



EMPLOYMENT TRIBUNALS

Claimant

Ms Christy Howells

v

Respondent

Herbalife Europe Ltd

Heard at: Watford (in person)

On: 23 March 2023

PRELIMINARY HEARING

Before: Employment Judge Bedeau

Representation

For the Claimant: In person

For the Respondents Mr J Green, Counsel

JUDGMENT

1. The claim of unfair dismissal was presented out of time as it was reasonably practicable for it to have been presented in time. Accordingly, it is struck out as the Tribunal does not have jurisdiction to hear and determine it.
2. The claim of direct sex discrimination is allowed to proceed to a final hearing as time is extended on just and equitable grounds.

REASONS

3. On 16 August 2022, the claimant presented her claim form to the Tribunal in which she made claims of constructive unfair dismissal and direct sex discrimination. She worked for the respondent as a Senior Creative Designer, from 12 August 2019 to 25 April 2022, when she left at the end of her notice following her resignation. She alleged that her line manager had behaved towards her and female staff members, in a sexually discriminatory way resulting in her resignation.
4. In the response presented to the Tribunal on 15 September 2022, the claims are denied. The respondent avers that the claims have been presented out of time and should be struck out.

5. On 19 November 2022, Employment Judge R Lewis, directed that the case be listed for a preliminary hearing in public for a Judge to hear and determine the following issue:-

“Whether the employment Tribunal can hear the claims, as they appear to be presented out of time.”

The evidence

6. I heard evidence from the claimant. The respondent did not call any witnesses.
7. The parties adduced in to evidence their separates bundles of documents. The respondent's comprising of 80 pages, the claimant's 23 pages. “CB” refers to the claimant's bundle, “RB”, to the respondent's bundle, followed by the page number.

Findings of fact

8. The respondent is a company specialising in the manufacture, marketing and sale of health and nutrition products. It operates from premises on Harefield Road, Uxbridge.
9. The claimant commenced employment with the respondent on 12 August 2019, as a Senior Creative Designer. She alleges that her line manager showed obvious favouritism towards the male staff but would undermine and criticise the female members of staff under his management. At group meetings he would refer to the female staff as “the girls”. On many occasions he told the claimant to speak up and said that she was a bad example to the team. On 25 March 2022, she tendered her resignation, giving one month's notice to leave on 25 April 2022. (RB page 26)
10. On 30 March 2022, her resignation was accepted and her leaving date was confirmed by the Human Resources Manager. (CB p3)
11. She met with the HR Manager on 7 April 2022, to discuss her concerns about the behaviour of her line manager. That meeting was treated as informal, but the claimant was unhappy with the outcome as she was told that there had not been any concerns raised about her line manager's treatment of his staff. On 13 April 2022, she was advised by the HR Manager that should she wish to pursue a grievance, it must be in writing. (RB p28)
12. In her grievance email dated 21 April 2022, the claimant repeated her allegations of her line manager's sexist behaviour towards the female members of staff, and stated that when they challenged him, he would micromanage them. She then wrote:

“The above conduct clearly constitutes workplace bullying, and as my resignation is due to this, my resignation therefore constitutes constructive unfair dismissal under UK employment law.” (CB p27)
13. She left her employment on 25 April 2022.

14. There then followed a grievance investigation during which staff members were interviewed including the claimant who was interviewed on 6 May 2022. In her interview she gave an account of her experiences with her line manager but was unable to give dates of the various incidents. (RB p30-38)
15. The outcome of the grievance was sent to her by the Senior Director of Human Resources-Europe and Africa, who conducted the investigation, on 16 August 2022, which the claimant received the following day. It was found that the female members of staff in the claimant's team, gave "a different experience with [the line manager] than the male colleagues. I have to consider why this is as it is clearly not acceptable. I have come to the conclusion that there is unconscious bias rather than a deliberate act on [the line manager's] part of sexual discrimination."
16. In relation to the claimant, it was found that a witness had observed a change in her behaviour following her interactions with the line manager.
17. The conclusion was,

