



EMPLOYMENT TRIBUNALS

Claimant: Miss P Kelly
Respondent: P&O North Sea Ferries Limited
On: 13 September 2022
Before: Employment Judge McAvoy Newns
Heard At: Leeds Employment Tribunal (via CVP)

Appearances:

For the Claimant: Mr A Pickett, Counsel
For the Respondent: Ms A Greenley, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal has been presented outside of the normal time limits. As it was reasonably practicable for her to present this claim within the normal time limits, I have not exercised my discretion to consider it out of time. This claim is therefore dismissed.
2. The Claimant's claim for disability discrimination has been presented outside of the normal time limits. As it is not just and equitable to do so, I have not exercised my discretion to allow it to be considered out of time. This claim is therefore dismissed.

WRITTEN REASONS

Background

1. Following the Respondent's application dated 16 August 2022, and as directed by Employment Judge Maidment on 17 August 2022, the purpose of today's hearing is to consider whether the Claimant's claims had been submitted

outside of the normal time limits and, if they had, whether I should exercise my discretion to allow them to be considered outside of those time limits.

2. Upon reading into the case on 12 September 2022, I noted that the hearing had been listed for 90 minutes and it was due to be conducted over telephone. As I needed to hear evidence from the Claimant, and it is not preferable to do that over telephone, I instructed that the hearing be converted into a CVP hearing. The parties did not object. Both parties attended on time and agreed to the hearing duration being extended beyond 90 minutes, if required.
3. Prior to today, the Claimant was a litigant in person. There were no solicitors on the Tribunal's record and, to my knowledge, that remains the case as of the date of this Reserved Judgment. However, the Claimant attended today's hearing with Counsel representing her. I enquired with such Counsel at the outset of the hearing whether the Claimant was clear about the purpose of it. It transpired that such Counsel was not himself aware of such purpose, believing that the hearing had been listed for case management purposes solely. As a result, I adjourned the hearing for 15 minutes in order for such Counsel to take instructions. Following this adjournment, the Claimant's Counsel confirmed that they were content to proceed and no application for a postponement was made. I enquired as to whether a further adjournment was needed and was informed it was not at that point but may be needed later. I highlighted the difficulties that the Claimant's Counsel would have in seeking to take instructions from the Claimant herself when she was giving evidence. The Claimant's Counsel had instructing solicitors who he could take instructions from. The Claimant was content to proceed with the hearing.

Identity of the Respondent

4. With the parties' consent, the name of the Respondent is substituted to P&O North Sea Ferries Limited.

Evidence

5. I heard evidence from the Claimant. With the parties' consent, as no witness statement had been prepared, the Claimant's Counsel asked the Claimant questions as evidence in chief and the Respondent then cross examined her. I had a small number of questions which I asked the Claimant after she had been cross examined. I also had a bundle of documents running to 60 pages.

Summary of claims

6. Following her termination date on 17 November 2021, the Claimant brought a number of dismissal related claims. She alleged that her dismissal was unfair and an act of disability discrimination.
7. As the Respondent has acknowledged, the basis of the Claimant's discrimination claims are unclear. There are no discrimination claims, apparent from her claim form, post-dating the Claimant's dismissal. No application for permission to amend her claim to include such claims has been made.

8. Whilst the Claimant had ticked the 'other payments' box on her claim form, no particulars of such claim were provided, even following the Respondent's request, and I was not addressed regarding such claims today. I have therefore proceeded on the basis that there is no such 'other payments' claim to consider time limits regarding. As I expect any outstanding payments would be due at the end of November 2021, my findings in relation to time limits set out below would be applicable to any such breach of contract and/or unauthorised deductions from wages claim in any event.

Findings of facts

Time limits

9. The final act relied upon by the Claimant for her claims occurred on 17 November 2021, when her employment with the Respondent terminated. In her claim form the Claimant stated that her termination date was 1 December 2021. However, in evidence today, she acknowledged that this was incorrect.
10. The Claimant attended an appeal hearing on 21 December 2021. According to the notes, this lasted around 35 minutes [50]. She attended an appeal outcome hearing on 1 February 2022. According to the notes, this lasted around 25 minutes [56].
11. The Claimant initiated the ACAS early conciliation process (the "**ACAS process**") on 17 March 2022. She was supposed to do so by 16 February 2022 in order to benefit from the extension of time provisions. It was acknowledged, therefore, that she had started the ACAS process outside of the Tribunal's time limits.
12. The ACAS process ended on 27 April 2022 and the certificate was received by the Claimant on the following date.
13. The claim was submitted initially on 28 May 2022. However, there was an error as Mr Andy Faichney had been named as the respondent rather than the Respondent itself. This caused the claim to be rejected.
14. On 10 June 2022, the Claimant sought to correct this error and, following Employment Judge Maidment's order dated 20 June 2022, the claim was treated as having been received on 10 June 2022.
15. As the Claimant did not benefit from the extension of time provisions because she did not start the ACAS process by 16 February 2022, the Claimant's claim was received almost four months late. Rather than it being received by 16 February 2022, it was received on 10 June 2022.

