EMPLOYMENT TRIBUNALS

Claimant: Ms Angela Callaghan

Respondent: Autumn House Care Limited

Heard at: Southampton On: 14 January 2019

Before: Employment Judge Gardiner

Representation:

Claimant: Miss I Burkett, Lay Representative

Respondent: Mrs A Delbourgo, Counsel

PRELIMINARY HEARING

JUDGMENT

1. The Tribunal has jurisdiction to consider the unfair dismissal and disability discrimination claims, which are not time barred.

2. The Respondent's applications for a strike out of the Claimant's unfair dismissal and disability discrimination claims, alternatively for a deposit order to be made in relation to those claims, are dismissed.

REASONS

1. The Claimant had been employed by the Respondent as a Senior Care Assistant since 2005. Following a period of sickness absence, she was

dismissed by letter dated on 15 January 2018. This was received on 17 January 2018. On 29 March 2018, she attempted to submit an employment tribunal claim but the claim was rejected as not being on the prescribed form. Her employment tribunal claim was correctly presented on 17 May 2018. In it she complained that she had been unfairly dismissed, and also alleged that her dismissal was an act of disability discrimination. There is also a claim for wrongful dismissal in that the Claimant was not paid her notice pay.

2. The issue that arises on this Preliminary Hearing is whether the unfair dismissal and discrimination claims have been brought within the statutory time limits; and if not, whether time should be extended to enable the claims to be heard on their merits. If not, the Tribunal lacks jurisdiction.

3. It is also argued by the Respondents that even if the Tribunal considers that it has jurisdiction to consider the claims on their merits, then the Tribunal should strike out each of the claims on the basis that they have no or little reasonable prospect of success, or alternatively issue a deposit order.

Unfair dismissal – jurisdiction

4. Under Section 111(2)(a) of the Employment Rights Act 1996, an employment tribunal shall not consider a claim of unfair dismissal unless it is presented to the tribunal before the end of the period of three months beginning with the effective date of termination. Here the effective date of termination was 17 January 2018, the date on which the Claimant received notice of dismissal. Therefore her unfair dismissal claim ought to have been brought on or before 16 April 2018, unless the three-month time period is extended by reason of the early conciliation provisions. Here the Claimant applied to ACAS for early conciliation on 2 March 2018. The early conciliation certificate was issued on the same date. The effect of early conciliation in this case is to pause the three-month time limit for one day, 2 March 2018 (Section 207B of the Employment Rights Act 1996). As a result, the unfair dismissal claim ought to have been brought by 17 April 2018.

5. In the present case, a complaint of unfair dismissal claim was only lodged on the prescribed form on 17 May 2018. Accordingly, it was lodged one month outside the primary limitation period.

6. The tribunal only has jurisdiction to consider an unfair dismissal claim that has been presented outside the primary limitation period if it was not reasonably practicable to bring the claim within the primary limitation period and it was brought within such further period as the tribunal considers reasonable.

7. *North East London NHS Foundation Trust v Zhou* (EAT 5.7.18), was a case where there had been a minor but fatal error in an initial claim lodged in time. The EAT held that in circumstances where it might not have been unreasonable for a claimant or her advisers not to appreciate the error, a tribunal would be entitled to find that it was not reasonably practicable for the corrected claim form to be presented in time. The question in a particular case

was fact and context specific, and the extent of the error and the context in which it was made were relevant to the Tribunal's discretion.

8. The following factual findings are relevant to whether it was reasonably practicable to have issued proceedings within the statutory time limit :

(1) When the Claimant received her notice of dismissal she was signed off work on sick leave. The most recent fit note, albeit from August 2017, signed her off for three months until the middle of November 2017 with "extreme emotional distress due to social issues". Since then, her husband had died and she had organised his funeral, a period which she found particularly difficult.

(2) As a result of her state of health, she had not responded to various communications from her employer in the period from late 2017 onwards. The Claimant's mental health was further impacted when she received her dismissal letter on 17 January 2018. She was distressed by the fact this letter had come "out of the blue". She had not been warned that she was liable to be dismissed unless she contacted her employers; nor had she been invited to a formal meeting to review her sickness absence and consider whether she should be dismissed in the light of the latest medical evidence.

(3) On receipt of the dismissal letter, she had been able to write to the Respondent to challenge the dismissal, and had been able to attend an appeal hearing on 15 February 2018. At this point she was acting by herself and did not have any representation, whether legal or otherwise.

(4) She approached ACAS at the start of March 2018 for advice in relation to bringing a potential employment claim. This was treated as a request for Early Conciliation. An Early Conciliation Certificate was issued on the same day, 2 March 2018.

(5) Thereafter, she attempted to source the required form from the internet. For whatever reason, what she downloaded from the Gov.uk website was not in an acceptable form to be actioned by the Tribunal Service. She completed this form with help from the Newport Law Centre. She had shown the non-compliant form to her lay advisor, Miss Burkett. Miss Burkett was not legally qualified. She had not raised any concerns about whether the form was in the correct format.

