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EMPLOYMENT TRIBUNALS

Claimant: Ann Shallow
Respondent: Barts Health NHS Trust
Heard at: East London Hearing Centre (by Cloud Video Platform)
On: 01 July 2021
Before: Employment Judge Housego

Representation

Claimant: Justice Maduforo, Solicitor, of Tice Madox, solicitors
Respondent: Camille Ibbotson, of Counsel, instructed by Bevan Brittan LLP

JUDGMENT

The claim is struck out, as out of time.

REASONS

Law

1. A claim for unfair dismissal must be presented within 3 months of the effective date of termination¹, extended in a variety of ways by the requirement to obtain an Early Conciliation Certificate from ACAS before filing a claim. What the extension is depends on when the notification is given by the Claimant and when the certificate is issued². If not so filed, time may be extended for such further time as is reasonable, but only if it was not reasonably practicable for the claim to have been filed in time.

2. General guidance for the parties about the approach of the Tribunal in such cases (not all will be applicable) is:

¹ Employment Rights Act 1996 S 111 Complaints to employment tribunal.

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(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.

² S207B of the Employment Rights Act 1996.

The test for extending time has two limbs to it, both of which must be satisfied before the Tribunal will extend time:

- first the Claimant must satisfy the Tribunal that it was not reasonably practicable for the complaint to be presented before the end of the three month primary time limit
- if the Claimant clears that first hurdle, she must also show that the time which elapsed after the expiry of the three month time limit before the claim was in fact presented was itself a 'reasonable' period.

3. Hence, even if the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the three month time limit, if the period of time which elapsed after the expiry of the time limit was longer than was 'reasonable' in the circumstances of the case, no extension of time will be granted.

4. As regards the first limb of the test, it is quite difficult to persuade a Tribunal that it was 'not reasonably practicable' to bring a claim in time. A Tribunal will tend to focus on the 'practical' hurdles faced by the Claimant, rather than any subjective difficulties such as a lack of knowledge of the law, an ongoing relationship with the employer or the fact that criminal proceedings are still pending. The principles which tend to apply are:

- section 111(2)(b) ERA should be given a liberal construction in favour of the employee
- it is not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit
- however, a Claimant will not be able to successfully argue that it was not reasonably practicable to make a timely complaint to an Employment Tribunal, if he has consulted a skilled adviser, even if that adviser was negligent and failed to advise him correctly
- there may be exceptional circumstances where that principle may not apply, namely where the adviser's failure to give the correct advice about time limits is itself reasonable, for example, where both the Claimant and the adviser have been misled by the employer as to some material factual matter such as the date of dismissal
- where a claimant has consulted skilled advisers, such as solicitors, the question of reasonable practicability is to be judged by what he could have done if he had been given such advice as they should reasonably in all the circumstances have given him
- the question of reasonable practicability is one of fact for the Tribunal, and should be decided by close attention to the particular circumstances of the particular case
- a Claimant can rely on failure to act in reliance on advice from, for example, Tribunal employees or government officials. In DHL Supply Chain Ltd v Fazackerley [2018] UKEAT 0019_18_1004 the EAT held that the Employment Tribunal did not err in finding that it was not reasonably practicable for the claimant to have brought proceedings in time when he relied on incomplete advice from Acas that he should exhaust an internal appeal process first before considering starting a Tribunal claim

