



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Catherine Mathurin

Central Surrey Health Limited

Heard at: Reading by CVP

On: 10 November 2023

Before: Employment Judge Anderson

Appearances

For the Claimant: In person

For the Respondent: G Price (counsel)

JUDGMENT

1. The claimant's claims of unfair dismissal and protected disclosure (whistleblowing) detriment were not filed in time and the claimant was not able to show that it was not reasonably practicable for the claim to have been presented in time, in accordance with s111(2)(b) Employment Rights Act 1996.
2. The claimant's claims of disability, race and age discrimination (direct, harassment and victimisation) were not presented in time. A decision on whether it would be just and equitable to extend time for the filing of the claim in accordance with s123(1)(b) Equality Act 2010 has been deferred until the final hearing.

REASONS

The Hearing

1. This case came before me today to consider whether some or any of the claim had been brought in time. At a hearing on 14 September 2023 I ordered the parties to file a short bundle of documents relevant to the matter of time. The parties filed a joint bundle of 461 pages plus an additional bundle of 5 pages. The claimant filed a witness statement running to 63 pages. The respondent filed a skeleton argument. The claimant gave evidence on oath. I gave judgment orally after hearing the evidence. That judgment is set out below. I noted when writing the judgment up for promulgation that I had referred to the date of 26 February 2022 as the last in time filing date in the judgment, where as it is the date before which any

acts or omission are out of time. I have corrected that, but it does not affect the outcome.

2. Both parties made submissions. I have included those submissions within the body of the decision. I have included in this written judgment a short chronology of relevant dates and findings of fact which I did not include in the oral judgment, as well as the relevant paragraphs of the statutes.
3. In his skeleton argument Mr Price set out what he understood to be the last act complained of in relation to each head of claim. The claimant did not raise with me any argument about those dates, and I accept that they are correct.

Relevant findings of fact

4. The claimant has previously brought a claim in the employment tribunal and judgment was given in September 2019.
5. On 10 May 2021 the claimant told her GP that she had contacted two legal advisors and approached two trade unions for legal advice about work related problems.
6. The claimant suffered a number of bereavements during April 2020 and April 2022 including the loss of a work colleague, two neighbours and a friend of her son.
7. The claimant contacted her GP on 10 May 2022, and it is noted on the medical records that she had a diagnosis of mixed anxiety and depression.
8. The same is noted for the period 25 May 2022 to 6 July 2022, though most of that entry has been redacted by the claimant.

Chronology

9.

08.09.2021	The claimant commenced early conciliation
20.10.2021	Early conciliation ended and a certificate was issued
28.01.2022	The claimant was dismissed
16.03.2022	The claimant commenced a second round of conciliation via ACAS
26.04.2022	Conciliation ended and a certificate was issued
25.05.2022	The claimant filed her claim in the employment tribunal.

Law

10 Employment Rights Act 1996

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.*
- (2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).*

...

11 Equality Act 2010

123 Time limits

- (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*
 - (a) the period of 3 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.*
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of—*
 - (a) the period of 6 months starting with the date of the act to which the proceedings relate, or*
 - (b) such other period as the employment tribunal thinks just and equitable.*
- (3) For the purposes of this section—*
 - (a) conduct extending over a period is to be treated as done at the end of the period;*
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.*

...

Decision

- 12 Mr Price, for the respondent, said that the respondent accepts that the claimant's claim for unpaid wages, including holiday pay, on the evidence given by the claimant today, is in time. I have not considered that matter further.
- 13 The claimant, in her oral evidence and submissions gave reasons why the claim had been filed late. She made no submissions in oral or written evidence that the claim was in time, other than in relation to unfair dismissal where she said that the appeal decision on her dismissal was the relevant date.
- 14 It is the respondent's position that acts or omissions that occurred before 26 February 2022 are out of time, the claim having been filed on 25 May 2022 and there being no extension to time because of the second conciliation. Despite my having specifically ordered the respondent to file the skeleton argument with the claimant a week before this hearing so that she could have time to consider its arguments and what her response to those arguments might be, the claimant did not engage with any arguments about the filing dates, or the dates of the last act relied upon under any particular head of claim. She said she did not understand the point about the February date and that she had not read the cases that counsel had referred to.

