimant contacted ACAS while Mrs Smitherman spoke to the solicitors. They worked together as a team in dealing with all the matters that the claimant had to deal with.

The Tribunal asked itself what was the substantial reason for the claimant's failure to issue her claim in time? The claimant has been upset since the day she was informed that her employment had been terminated. She continued to be upset about this at the hearing. In this Tribunal's judgment, in December, the claimant did not issue her claim mainly because she was having suicidal thoughts, was distressed and unable to contemplate bringing a claim. In January and February, the claimant was much better mentally and physically. The GP records do not record her attending for a prescription for antidepressant or similar medication throughout this time. It is this Tribunal's judgment that in January and February 2021, the claimant continued to be a person with physical and mental health impairments as she had been while employed by the respondent but not to the extent that she was unable to function.

The reason? It is this Tribunal's judgment that she failed to issue her claim in February/March 2021 mainly because at that time, she was hoping that her appeal would be successful and she would be reinstated to her job. It was not because she was unaware of the three-month deadline or because she was too unwell to issue the claim. It was because she was focused on her appeal. The claimant was well enough to conduct correspondence with the managers at the respondent and to contact ACAS and through her mother, she was aware of the statutory time limit. Even if her mother had not informed her that the solicitor said that the claim must be brought within three months less one day, the letter from ACAS contained sufficient information to cause the claimant to look up how and when to issue a tribunal claim. In February, the claimant was well enough and able to work out how to start the early conciliation process. That leads this Tribunal to conclude that she was well enough and that her mental health was stable enough to enable her to look up or find out how to start an employment tribunal claim.

It is this Tribunal's primary judgment that the claimant did not issue her claim within the statutory time limit and by 7 March 2021 because she could not bear the thought of not working for the respondent and therefore placed all her hopes on a successful outcome of her appeal. She knew about the tribunal deadline but did not want to think about bringing a tribunal claim. If it was that case that she did not know of the deadline then it is this Tribunal's secondary judgment that it was not reasonable, bearing in mind the advice given by the solicitor to Mrs Smitherman and the contents of the letter from ACAS on 3 February, for the claimant not to be aware of the statutory time limits for bringing a complaint of unfair dismissal and the money claims that she wished to make.

It is therefore this Tribunal's judgment that it was reasonably feasible for the claimant to issue her complaints of unfair dismissal, failure to pay holiday and notice pay and wages within the statutory time limits and by 7 March 2021.

Even giving the law a liberal interpretation, it is this Tribunal's judgment that it was reasonably practicable for the claimant to have issued her claims in February/March 2021. The claim was issued on 12 April, which is outside of the statutory time limits.

The Tribunal has no jurisdiction to hear the claimant's complaints of unfair dismissal, a failure to pay holiday pay, a failure to pay notice pay and for arrears of wages. Those claims are dismissed.

Disability Discrimination

It was the claimant's submission that the loss of her job, her health scare, losing her cat and her anxiety and depression were constants in her life between December 2020 and April 2021. Added to that was the loss of the PIP income which caused the claimant and her mother to focus on restoring that benefit as it was her only source of income. The PIP hearing was not until 10 March which was after the expiration of the three-month statutory time limit.

The respondent did not provide the claimant with an outcome to her grievance for 10 months.

The same time limits apply to discrimination complaints and so the complaint of disability discrimination should have been brought by 7 March 2021.

The complaint was issued outside of the statutory time limit. Is it just and equitable to extend time in this case to allow the claimant's complaint to proceed? Has the claimant persuaded the Tribunal that it would be just and equitable to extend time? The Tribunal has a wide discretion to do what it thinks is just and equitable in all the circumstances. The Tribunal should consider and 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".

The claim should have been issued by 7 March. It was issued just over a month later on 12 April. The reason as already stated above was likely to be because the claimant was focussed on being reinstated to the exclusion of anything else. It was not because she did not feel aggrieved at the respondent's decision to terminate her employment or that she ever stopped feeling that this had been done because of her disability. Her long letter to the respondent dated 10 December, although rambling, did confirm that she felt that she had been treated in this way because of her disability status. Her appeal also made that clear.

Although it is this Tribunal's judgment that the claimant had regained her mental health to a level in February/March 2021 to a level that made it reasonably practicable that she could have issued her unfair dismissal claim, she continued to be a person with a multitude of issues in her life; both physical and mental, which continue to date. The claimant had a number of deeply distressing things occur in her life between December 2020 – April 2021. She never changed her mind about her belief that there had been disability discrimination in regard to the termination of her employment.

The deadline was missed because she was focussed on getting her job back and getting her PIP restored so that she would have income. For a person with multiple physical and mental impairments, that would have made a long list of difficult tasks that needed to be done.

In the circumstances, she failed to issue her claim until the solicitor reminded her mother that it needed to be issued. It was issued a few days later.

As the respondent has already responded to the claim, it is unlikely that the lateness of the claim affected its ability to respond. I was not told that the lateness of the claim would have an adverse effect on the cogency of the evidence. I take notice of the fact that as soon as the solicitor reminded the claimant's mother of the deadline for issuing the claim, the claimant acted and brought it. It is likely that once the PIP appeal was out of the way, the claimant was able to focus on this and issued her claim. The appeal against dismissal was not addressed until sometime afterwards.

Having taken all these factors into consideration, it is this Tribunal's judgment that it is just and equitable that the time limit should be extended to enable the claimant to pursue her complaint/s of disability discrimination.

Judgment

The complaints of unfair dismissal, failure to pay holiday pay, failure to pay notice pay and unlawful deduction of wages were issued outside of the relevant statutory time limits. The Tribunal does not have jurisdiction to consider these claims and they are struck out.

The complaints of disability discrimination were issued outside of the relevant statutory time limit.

It is this Tribunal's judgment that it is just and equitable to extend time under section 123 Equality Act 2010 to enable the Tribunal to consider the claimant's complaints of disability discrimination.

Case management orders made under the Employment Tribunals Rules 2013

The claimant is to write to the Tribunal by **31 January 2022** to clarify her complaint of disability discrimination by setting out in bullet points whether her allegations are only of a discriminatory dismissal or what other allegations she says are identifiable from her ET1 claim form.

The respondent has until **14 February 2022** to respond with comments on the claimant's clarification

The matter will be listed for a case management preliminary hearing to consider the complaints, list a final hearing and make any necessary orders. The parties will be notified of the date of that hearing in due course.

Employment Judge **JONES**

11 January 2022