Reasons for late submission of claim

16. The Claimant confirmed in evidence that her reasons for submitting her claims late were as follows:

1. The dismissal appeal process was ongoing until 1 February 2022. She believed it was appropriate to exhaust that process before considering litigation in the Tribunal. This was particularly the case as she believed the appeal manager was planning to redeploy her. She said that she planned to speak to a solicitor when the internal process had been completed. Although UNITE were supporting her, they did not advise her to start the Tribunal proceedings before the appeal process had been completed. However, the Claimant did not specifically tell UNITE that she planned on bringing a claim. Furthermore, she did not ask UNITE for their help with bringing a claim (including for advice in relation to time limits); she just asked for their help with getting her job back;
 2. Her lack of immediate awareness of the fact that she had been dismissed. However, the Claimant's evidence regarding this point was confused. She initially said that she had not realised she had been dismissed, she had not appreciated the seriousness of the meeting that she had attended on 17 November 2021. She thought she was still liaising with the Respondent regarding an internal redeployment. This created the impression that it was some considerable time after 17 November 2021 before she learned of her dismissal. However, she later accepted that she was definitively aware, as of 18 November 2021, just one day later, that her employment had been terminated. She also conceded that her memory of these events was 'very bad'; and
 3. The Claimant's medical condition. She has Crohn's disease and had recently been diagnosed with Bile Acid Malabsorption. Her evidence was that this caused her to need to use the toilet between 10-40 times per day. This led to fatigue, exhaustion and depression related symptoms. She was prescribed fluoxetine and amitriptyline. She said that she could not see a path forward. She was unable to leave the house due to accidents happening. In November 2021, December 2021 and January 2022 the Claimant explained that she was going to the toilet around 40 times per day with around five seconds' notice. She was also being treated for a hernia. No medical evidence supporting this oral evidence was provided however this oral evidence was not specifically challenged by the Respondent in cross examination. I have noted also that the Respondent conceded that the Claimant met the definition of a disabled person when responding to the Claimant's claim. No oral evidence of the impact of the Claimant's health between February and June 2022 was provided.
17. The Claimant explained that, immediately after the appeal hearing on 1 February 2022, she spoke with UNITE, who had accompanied her to that hearing remotely. She confirmed that she did not ask UNITE for advice regarding what she should do next, the appeal having been refused. Specifically she did not ask UNITE for advice about lodging a claim in the Tribunal and the time limits associated with the same. She did not seek advice about the ACAS Process.

18. Soon after the above, the Claimant spoke with the CAB and also a non-legal former colleague who had been made redundant previously. She was advised to speak to ACAS, which she did. She confirmed that had found ACAS' contact number by using Google. The Claimant did not recall the date that she initially contacted ACAS however agreed that the ACAS early conciliation process was not started until 17 March 2022. She believed she had contacted ACAS on or around 11 March 2022 as she received an automated response from them on this date. She explained that after she had approached ACAS she "let them do their thing".
19. The Claimant acknowledged that she received the certificate from ACAS on 28 April 2022. It was dated 27 April 2022. She then spoke to a friend and explored whether she had legal expenses insurance. She explained that after she had approached the insurance company she "let them do their thing". There were delays but she did not regularly or proactively chase them. The Claimant did not remember exactly when she spoke to people from the insurance company or who she spoke with.
20. The Claimant lodged her claim as a litigant in person on 28 May 2022. For the reasons explained earlier, it has been treated as having been received on 10 June 2022. It is a short claim, which could not have taken too long to prepare and submit, in respect to which the discrimination claims have not been clearly particularised. The Claimant could not remember whether she had received legal advice by this point.
21. The Claimant confirmed that she has been receiving support from solicitors, via her insurance company, during these proceedings. She sent them correspondence concerning this hearing and were or ought to have been aware of the purpose of today's hearing. Notwithstanding this, no documents relevant to the time limit issue, including medical evidence and the Claimant's contact with ACAS, the CAB or her insurance company, were provided. The Claimant's Counsel was unaware, at the start of the hearing, of its purpose, believing that the hearing had been listed to deal with case management only.