(6) At the time, the Claimant was suffering from anxiety and depression. Medical evidence provided by her GP dated 21 March 2018 showed that she was suffering from what her GP described as severe anxiety and depression.

(7) On the balance of probabilities, her mental health was a factor in her submitting a form in which the formatting of the form meant that some of the boxes on the form were not nearly as clear as they ought to have been. Neither she nor her adviser appreciated that the form would be

rejected by the Tribunal. That was understandable. Indeed, even at the time of this hearing, the precise features of the original claim that rendered it non-compliant were not clear to the parties.

(8) The Claimant did attempt to issue the claim within the statutory time limit but this was rejected by the Tribunal Service. However, she did not realise that it had been rejected until 15 May 2018, when she contacted the Tribunal Service on the advice of Miss Burkett. Given her mental health at the time, her lack of expertise in these matters, and the fact that she was not in receipt of legal advice, she cannot be fairly criticised for the delay from 29 March 2018 until 15 May 2018 in checking to see whether her claim had been accepted.

(9) The Tribunal Service re-sent the notice that it had attempted to send to her on 9 April 2018. This time it was received. At the same time, it sent her an email notification that had been sent to the Tribunal Service in response to the purported notice of 9 April 2018. This was worded as follows :

> "Delivery to these recipients or distribution lists is complete, but delivery notification was not sent by the destination."

(10) This is clearly an unusual message that indicates that there has been a problem with the communication. On balance of probabilities, I consider that it supports the oral evidence given by the Claimant, namely that this email and its attachments may have been sent by the Tribunal Service but was never received at the time by the Claimant.

(11) On the balance of probabilities, had she received the notification on 9 April she would have acted extremely promptly to reissue the proceedings. This is supported by the fact that she did act promptly after she contacted the Tribunal on 15 May 2018. In that instance, there was only two days between receiving the notice and reissuing the claim.

(12) If the Claimant had acted prompted had she received the 9 April 1918 notice by email, then she would have lodged a compliant ET1 form sufficiently quickly that it would have been lodged before the time limit expired on 17 April 2018.

(13) As it was, she acted with commendable speed by issuing compliant proceedings on 17 May 2018, having been notified of the problem on 15 May 2018.

9. The test for considering whether it was reasonably practicable to bring a claim is an exacting one – it has been interpreted in the authorities as requiring the Claimant to show that it was not reasonably feasible to bring the claim within time. This is a high hurdle, but not an impossible one. It is one that can take into account the state of the Claimant's health and the steps that the Claimant in fact took.

10. In the light of these findings of fact, I consider that it was not reasonably practicable for the Claimant to have downloaded the correct form and to have submitted it to the Tribunal. In circumstances where she did not realise her error until 15 May 2018, it was not reasonably practicable to have done so until 15 May 2018, and a compliant form was submitted within a reasonable time thereafter.

11. Therefore the tribunal does have jurisdiction to determine the unfair dismissal claim on its merits.

Discrimination – jurisdiction

12. I now turn to deal with the discrimination claim. The Claimant says that her dismissal was also an act of disability discrimination – both direct discrimination, discrimination arising out of disability and a failure to make reasonable adjustments. The decision was taken to dismiss her on 15 January 2018 when the letter was written notifying that she would be dismissed. The primary time period for bring a direct discrimination claim is three months from the date on which the act of discrimination took place. Here, proceedings ought to have been brought by 14 April 2018. The effect of the Early Conciliation provisions is to extend the time limit by one day, to 15 April 2018 : the effect is the same as for the unfair dismissal claim.

13. As the claim here was brought on 17 May 2018, it was issued over a month outside the primary limitation period. The tribunal only has jurisdiction to consider the matter on the merits if it would be just and equitable to do so. The burden of showing that it would be just and equitable is on the Claimant. Extending the primary limitation period is the exception rather than the rule (*Robertson v Bexley Community College* [2003] IRLR 434). In considering whether it is just and equitable, the Tribunal has regard to all the circumstances, and in particular the factors listed in Section 33 of the Limitation Act 1980, suitably modified (*BCC v Keeble* [1997] IRLR 336). If there has been fault on the part of a Claimant's adviser, then the Claimant cannot be held responsible for the fault of her adviser. This is a relevant factor to consider in exercising the discretion (*Virdi v Commissioner of the Metropolis* [2007] IRLR 24).

14. I consider that it would be just and equitable to extend time here :

    (1) The Claimant did contact the Tribunal within time in an attempt to issue proceedings, albeit that those proceedings were not correctly issued because the proceedings did not use the prescribed form.

    (2) The Claimant was notified that the claim had not been accepted on 9 April 2018, but did not receive this email. As a result, until she rang the Tribunal on 15 May 2018 she did not know that her claim had been rejected. Having been sent the notice of rejection on or around 15 May 2018, she then resubmitted her claim on 17 May 2018, two days later.

(3) As a result, apart from her error in failing to use the prescribed form, the Claimant cannot be criticised for failure to comply with the Tribunal's time limits or any failure to respond promptly to the Tribunal correspondence.

