



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss C Barnett

v

Ministry of Justice

Heard at: London Central

On: 28 June 2023

Before: Employment Judge Glennie

Representation:

Claimant: Mr D Hunon (Solicitor)

Respondent: Ms J Ball (Counsel)

JUDGMENT ON PRELIMINARY HEARING

1. The name of the Respondent on the Tribunal's file is amended to Ministry of Justice.
2. The claim is dismissed on the grounds that the Tribunal does not have jurisdiction to hear it.

REASONS

1. By her claim to the Tribunal the Claimant, Miss Barnett, made complaints of disability discrimination and maternity / pregnancy discrimination under the Equality Act 2010; unfair dismissal, a claim for a redundancy payment, and unlawful deduction from wages (holiday pay) under the Employment Rights Act 1996; and for breach of contract (non-payment of notice pay) under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The Respondent (correctly identified as the Ministry of Justice) disputed those claims, including on the grounds that they had been presented out of time. It is not disputed that they were presented outside the relevant primary time limits.
2. This preliminary hearing was listed in order to determine the following issues:

To consider why the claims have been brought outside the normal three-month time limit that applies to all the claims, and:

(a) For those claims subject to a “reasonable practicability” test (i.e. unfair dismissal, wages, holiday pay, breach of contract, redundancy pay) whether it was reasonably practicable to bring the claims in time and, if not, whether they have been brought within a reasonable period; and

(b) For the discrimination claims whether it would be just and equitable to extend time.

3. Although this point was not canvassed at the hearing, it seemed to me that there was a minor error in formulation of the issues to be decided, in that section 164 of the Employment Rights Act 1996, which contains the time limits for bringing a complaint about a redundancy payment, does not provide for any extension of time beyond the second six-month period from the “relevant date” (i.e. the effective date of termination of employment. As will be apparent from the chronology of events, there is no doubt that the claim was presented well after the period of 12 months from the effective date of termination. The issues therefore correctly identify that the complaint about a redundancy payment was brought outside the primary limitation period (although incorrectly assume that a period of 3 months is applicable): there is no power to extend time for that complaint, which falls outside the exercise in respect of the other complaints. That complaint must be dismissed as having been presented out of time.
4. Having heard evidence and submissions, I gave an oral judgment and reasons. These written reasons are provided on the Claimant’s application.
5. The Claimant provided a witness statement and gave oral evidence. I found her to be a truthful and straightforward witness.
6. There is in the background to the events with which this hearing was concerned the sad fact that in June 2015 the Claimant lost her 4-week old daughter. That had serious consequences for her mental health, and anyone involved with this case can only sympathise with her regarding that bereavement.
7. In her witness statement, the Claimant said that following the loss of her baby, she was not fit to return to work. She also became a victim of domestic violence, and had to move to a refuge. She remained unable to return to work, and there followed a process regarding her attendance, which ultimately concluded with her dismissal. (There is a potential issue as to the date of the dismissal, and whether this was 30 November or 15 December 2018. This makes no practical difference to what I have to decide, and I assume the later date for the purposes of this hearing).
8. The Claimant continued that she immediately contacted her union, and that they sent her a questionnaire on 16 January 2019. She completed this and returned it on 28 January 2019. On 18 February 2019 a solicitor from the

firm retained by the union telephoned the Claimant to say that they would be giving her advice. On 6 March 2019 she received a letter from the solicitors saying that her case did not have reasonable prospects of success.

9. The last day of the period of 3 months from the date of dismissal was 14 March 2019. On 21 March 2019 the solicitor sent the Claimant an ACAS early conciliation certificate which showed that ACAS had been notified on 6 March 2019 and that the certificate had been issued on 21 March 2019. This meant that the last date on which the claim could be presented within time was 21 April 2019. The solicitor also said that since they had decided not to take on the case, the Claimant would have to deal with it herself.
10. The Claimant's evidence in her witness statement was that from the point of receiving the early conciliation certificate she fell into a deep mental breakdown and was mentally incapacitated.
11. On 20 June 2020 the Claimant again contacted her union because she was trying to get back into work but was being rejected by prospective employers because of the dismissal on her record. In her oral evidence the Claimant said that she had the support of an advocate (not, in this context, meaning a lawyer) at this time. She stated that the union asked her to put everything in writing, which she did. At some point after this, still in 2020, the Claimant received a further letter from a different solicitor at the same firm as before, again saying that her case had no realistic prospect of success. In her oral evidence the Claimant agreed that the reason for not going ahead with her claim at this time was that she had been told that her case had no reasonable prospect of success. She also said in re-examination that, prior to June 2022, she had not had the mental capacity to present a claim.
12. The Claimant presented her claim to the Tribunal on 24 June 2022. There was a delay in the processing of the claim (which presumably explains why it bears a 2023 case number) and it was acknowledged, and notice of it was sent to the Respondent, on 21 March 2023.
13. The Claimant relied on 8 medical letters. Five of these dated from 2015 and refer to flashbacks, depression, PTSD. Another from November 2017 (and so still pre-dating the Claimant's dismissal) described marked depression. There were 2 letters that post-dated the dismissal. One dated 25 August 2021 referred to severe depression and included the observation that "As her mood is quite variable she has found it difficult to work." These were all from General Practitioners. The most recent, dated 16 May 2023, from a Social Prescriber, referred to mental health issues June since 2015 including anxiety, depression, panic attacks, agoraphobia, memory difficulties and sleep deprivation. The writer said that the Claimant had been mentally incapable of managing her commitments until June 2022, when she had been provided with advocacy and support.