"Given all of the above, I can see there are clear development interventions required and these will be taken forward. I cannot, however, uphold bullying and sexism based on the information I have."
18. The claimant's grievance against the Human Resources Manager's conduct at the informal meeting was not upheld. She, the claimant, was advised of her right to appeal the decision. (RB p79-80)
19. The claimant told me, and I accepted her evidence, and do find as fact, that her partner had suggested to her in April 2022, that she should contact ACAS, which she did but much later, on 10 August 2022, and a certificate was issued on 16 August. She said that during that time she submitted a Subject Access Request on 7 July 2022, which was extended to 7 October 2022.
20. She was waiting for the grievance outcome before submitting her claim form. She had received information on 16 August 2022, that the outcome was going to be sent to her on that day and was not favourable from her point of view. She, therefore, presented her claim. She did not appeal the outcome as the process had taken a long time for a conclusion and, by then, she had presented her claim form. At all material times she was not suffering from either a mental or physical impairment, nor was she under any medication.
21. She had more than one conversation with the ACAS conciliator but there was no information given to her about her rights in relation to the grievance process. She was, however, aware that she had potential claims before the Employment Tribunal of constructive unfair dismissal and sex discrimination. The last act being the termination of her employment on 25 April 2022. She also obtained a book on employment to read after she presented her claims.

Submissions

22. I heard submissions from the claimant and Mr Green, counsel on behalf of the respondent. I do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I have also taken into account the authorities they have referred me to.

The law

23. Under section 123(1) Equality Act 2010, a complaint must be presented within three months,

“starting with the date of the act to which the complaint relates” (a), “or such other period as the employment tribunal thinks just and equitable,” (b) and “conduct extending over a period is to be treated as done at the end of the period,” (3)(a).
24. The time limit is extended if there is an ACAS certificate, section 140B(4) Equality Act 2010.
25. Time limits are to be applied strictly. The Court of Appeal held that the exercise of the discretion on just and equitable grounds is the exception rather than the rule, Robertson v Bexley Community Centre [2003] IRLR 434. The factors the Tribunal may consider in exercising its discretions are: the reason for and the extent of the delay; whether the claimant was professionally advised; whether there were any genuine mistakes based on erroneous information; what prejudice, if any, would be caused by allowing or refusing to allow the claim to proceed; and the merits of the claim. There is no general rule, and the matter remains one of fact.
26. In the case of Abertawebro Morgannwg University Health Board v Morgan EWCA/Civ/EAT/640, it was held by the Court of Appeal, that the Tribunal has a broad discretion to consider factors, such as the length of and reasons for the delay; whether the delay has prejudiced the respondent; and the prejudice to the claimant.
27. If a claimant knows of the existence of a right, they will generally need to make inquiries as to how and when to exercise it, Bowden v Ministry of Justice UKEAT/0018/17.
28. Waiting for the outcome of an internal appeal or grievance, is only a factor to be taken into account, Apelogun-Gabriels v London Borough of Lambeth [2003] IRLR 116.
29. In relation to unfair dismissal, section 111(2) Employment Rights Act 1996, states that the claim must be presented within three months from the effective date of termination, or within such further period as the Tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the three months.
30. Time is extended if there is an ACAS certificate, section 207B Employment Rights Act 1996.
31. The claimant bears the burden of proving both that it was not reasonably practicable for him or her to have presented their claim in time and that they presented it within a reasonable time thereafter.
32. In the case of Dedman v British Building and Engineering Appliances Limited [1974] ICR 53, the claimant was summarily dismissed. He knew he had some

rights under the relevant statute at the time but did not know about the limitation period. He sought advice from a firm of solicitors, but they did not advise him as to the time limit. He presented his claim form out of time. He failed in his application that he be allowed to pursue his unfair dismissal claim as it was not “practicable” for the claim to have been presented in time as he was unaware of the time limit and had sought legal advice but was not told about the time limit. The case was considered by the Court of Appeal.

33. Lord Denning MR, held that, “If a man engages skilled advisers to act for him and they mistake the time limit and present it too late, he is out. His remedy is against them.”, page 61, paragraph F.
34. A claimant may know of his or her rights but prevented from exercising them through either “illness, absence, some physical obstacle, or by some untoward an unexpected turn of events” which would make it not practicable to have presented the claim in time. Where the claimant is pleading ignorance of the law, questions had to be asked as to what were his or her opportunities for finding out their rights? Did they take them? If not, why not? Were they misled or deceived? Were there acceptable explanations for a continuing ignorance of the existence of their rights? Ignorance of his or her rights does not mean that it was impracticable for him to present a complaint in time.”, Scarman LJ, page 64, paragraphs D to F.
35. In the case of Walls Meat Company Limited v Khan [1978] IRLR499, it was held that it would not be reasonably practicable if there was “some impediment which reasonably prevents, or interferes with, or inhibits, such performance” namely the presentation of a complaint. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable”, Brandon LJ, page 502 paragraph 44.
36. In the case of Palmer v Southend-on-Sea Borough Council [1984] ICR 372, it was held that the test of “reasonably practicable” means “Was it reasonably feasible” to present the complaint within three months?
37. I have also taken into account Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, and Miller and Others v The Ministry of Justice UKEAT/0003/15/LA and UKEAT/0004/15/LA.