The Law

Unfair dismissal

22. Section 111(2) Employment Rights Act 1996 ("ERA") states that in respect of a complaint for unfair dismissal, the 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".*

Discrimination

23. Section 123(1)(a) of the Equality Act 2010 ("EA"):

"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".

Early conciliation

24. Section 207B(4) of the ERA states:

"If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period".

25. Section 140B(4) of the EA states:

"If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period".

Not reasonably practicable test

26. Following *Porter v Bandbridge 1978 ICR 943*, the Claimant has to satisfy the Tribunal not only that she did not know of her rights throughout the period preceding the complaint and there was no reason why she should know, but also that there was no reason why she should make enquiries. In this regard, the burden of proof is on the Claimant.

27. Following *Palmer v Southend-on-Sea Borough Council 1984 ICR 372*, the term 'reasonably practicable' means something like 'reasonably feasible'.

28. As Lady Smith in *Asda Stores Ltd v Kauser EAT 0165/07* explained: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.

29. In *Marks & Spencer v Williams-Ryan [2005] ICR 1293* at paragraph 21: "it has repeatedly been held that, when deciding whether it was reasonably practicable for an employee to make a complaint to an Employment Tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and the time limit for making such a complaint...It is necessary to consider not merely what the employee knew, but

what knowledge the employee should have had had he or she acted reasonably in all the circumstances."

30. In *Schultz v Esso Petroleum Co Ltd* 1999 ICR 1202, the Court of Appeal accepted that illness may justify the late submission of claims. The Court emphasised that the test is one of practicability — what could be done — not whether it was reasonable not to do what could be done. In the Court's view, the tribunal had failed to have regard to all the surrounding circumstances, which included the fact that S had been trying to avoid litigation by pursuing an appeal against his dismissal. Although it was necessary to consider what could have been done during the whole of the limitation period, attention should be focused on the closing stages rather than the earlier ones. In this case S's disabling illness took place at the end of the period in question and it was not reasonably practicable for him to have made the claim in time.
31. In *Cygnets Behavioural Health Ltd v Britton* 2022 EAT 108, the EAT disagreed with the employment tribunal's conclusion that it was not reasonably practicable for B to have presented his unfair dismissal claim in time because of depression and dyslexia, combined with ignorance of the time limit. He had limited mental and physical energy and his primary focus during the relevant time was on a regulatory investigation into his fitness to practise as a physiotherapist. The EAT observed that, notwithstanding B's conditions, he had been able to do a great deal during the period between his dismissal and the expiry of the time limit, including appealing against his dismissal, contacting Acas about his potential claims, working as a locum and then in a temporary post, moving house and engaging in great detail with the regulatory investigation. While he had been very busy, the EAT considered that it would be 'the work of a moment' to ask somebody about unfair dismissal time limits or to type a short sentence into a search engine. There was no rational explanation or justification in the tribunal's judgment as to why B's conditions prevented him from finding out about the time limit.

Just and equitable test

32. The onus is on the Claimant to convince the Tribunal that it is just and equitable – as confirmed in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576. In this case, the Court of Appeal held: *'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 the discretion is the exception rather than the rule.'*
33. Following *British Coal Corporation v Keeble* [1997] IRLR 336, Tribunal's discretion to extend time under the 'just and equitable' requires consideration of the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

1. The length of and reasons for the delay;

2. The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time;
 3. The extent to which the party sued had cooperated with any requests for information;
 4. The extent to which the claimant acted promptly and reasonably once she knew of her potential cause of action; and
 5. The steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action.
34. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5*, the Court of Appeal revisited the *Keeble* factors. It confirmed that it is not healthy for the *Keeble* factors to be taken as the starting point for Tribunals' approaches to 'just and equitable' extensions. Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. The best approach for a Tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular the length of, and the reasons for, the delay.
35. In *Robinson v Post Office 2000 IRLR 804, EAT*, it was confirmed that there is no general principle that it will be just and equitable to extend the time limit where the claimant was seeking redress through the employer's grievance procedure before embarking on legal proceedings. The general principle is that a delay caused by a claimant awaiting completion of an internal procedure may justify the extension of the time limit but it is only one factor to be considered in any particular case.