- 15 The claimant commenced ACAS early conciliation on 8 September 2021. It ended on 20 October 2021. She started a second conciliation on 16 March 2022 which concluded on 26 April 2022. The claimant filed her claim on 25 May 2022. The respondent relied on the case of *HMRC v Garau UKEAT/0348/16/LA*, as authority that the second conciliation does not result in any further extensions for the filing date, and drew my attention to paragraphs 13 and 14 of the judgment in which the EAT refers to the case of *Compass Group UK & Ireland Ltd v Morgan [2017] ICR 73* where it was held that it did not matter, for the purposes of having complied with the conciliation rules, if the early conciliation certificate had preceded some of the events relied on in a claim. I accept the respondent's submissions on this matter and accept that the second conciliation period does not extend the time for filing the claim.
- 16 From this and relying on the dates of the last acts under each head of claim as set out in the respondent's skeleton argument I find that with the exception of any claim of an unlawful deduction from wages, including a holiday pay claim, all of the claimant's claim is out of time. The claimant said in her submission that the final act in relation to the unfair dismissal claim was the refusal of her appeal against dismissal in March 2022. I do not accept this. An unfair dismissal claim must be brought within three months of the date of dismissal and that filing period is not, except in exceptional circumstances which do not apply here, extended by the fact that an appeal against dismissal is ongoing [*J Sainsbury Ltd v Savage 1981 ICR 1, CA*].
- 17 Having decided that much of the claim is out of time I need to go on and decide, if appropriate at this stage of the proceedings, whether time for filing should be extended. For the claims that arise under the Employment Rights Act 1996, s111 of that Act applies in that I have to determine whether it was reasonably practicable for the claim to be filed in time and if not, if it was then filed within such further period as the tribunal considers reasonably practicable. The claims that fall to be decided under this section are unfair dismissal and whistleblowing.
- 18 The claimant did not make the point, but Mr Price raised the issue of a potential continuing act in the matter of whistleblowing. He said that the last alleged detriment (dismissal) was not part of a continuing course of conduct as the previous alleged detriment took place over a year earlier and was not connected to a redundancy procedure and dismissal. The claimant did not address this submission. I agree that, on the evidence before me, the later alleged detriment (dismissal) appears to be unrelated to the earlier alleged detriments as they are separated by a period of a year. This matter is not relevant thought to the decision I have made below on whether it was reasonably practicable to file the claim in time, as even relying on the latest act (the dismissal), the claim would be out of time.
- 19 It is the claimant's case that she could not file on time because she was unwell, was unable to obtain legal advice and had suffered a number of bereavements which affected her ability to progress the claim. The claimant produced medical records which show that she reported anxiety to her GP

on 10 January 2022 and again from 25 May 2022 and she sought counselling. It is not clear that she received counselling. There is also evidence in the bundle and heard at the hearing today, that the claimant has previously instructed her union on an employment tribunal claim, as well as on an appeal against the decision in that case, had contact with ACAS in September 2021, sought assistance from the Royal Courts legal advice service, and spoke to at least two solicitors and trade unions before issuing her claim in May 2022. There is evidence that she was actively pursuing appeals against her dismissal, and a grievance she had raised, in the early part of 2022, and that she was engaging in the redundancy process from when it was instigated in September 2021.