- it is not reasonably practicable to bring a claim if a Claimant is unaware of the facts giving rise to the claim. However, once they have discovered them, a Tribunal will expect them to present the claim as soon as reasonably practicable, rather than allowing three months to run from the date of discovery
- if a Claimant knows of the facts giving rise to the claim and ought reasonably to know that they had the right to bring a claim, a Tribunal is likely not to extend time. If the Claimant has some idea that they could bring a claim but does not take legal advice, a Tribunal is even less likely to extend time
- if a letter is posted by first class post, it is reasonable to assume that it will be delivered two days later (excluding Sundays and Bank Holidays). If it is not, a Tribunal is likely to extend time. However, the onus is on the Claimant to ensure that it does arrive in time: he must take all reasonable steps to check. Claimants' representatives should therefore always make a note of when they would expect to receive a response from the Tribunal (or Acas) and to chase if it has not been received
- if an employee makes a mistake on a claim form which means that it is rejected by an Employment Tribunal (such as incorrectly stating the early conciliation certificate number) and thereafter the time limit for the claim expires while he is labouring under the misunderstanding that he has not made a mistake, that misunderstanding—provided it is reasonable in the circumstances—may justify an extension to the time limit on the basis that it was not reasonably practicable for him to have brought the claim in time
- where an error on the part of solicitors leads to an initial employment tribunal claim being rejected and a corrected resubmitted second claim being presented out of time, in deciding whether it was 'not reasonably practical' for the resubmitted claim to be presented in time, the employment tribunal must assess the reasonableness of the solicitors' original error. This involves taking into account all the circumstances (eg in North East London NHS Foundation Trust v Zhou (JURISDICTIONAL POINTS - Claim in time and effective date of termination) [2018] UKEAT 0066_18_0507 the claimant had completed her own ET1 form to save costs and her solicitors did not spot her error in respect of the early conciliation certificate number) and a recognition that not every omission, however technical, is unreasonable. In accordance with the principle in Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379 CA):
 - if the error which led to the first claim being rejected was reasonable, and the claimant and her solicitors thereby believed a valid claim had been presented in time, the tribunal may find that it was not reasonably practicable to present the second claim in time, however
 - if the error on the part of the solicitors was not reasonable, then the claimant is bound by their error, and it would have been reasonably practicable for the claim to have been presented in time

5. If the first limb of the test is satisfied, the Claimant must then satisfy the second as well: even if a Tribunal concludes that it was not reasonably practicable for a Claimant to present the claim within the three month time limit (or extended

period where the requirement for early conciliation applies) no extension of time will be granted unless the claim was presented within a 'reasonable' time (judged according to the circumstances of the case) thereafter.

6. If a Tribunal concludes that the extent of the delay between expiry of the primary three month limitation period (or extended period where the requirement for early conciliation applies) and the date the claim was presented was objectively unreasonable, the fact that the delay was caused by the Claimant's advisers rather than by the Claimant makes no difference, and hence a time extension will be refused.

7. The law is clearly set out by Eady J in Paczkowski v Sieradzka (Jurisdictional Points : Extension of time: reasonably practicable) [2016] UKEAT 0111_16_1907 (19 July 2016), particularly at paragraph 19 onwards.

Chronology

8. In this case:

8.1 On 09 November 2015 Ms Shallow started work with the Respondent.

8.2 On 21 June 2018 and 19 July 2018 there were incidents at work.

8.3 On 24 July 2018 Ms Shallow went off sick, by reason of diabetes.

8.4 On 08 August 2018 Ms Shallow was told the incidents would be investigated.

8.5 On 13 August 2018 occupational health said she was not fit to return to work.

8.6 On 12 November 2018 occupational health said a phased return to work was advised.

8.7 On 08 February 2019 Ms Shallow was dismissed.

8.8 In March 2019 Ms Shallow was diagnosed with F29X non-organic psychosis (an ICD-10 categorisation). Ms Shallow hears voices, which are often unpleasant and demanding.

8.9 On 02 April 2019 her appeal was heard.

8.10 On 24 April 2019 her appeal was dismissed.

8.11 The time limit of 3 months expired on 07 May 2019.

8.12 On 30 November 2020 the Claimant notified Acas in respect of early conciliation certificate.

8.13 On 07 December 2020 the certificate was issued.

8.14 On 05 January 2021 this claim was filed.

Facts

9. The chronology is as above.

10. The dismissal was as summary dismissal following incidents related to call handling (she was a telephone operator). Why this took so long, and whether the process or outcome was fair is not relevant to this preliminary hearing, which is about whether there is jurisdiction to hear the claim at all, given the elapsed time.

11. Ms Shallow suffers from diabetes. She became very ill with it, and required insulin. By 12 November 2018 Dr Atif Maqsood, a Consultant in Occupational Medicine at Barts NHS Trust Health and Wellbeing Directorate reported that Ms Shallow said that she was generally well and was symptom free (page 29 of her bundle of documents).

12. At her appeal Ms Shallow was represented by Liz Frayne of the Independent Union (“IDU”). Ms Shallow was not represented by anyone after that appeal, although the outcome letter was copied to Ms Frayne (38 & 39 of the Respondent’s bundle of documents).