Submissions

36. Both parties gave oral submissions.
37. These submissions are not set out in detail in these reasons but both parties can be assured that I have considered all the points made, even where no specific reference is made to them.
38. No specific legal authorities were brought to my attention by either party.
39. The Claimant's Counsel asked me to focus on the extent of the Claimant's ill health at the relevant time as well as the fact that the Claimant's priority was to exhaust the internal procedures.
40. The Respondent's Counsel submitted that a respondent should not be required to show that, e.g., a witness may no longer be available in order to assert that it is not just and equitable to extend time. She submitted that whilst prejudice was an important factor, it should be balanced against other factors including, in particular, the length of and reasons for the delay.

Conclusions

Unfair dismissal

41. It was reasonably practicable for the unfair dismissal claim to be presented by 16 February 2022. This is because:
1. At the time, the Claimant had access to support and advice from a reputable trade union, UNITE. She could have asked UNITE for support with lodging her claim or, at the very least, advice about when she ought to do so. She could have asked UNITE for advice on the ACAS Process and the effect starting this process by 16 February 2022 would have had on time limits;
 2. The Claimant confirmed that she had found ACAS' details through Google. She learned about ACAS through the CAB. The steps undertaken to discover this were done after 16 February 2022, however, there is no justifiable reason why the Claimant did not take these steps before, having been clear on 18 November 2021 that her employment with the Respondent had been terminated; and
 3. Between her dismissal and 16 February 2022, she had managed to liaise with the Respondent in order to request an appeal against her dismissal and seek redeployment. She had engaged in the appeal process by attending meetings on 21 December 2022 and 1 February 2022.
42. Had the Claimant made the enquiries set out at 37(1) and (2) above, which I find it is reasonable for the Claimant to have done, the Claimant is likely to have learned about the need to lodge her claim or start the ACAS Process prior to 16 February 2022.
43. I have taken into consideration the fact that the Claimant's oral evidence was that she was unwell with significant medical conditions between this time. I have taken into consideration what the Claimant has said was the effect of such conditions, as stated earlier. It is relevant also that the Respondent has conceded that one of these conditions met the statutory test for a disability and did not challenge the Claimant's oral evidence about the impact of her disability.
44. However, whilst I do not doubt that the Claimant suffered from these conditions, I have seen no medical evidence persuading me that the impact of these medical conditions prevented the Claimant from lodging her claim by 16 February 2022. This is important as the burden of proof is on the Claimant to persuade me that time ought to be extended and, as the Claimant had legal representation supporting her in the background at the time of this hearing, there is no justifiable reason why such evidence was not adduced for this hearing, should it have supported what the Claimant said in oral evidence.
45. Furthermore, relevant to this is the following:

1. The Claimant's claim contains little detail, is unparticularised and cannot have taken much time to prepare. Certainly it cannot have taken her longer than the hour she spent attending appeal meetings, mentioned earlier. I see no reason why a claim of similar length and lack of particularisation could not have been lodged prior to 16 February 2022; and
 2. Notwithstanding the oral evidence that the Claimant gave about the impact of her medical conditions, she was still able to engage in the appeal process during this time, as explained above.
46. I have also taken into consideration the fact that the Claimant was awaiting the outcome of her appeal before lodging her claim. Although the case law supports the assertion that this is a factor to consider when deciding whether it was reasonably practicable to submit a claim in time, it is not determinative. There was nothing stopping the Claimant from lodging her claim, or at least starting the ACAS Process, whilst the appeal process was underway. She had support from UNITE who could have advised her, had she asked, that this was possible and indeed advisable particularly when an appeal process has gone on for several months.
47. However, if I had found that it was not reasonably practicable for the Claimant to present her claim until she knew the outcome of her appeal, I would have concluded that she failed to present her claim within a reasonable period of time thereafter. This is because the Claimant knew the outcome of her appeal by 1 February 2022. She lodged her claim on 28 May 2022 which was deemed to have been received on 10 June 2022. This was over four months later. During this time she had spoken to the CAB and had liaised with ACAS.
48. I have also considered this second limb of the legal test, in respect to the impact of the Claimant's health at the time, in conjunction with the *Schultz* decision mentioned earlier. If the Claimant's health did prevent her from lodging her claim or starting her ACAS Process by 16 February 2022, I would have concluded that she failed to do so within a reasonable period of time thereafter. The Claimant's own evidence regarding this was that her medical condition affected her between November 2021 and January 2022. She gave no evidence of the specific impact between February and June 2022. As stated earlier, there was no medical evidence of this being provided, despite it being reasonable to expect the Claimant's representative to have sought this in advance of today's hearing.
49. As the unfair dismissal claim has been presented out of time and I have not exercised my discretion to allow it to be considered out of time, it is dismissed.