Conclusion

38. The three months time limit for presenting the claims expired on 24 July 2022. The claim form was presented on 16 August 2022. Although the claimant notified ACAS on 10 August 2022, it was outside the primary time limit. She is, therefore, unable to take advantage of the extension of time provisions.

Constructive unfair dismissal - reasonable practicability

39. In relation to her constructive unfair dismissal claim, the test to be applied is whether it was not reasonably practicable for her to have presented that claim in time? The approach is for me to consider whether it was reasonably feasible for this claim to have been presented within the three months? In April 2022, she was advised by her partner to contact ACAS. She knew at the time that she had a constructive dismissal claim as she referred to it in her formal grievance email on 21 April. She is an intelligent person capable of engaging in research on her employment rights. She first made contact with ACAS on 10 August 2022 and later read a book to assist her.
40. I have come to the conclusion that it was reasonably feasible on her part to have researched her employment rights when she was advised by her partner in April to contact ACAS. This was later demonstrated when she was able to read a book on employment rights. It was not reasonable to have waited for the outcome of her grievance in view of the fact that she had put in a Subject Access Request on 7 July 2022 which suggests that she was looking for evidence in support of her possible constructive unfair dismissal claim against the respondent and there was no indication in July 2022, that the grievance outcome would be favourable to her. Accordingly, it was reasonably feasible to have presented this claim within the primary three months time limit. The Tribunal does not have jurisdiction to hear and determine it. It is, therefore, struck out.

Direct sex discrimination - just and equitable

41. In relation to the direct sex discrimination claim, the question is, is it just and equitable extend time because it was presented outside of the primary three months limitation period? I do have regard to section 123(1) Equality Act 2010, and have taken into account the relevant factors as set out in the cases of Robertson v Bexley Community Centre, and Abertawebro Morgannwg University Health Board v Morgan. Firstly, the extent and reason for the delay. I accept that the claimant was waiting for an outcome to her grievance but by June/July 2022, there was no outcome and she had put in her Subject Access Request to gather evidence in support of potential claims against the respondent. I was not overly impressed with her reason for the delay. Waiting the outcome of an internal process is, however, one factor to take into account.
42. In relation to the cogency of the evidence if the direct sex discrimination claim proceeds to a full merits hearing, I take the view that remains unaffected. The respondent would not be required to engage in pursuing new evidence to rebut or to challenge the assertions in the claim, nor is the issue of failing memories relevant in this context. The grievance investigation involved interviewing several witnesses, including the claimant's line manager. Those interviews were recorded and took place less than one year ago. Potential witnesses can refresh their memories from the grievance notes taken and that will also include the Senior Director of Human Resources-Europe and Africa.

43. I also take into account whether there was any fault on the part of the respondent that might have caused or contributed to the delay, and I have come to the conclusion that the respondent's conduct of these proceedings could not be faulted.
44. What about the prejudice to the respondent? The prejudice to the respondent were I to allow the claim to proceed, is fairly limited in my view. The respondent has already set out its case in the response; has the necessary evidence to mount a defence to the claim; and it is likely to amend its response. For the claimant, I acknowledge that to strike out her claim would be the end of her case against the respondent. From my reading of the grievance outcome, it seems that she could derive some support from its findings as it was found that there had been unconscious sex discrimination. On the face of it, the claimant would be deprived of presenting a meritorious claim. I have come to the conclusion that the prejudice to her outweighs the prejudice to the respondent.
45. This exercise is a balancing one. Exercising my discretion on just and equitable grounds in favour of a claimant, is the exception rather than the rule, Robertson v Bexley Community Centre. I have, however, come down on the side of the claimant and will extend time on just and equitable grounds. She will be allowed to pursue her direct sex discrimination claim to a final hearing.

.....
Employment Judge Bedeau
2 April 2023

.....
Sent to the parties on: 8 April 2023

.....
T Cadman

.....
For the Secretary to the Tribunals