13. Ms Shallow was treated by Homerton Hospital for her diabetes, and by East London NHD Foundation Trust for her psychosis.

Late filing of the claim – reasons advanced

14. The reasons said to make it not reasonably practicable to file the claim earlier were:

14.1 The effect of diabetes on her.

14.2 The effect of her psychosis.

14.3 That she was naïve and ignorant of the time limit.

14.4 That she was not advised by her representative of the time limit, and should have been.

14.5 The effect of Covid-19 was to isolate her from advice, as she was shielding throughout, from March 2020 until the claim was filed.

Evidence and submissions

15. Ms Shallow gave evidence. Her friend, Valerie Edwards was on hand and helped Ms Shallow navigate her way through the documents. Both Mr Madufuro and Ms Ibbotson provided helpful written submissions, to which they spoke. I made a full typed record of proceedings in which they are recorded. In essence, Mr Madufuro stressed the exceptional circumstances of Ms Shallow’s health, in a truly extraordinary time, and Ms Ibbotson stressed the length of time, and submitted that it was unlikely that it was not reasonably practicable for Ms Shallow to submit the claim for the whole of the 23 months since her dismissal. Both Claimant and Respondent submitted documents, which I have considered fully, whether or not referred to in this judgment.

Consideration of reasons

16. I say at once that I had absolutely no doubt but that Ms Shallow’s diagnosis of psychosis is entirely genuine, and plainly the hearing was not easy for her. I do not underestimate the challenge of coping with it, particularly while having to self isolate for many months continuously. I was particularly grateful to Ms Shallow’s

friend, Ms Edwards, who helped with documents and plainly was a great support to her friend.

17. The medical evidence is plainly objective, and I accept it is accurate, as far as it goes.

Diabetes

18. Ms Shallow says that this was very bad, as indeed it was. She was unable to work for a period, and required insulin. She had symptoms of retinal neuropathy and issues with circulation, particularly in her feet. However, it was, as she accepted, under control and with her medication she was symptom free by November 2018. There is no evidence of (and Ms Swallow does not say that she did) relapse. It is not credible that Ms Swallow's diabetes made it not reasonably practicable for her to prepare and file her claim at the time the limitation period expired of during the 20 months since.

Psychosis

19. This is the heading which is the strongest for Ms Shallow. The medical report of 03 June 2021 from Ms Shallow's psychiatric nurse is headed "*To whom it may concern*" and does not refer to the issue in this case. It says that when Ms Shallow was initially referred to them she was experiencing multiple voices, commanding in nature and commenting on her actions and those of others. It says that (understandably) Ms Shallow was very distressed and distracted by this, low in mood and having difficulty sleeping. It says that the service continued to support Ms Shallow throughout this period. It says that she will continue to receive support from them until April 2022.

20. The reference to support "*through this period*" indicates that the period is finite – that it has ended. It does not say when it ended. It does not give an opinion on whether she was able to function normally, or to some or any extent during it. Ms Shallow indicated that the voices continue (and that she was experiencing them during the hearing, in answer to a question from me), and I accept that evidence.

21. A letter of 19 April 2021 from a consultant psychiatrist in the service supporting her (EQUIP, an acronym of the service named Early and Quick Intervention in Psychosis) set out the medication she has, confirmed her diagnosis and stated that she was advised to take time off from working and would be provided with a sick note if it was necessary.

22. The diagnosis was in March 2019, and doubtless the diagnosis was after Ms Shallow had struggled with the problem for some time. That means that it was operative for the whole time from her dismissal.

23. I note also that this was as the first lockdown started. I accept that Ms Shallow was shielding throughout. There was no evidence of this other than the oral evidence of Ms Shallow, who was plainly telling the truth as she saw it throughout her evidence. That means that she was isolated throughout the period.

24. Ms Shallow felt able to file her claim by the end of 2020, and I asked her what had changed to make this possible. She said that towards the end of 2020 she felt able to try to seek work, and the service (EQUIP) had helped her with this.

25. Ms Shallow is not very technologically aware (this was plain from her need of her friend to access the documents on her phone) but either alone or with friends was not said to be unable to access the form or submit it.