14. I first considered the claims where the “not reasonably practicable” test applies. This is expressed in materially the same terms in section 23(4) (unlawful deduction from wages) and section 111 (unfair dismissal), of the Employment Rights Act 1996, and article 7 of the 1994 Extension of Jurisdiction Order (for the breach of contract claim). Section 111 provides as follows:
- (2).....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 3 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.*
15. “Not reasonably practicable” means that, for some reason, it was not reasonably feasible for a claimant to present the claim within time. I found that in the present case, it was reasonably practicable for this to be done. The claim could have been presented in February or March when the union and solicitors were involved. The fact that the solicitors declined to take on the case because of their view of the merits does not mean that it was not reasonably practicable for the claim to be presented.
16. I accept the Claimant’s evidence that she was “mentally incapacitated” from around 21 March 2019 onwards. That does not, however, of itself mean that it was not reasonably practicable to present the claim within the 3 month period (as extended by the ACAS early conciliation period). As I have said, the claim could have been presented before 21 March 2019, and it would be wrong to concentrate only on the later part of the limitation period when considering this question. Additionally, “mentally incapacitated” is the Claimant’s own (as I accept, honest) description of her condition. There is no medical evidence from early 2019 showing that she was so unwell as to be unable to present a claim to the Tribunal. In January and March 2019 she had been well enough to consult her union and receive advice from the solicitors instructed.
17. I therefore concluded that it was not the case that it was not reasonably practicable for the claim to be presented within time.
18. Should I be wrong about that, I have also concluded that in any event the claim was not presented within such further time as was reasonable. In general terms, it would not usually be easy to establish that an additional period of more than 3 years was reasonable. In this case, however, the Claimant was evidently well enough in June 2020, with the assistance of an advocate, to put everything in writing to the union. What the Claimant said in re-examination about not having the capacity to present a claim before June 2022 might have been intended as a form of withdrawal from her concession that the reason why she did not proceed in June 2020 was the advice about her claim’s prospects of success. However, the real point, in

my judgement, is that there is no apparent reason why the Claimant could not have put her case in writing to the Tribunal in June 2020.

19. I therefore found that such further period as was reasonable expired no later than June 2020.

20. I then considered the “just and equitable” test. This is provided for in section 123 of the Equality Act in the following terms:

(1).....proceedings on a complaint.....may not be brought after the end of –

(a) The period of three 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.

21. In **Robertson v Bexley Community Centre [2003] IRLR 434**, a case decided under the equivalent provisions of the Race Relations Act 1976, Auld LJ said the following:

“It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So the exercise of discretion is the exception rather than the rule.”

22. In **London Borough of Southwark v Afolabi [2003] IRLR 220** the Court of Appeal upheld a tribunal’s finding that it was just and equitable to hear a claim which had been presented 9 years out of time. Peter Gibson LJ, with whom Sedley LJ and Rix LJ agreed on this point, said that it was not a requirement that the tribunal go through the list of factors in section 33(3) of the Limitation Act 1980, although that could be a useful tool in many cases. What was required was that no significant factor should be left out of account by the tribunal. Peter Gibson LJ added this, at paragraph 35:

“The policy of the Act is made clear by the brevity of the limitation period; that period of three months is in marked contrast to the limitation periods in ordinary litigation. Parliament.....envisaged that complaints within the jurisdiction of the ET will be determined within a short space of time after the events complained of.....”

23. The findings I have made with regard to the not reasonably practicable test are also relevant here. The delay in presenting the claim has been of more than 3 years. I have found that the claim could have been brought within time in around February/March 2019, and that there was a further opportunity when it could have been presented in June 2020, when it would have been less out of time than it was 2 years later.

24. I take into account the Claimant's mental health. I have no doubt that this has made it more difficult for her to bring a claim than would otherwise have been the case. There will be prejudice to her if she is unable to bring a claim, although it is a claim which has twice been assessed by solicitors advising the Claimant as having no realistic prospect of success.
25. I find that the prejudice to the Respondent in having to deal with an otherwise out of time claim would be greater. I have not been told of any specific evidential prejudice, but I find it likely that there will be difficulty for both parties giving evidence in 2023 or 2024 about events that took place in 2018 and possibly even before that.
26. Even if there were no evidential prejudice, the Respondent would incur costs in defending the claim. Costs are not usually recoverable in Tribunal proceedings. Furthermore, on her claim form the Claimant has indicated that she has not obtained another job since the end of her employment with the Respondent, which suggests that it would be difficult for the Respondent to recover any costs that the Claimant might be ordered to pay.
27. I concluded that it would not be just and equitable for the Tribunal to hear the Equality Act complaints.
28. In conclusion, I find that the Tribunal does not have jurisdiction to hear any part of the claim, which is therefore dismissed.

Employment Judge Glennie

Dated:8 August 2023.....

Judgment sent to the parties on:

08/08/2023

For the Tribunal Office