Discrimination

50. Considering the factors set out in *Keeble* as a guide (as opposed to a checklist) and bearing in mind the recent Court of Appeal guidance from *Adedeji*, it is not

just and equitable to extend time to consider the Claimant's discrimination claims.

51. I agree with the Respondent's submissions that, whilst consideration of the prejudice which each party would suffer as a result of granting or refusing an extension is an important factor, it is not the only factor and in this case, that factor needs to be considered against the following:

1. The Claimant does not have a good reason for delaying the lodging of her claim such that it was not deemed to have been received until 10 June 2022, which is almost four months late. She had trade union support throughout, she was able to engage in an internal appeal process involving two meetings, that appeal process was concluded by 1 February 2022 and she had access to advice from the CAB and ACAS. She learned about ACAS through the CAB and obtained their contact number using Google.
2. Linked to (1) above, the Claimant has not been sufficiently engaged in pursuing these proceedings. She had access to support from UNITE but did not ask them for advice about lodging a claim in the Tribunal or the time limits applicable to the same. At various points she contacted various people to help her and "let them do their thing", without proactively chasing them or taking ownership of the matters. She started the ACAS Process outside of the time limits. She lodged her claim more than one month after receiving her ACAS certificate. When lodging her claim initially, she did so incorrectly and with little particularisation. She had to apply for one of the errors to be rectified.
3. Whilst my focus is on the Claimant's conduct prior to 10 June 2022, it is relevant to note that, as of today's hearing, the basis of the discrimination claim remains wholly unclear. This is notwithstanding the fact that the Respondent highlighted, in their ET3 response dated 13 July 2022, that the claim lacked particularisation and it was unable to properly respond to it. Despite having legal representation supporting her in the background, and Counsel representing her today, no documentary evidence relevant to any of the assertions made by the Claimant have been provided (which is considered in more detail below as this is relevant to the Claimant's evidence regarding the impact of her health).
4. The fact that the evidence adduced by both parties is likely to be less cogent now. In this regard the Claimant said, on several occasions, that her memory of certain events relevant to her case was "very bad". There are also potential issues regarding the Respondent's ability to call relevant witness evidence, as considered later.
5. Tribunal time limits are expressed in mandatory terms; they are short for a good reason (which includes the preservation of the integrity of evidence) and the burden of proof is on the Claimant to persuade the Tribunal that time should be extended. The case law states that there

should be no presumption that time will be extended and indeed the reverse is true.

52. I have taken into consideration the Claimant's ill health during this time but I am not persuaded that this provides a good reason for the four-month delay. As stated earlier, whilst I do not doubt that the Claimant suffers from the medical conditions that she refers to, no medical evidence of the impact of such conditions have been provided to me, despite the fact that the Claimant's legal team have or ought to have been aware of the purpose of this hearing for several weeks at least. Furthermore, the oral evidence of the Claimant concerned the impact of her medical conditions between November 2021 and January 2022. No oral evidence was given about the symptoms persisting between February and June 2022.
53. I have taken into consideration the fact that this decision will result in the Claimant's claims for discrimination being dismissed and consequently this will prejudice the Claimant significantly. However, if they are allowed to proceed, the Respondent will also suffer prejudice, in particular as follows:
1. The Claimant said that she believed that the Appeal Officer had retired and therefore was no longer employed by the Respondent. Consequently, from the Respondent's perspective, it is possible that one of its potentially most significant witnesses may not be able to attend the final hearing to give evidence about the Respondent's decision making; and
 2. The Claimant was dismissed more than 10 months ago. Before this case is set for a final hearing, a case management hearing will be needed. The claim still needs to be clarified. Case management orders need to be complied with. If they are not complied with, further case management hearings may be needed. Given the Claimant's approach to the proceedings thus far, I do not feel confident that they will be complied with, even with the benefit of legal representation. It could feasibly be mid to late 2023 before the case is heard and finally determined. This would be around two years after the Claimant's dismissal.
54. Whilst I recognise the significance of the balance of prejudice to the just and equitable test, it is not the only factor that I am required to consider. As confirmed recently by the Court of Appeal in *Adedeji*, my discretion is a broad one. I am required to be mindful of the fact that the Claimant must persuade me that it is just and equitable for me to extend the time limits. For the reasons outlined above, she has not done so and, therefore, her discrimination claims are dismissed.

**Employment Judge McAvoy News
28 September 2022**