26. While having immense sympathy with Ms Shallow's predicament, and giving full weight to Mr Maduforo's submissions, I cannot see evidence to contradict Ms Ibbotson's submission that to succeed Ms Shallow has to show that throughout the 20 months – and arguably 23 months – it was not reasonably practicable for Ms Shallow to submit the claim to the Employment Tribunal. The burden of proving that, on the balance of probabilities, lies on Ms Shallow.

27. Doubtless there were times – periods – when it was not reasonably practicable for her to have done so. Doubtless also it would be more difficult for her than for others, probably for the whole period.

28. Ms Shallow was never hospitalised. She has had medical help throughout the period. She has medication, adjusted as necessary, through the great help she has received from the NHS. There is no medical evidence to support her assertion that it was not reasonably practicable for her to submit the claim *throughout* the period. There is no real explanation of what changed to make it possible for her to do so, other than gradual improvement to where she is today. The problem is that there isn't medical evidence of that graduated improvement, or that she was so debilitated by the psychosis during the period before lodging it that it was not reasonably practicable for her to engage with the process of filing a claim.

Naïvete and ignorance of the time limit

29. This is simply not a reason to extend time in this case. While ignorance of the period can be a reason why it was not reasonably practicable to file a claim within that period, it has to be reasonable not to know of the time limit.

30. Ms Shallow was not in ignorance of any fact, and always felt that her dismissal was unfair. Ms Shallow says that no one told her of the time limit. An internet search for "*unfair dismissal*" brings up the time limit front and centre. It is to be expected that someone with a sense of grievance and without advice would do some preliminary research to find out what she might do about it.

31. That Ms Shallow did not do so for 20 months is not reason to find that her ignorance of the time limit made it not reasonably practicable for her to do so.

Not advised of time limit by representative

32. I accept that Ms Shallow does not recall being advised about the time limit. It is unlikely that she was not advised of it, but it is entirely credible that by reason of her psychosis she did not recall it. But as Ms Shallow was not supported by any representative after her appeal the onus was on her to find out what she might do. It is not reasonable to make no enquiry: it follows that not making such enquiry does not equate to it being not reasonably practicable to lodge her claim.

Self isolation

33. I accept Ms Shallow was self isolating throughout the period, and that this, with her psychosis, and her underlying health condition, made it difficult for her to make progress. However, she does not say that she had no access to the internet. She had nothing else to do, since necessarily she was at home all the time. Ms Shallow is also fortunate in having some very good friends who have stood by her

in her time of difficulty. In these circumstances it is not possible for Ms Shallow to show that self isolation, even in conjunction with the other matters affecting her, made it not reasonably practicable for Ms Shallow to file her claim throughout the period.

Conclusion

34. For these reasons I find that Ms Shallow has not shown, on the balance of probabilities, that it was not reasonably practicable for her to file her claim within the limitation period and until she did file it.

Such further period as is reasonable

35. My conclusions about the reasonable practicability of filing the claim earlier are determinative of this application, but even had the Claimant succeeded in showing that over this prolonged period it was not reasonably practicable to file the claim there is a second stage, which is that it was then filed within such further period as is reasonable.

36. Had I reached this stage, the claim would still have to be dismissed. The early conciliation notification was on 30 November 2020, and the only reason for doing that is that a claim was then in mind. The notification leading to the certificate necessary for the filing of a claim was on 30 November 2020. By that date it must have been reasonably practicable for Ms Shallow to lodge her claim. The certificate was issued on 07 December 2020. The claim was not lodged until 05 January 2021.

37. Given such a long period – the claim was filed almost 23 months from dismissal, and 20 months after the limitation period ran out – anyone out of time is expected to lodge the claim immediately they become aware of the time limit, or are able to proceed. Ms Shallow waited almost a month to do so.

38. It was put to her that she was able to look for a job about this time – and why had she not done so earlier. Ms Shallow did not really have an answer save that it was the Christmas period. That really will not be a good reason for not submitting it on or soon after 07 December 2020. The further period until 05 January 2021 was not reasonable, and so the claim would have to be dismissed even if it was not reasonably practicable for her to have filed the claim before 30 November 2020.

Employment Judge Housego

05 July 2021