(4) Her mitigation is that she was suffering from severe depression at the relevant time.

(5) Had the Claimant received the notice dated 9 April 2018 when it was sent, then the likelihood is that she would have issued the claim within the original time limit;

(6) The Respondent has not identified any prejudice that it would suffer if it had to defend the claim on its merits. From February 2018 onwards, the Respondent has notice that the Claimant was challenging her dismissal as a result of her internal appeal. The delay in issuing compliant proceedings has not significantly affected the cogency of the evidence.

15. I do bear in mind that the Respondent is a small organisation without a full-scale human resources function. However, in carrying out the balancing exercise, I have particular regard to the Claimant's state of health at the relevant time, and the lengths that she went to in order to try to issue a disability discrimination claim within the required time. The balance of equity and justice favours allowing this claim to be determined on its merits.

Wrongful dismissal – jurisdiction

16. The wrongful dismissal claim is a claim for breach of contract. It is a claim that the Tribunal has jurisdiction to hear if it is made in accordance with the Employment Tribunals (Extension of Jurisdiction) Order 1993. That statutory provision permits contractual claims in circumstances where the Claimant has been dismissed and where the claim has been brought within three months of the date of the dismissal.

17. The wording of the limitation provision is in identical terms to the wording of the unfair dismissal legislation. As a result, the same considerations apply to this claim as apply to the claim for unfair dismissal. For the same reasons, the Tribunal concludes that it has jurisdiction to consider the wrongful dismissal claim.

Strike out - generally

18. The Respondent's case is that the various claims advanced by the Claimant have no or little prospect of success and so should be struck out or the subject of a deposit order. Given my conclusion on the issue of jurisdiction, this issue falls to be considered as if this was the only issue before the Tribunal. Are these appropriate claims to be struck out or subject to a deposit order ?

Unfair dismissal - Strike out

19. So far as the unfair dismissal claim is concerned, the claim advanced by the Claimant does have a real prospect of success. Dismissing the Claimant when the Claimant was dismissed must both be substantively and procedurally fair. The Respondent's case is that the reason for dismissal was incapacity, based on the Claimant's ill health. On the evidence before me there is a reasonable prospect of showing that the principal reason was different – either because the Claimant had exhausted her entitlement to sick pay, as referred to in the dismissal letter, or because the Claimant was not responding to the Respondent's communications and therefore the Respondent concluded she did not want to return to her role.

20. If either of the latter two reasons was the principal reason, then these may not in themselves be a sufficient basis for a fair dismissal. It is not for the Tribunal on a strike out application to determine the reason for the dismissal and whether it was a fair reason. However, I find that there is sufficient merit in the Claimant's argument that the reason was other than incapacity that there is a realistic prospect that it will succeed.

21. Even if the reason was incapacity as the Respondent contends, then there was a potential procedural failure. This is that, before the dismissal decision was made, the Claimant was not invited to a meeting to discuss her current state of health and the prospects that it might improve. Nor was there any enquiry with her GP or any other health professional as to the current diagnosis and prognosis and the prospect of her returning to work. This happened only after the dismissal and as part of the appeal process. There is a realistic argument that this ought to have happened before the dismissal and had this happened before dismissal then the dismissal would at the very least have been delayed.

Disability discrimination – Strike Out

22. So far as the disability discrimination claims are concerned, the case of *v Anyanwu v South Bank Students Union* [2001] ICR 391 is authority for the proposition that Tribunals should be slow to strike out discrimination claims as disclosing no real prospect of success before the tribunal has made factual findings at the Final Hearing.

23. Here, the tribunal will need to consider, for example, why the Respondent summarily dismissed the Claimant rather than offering the contractual notice to which she was entitled under her employment contract. Why was no detailed investigation made into her state of health, or no formal capability meeting scheduled ? Are these features from which inferences can fairly be drawn that the decision was tainted by bias on the grounds of the Claimant's disability ?

24. In addition, so far as the Section 15 discrimination claim for discrimination arising from disability is concerned, the key issue in relation to this claim will be whether a dismissal on health grounds can be justified by the Respondent

as a proportionate means of achieving a legitimate aim. It cannot be said that such a defence is bound to succeed merely because the Claimant has been absent from work for more than six months, or because the Claimant's entitlement to statutory sick pay had been exhausted. This claim, as with the other disability discrimination claims, will turn on the full evidence before the Tribunal at the final hearing.

Conclusions

25. For these reasons, the Tribunal's conclusions are that it has jurisdiction to consider the Claimant's unfair dismissal and disability discrimination claims notwithstanding the dates on which the claims were issued; and that there is sufficient merit in the claims that the Respondent's application for those claims to be struck out or subject to deposit orders fails.

26. The case management orders made by Employment Judge Salter on 23 August 2018 continue to apply. As ordered, there will be a Final Hearing at the Southampton Employment Tribunal on 20 to 22 May 2019.

Employment Judge Gardiner

Dated: 18 January 2019