- 20 The claimant's argument is that she was overwhelmed, and she did not understand the tribunal process. While I appreciate and accept that the claimant was going through a difficult time in both her personal and professional life in January to April 2022, I do not accept that the severity of that was such that she could not have filed a claim on time. Firstly, she did file a claim in May 2022, when, according to the medical records she was suffering from anxiety. Furthermore, the tribunal receives claims from many litigants in person, and many of those have had less legal advice, contact with solicitors or unions than the claimant has demonstrably had. I do not accept that she was either unaware of the time limits involved, unable to understand the process, or that she did not have the ability to obtain the necessary information about filing from, for example, the ACAS website.
- 21 I find that it was reasonably practicable for the claimant to have filed her claims of whistleblowing and unfair dismissal within time. As she did not, the claims are out of time and the tribunal has no jurisdiction to hear them.
- 22 The remaining claims are claims of discrimination. Where a discrimination claim is out of time the tribunal has the power to extend time for the filing of such a claim where it decides that it is just and equitable to do so. One of the factors that the tribunal will look at in reaching such a decision is whether the acts complained of are part of a continuing course of conduct. Where the claim is out of time anyway, i.e. where even the last act in the alleged continuing course is out of time, whether there was a course of conduct will be relevant to a consideration of the balance of prejudice in extending time. Where a course of conduct is alleged, evidence on the alleged acts will need to be heard by a tribunal before a decision can be made, and for this reason such decisions are often made at the final hearing. Mr Price for the respondent accepted that any consideration by the tribunal about whether the acts of direct discrimination claimed constituted a continuing course of conduct would require such evidence, and therefore may be better decided at the final hearing.
- 23 The last act of direct discrimination relied upon concerns the conduct of the redundancy process which may have taken place as late as December 2021, leading to a potential filing date of no later than 30 March 2022. The claim was filed on 25 May 2022. I agree that this is a matter that is best dealt with at the final hearing where the tribunal can hear evidence on all of the allegations which may constitute a course of conduct. Consequently, I

have not made a decision on whether the direct discrimination claim is in time.

- 24 The respondent's position on the victimisation claim is that the amendment was filed substantially out of time (a year late) and the claimant has failed to provide any good explanation of why it could not have been filed earlier. I allowed the claimant's application to amend her claim to include victimisation in September 2023 and noted in my decision that the victimisation claim concerns events that the respondent will need to concern itself with in any event in defending other heads of claim. That is still the case, as the direct discrimination claim relies on the events of 5 January 2022 to some extent, as does the victimisation claim. Where I have made no decision on whether to extend time for the direct discrimination claim, in my view it would not be sensible to make such a decision on victimisation, where some of the same evidence is relied upon. While I accept the respondent's point about the delay being particularly lengthy in respect of this head of claim, I have decided that the decision on whether it would be just and equitable to extend time for the filing of the victimisation claim is one for the tribunal at the final hearing.
- 25 On harassment, Mr Price asked me to find that it was not just and equitable to extend time in that the allegations refer to what are now events that took place a number of years ago. I note that the earliest act complained of was in February 2020 and the most recent was in September 2021, so ranging from three and a half, to two years ago. He said that the nature of the claim, harassment, was one which turned on nuances of what people said and did at the time, and he noted that to ascertain nuances from such historic events was implausible. He noted that the claimant herself had stated in cross examination that she could not remember what she had said in February 2020. Mr Price said that in his view the balance of prejudice was firmly against the respondent in relation to a historical harassment claim and such matters as this were why the tribunal had short filing periods.
- 26 I have considered this argument and acknowledge the difficulties that the respondent will face, however, many of the acts relied upon as harassment are also acts relied upon in relation to direct discrimination. I have not made a decision on whether to extend time on direct discrimination where, on the same facts as relied upon in the harassment claim, the respondent is likely to need to address the motivations of the relevant employees. To do so in respect of the harassment claim would, in my view, be unhelpful to the tribunal at the final hearing. I have therefore made no decision on whether the harassment claim is in time.

Employment Judge Anderson

Date: 13 November 2023

Sent to the parties on: 9/1/2024

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For the Tribunal Office