



EMPLOYMENT TRIBUNALS

Claimant

Miss N Dhami

v

Respondent

Tesco Stores Limited

ORDER AT PRELIMINARY HEARING

Heard at: Southampton

On: 10/8/2017

Before: Employment Judge Wright

Appearances

For the Claimant: Mr T Kirk (Counsel)

For the Respondent: Mr J Newman (Counsel)

JUDGMENT

If the claimant's second ET1 was presented out of time (there is no such finding that it was) it is just and equitable to extend the time limit in accordance with s.123 (1)(b) Equality Act 2010.

REASONS

1. Pursuant to an Order of EJ Pirani dated 5/4/2017 this claim was listed to deal with three preliminary matters:
 - i Whether the claim or any part of it should be dismissed because the claimant is not entitled to bring it if the statutory time limit has expired and if not, is it just and equitable to extend time.
 - ii Whether to strike out the claim or any part of it because it has no reasonable prospect of success.
 - iii Whether to order the claimant to pay a deposit (not exceeding £1,000) as a condition of continuing to advance any specific allegation or argument in the claim if the Tribunal considers that allegation or argument has little prospect of success.
2. It is the claimant's case she is disabled and her condition is a mental impairment, namely depression.

3. Although the claimant represented herself at the previous hearing, she is now represented by Counsel.
4. At the commencement of the hearing, the Tribunal was informed the claimant's counsel had arrived at 9am. The claimant's companion informed him she was not in the building and she had been ill (vomiting). Counsel explained the nature of the hearing to the claimant, but it was his opinion that in view of her condition, she would not be well enough to give evidence. He had explained the various options, including asking for a postponement. He thought it possible to proceed without her giving evidence and a postponement would add to her costs. It was thought the reason for her illness was food poisoning, but it was also conceded that her vomiting could be caused by anxiety in respect of the hearing. As such, the claimant wished to proceed with the hearing.
5. The hearing proceeded. The claimant did manage to attend a short part of the hearing, towards the end of her Counsel's summing up on the out-of-time point.
6. The claimant was made aware that if her illness was not caused by food poisoning and was caused by anxiety, that she would need to address this in advance of the final hearing, at least as far as her attending to give her evidence is concerned.
7. In considering the out-of-time point, the chronology is as follows:
 - 28/3/2015 claimant's start date;
 - 27/1/2016 claimant unfit for work;
 - 7/3/2016 claimant invited to meeting on 15/3/2016;
 - 14/3/2016 claimant informs the respondent she is unable to attend the meeting;
 - 16/3/2016 letter from respondent to claimant confirming the claimant will be on a lifestyle break (this is a period of unpaid leave) from 14/3/2016 to 6/6/2016; and
 - 25/3/2016 the lifestyle break actually started, the start date having been postponed as the claimant remained certified as unfit for work.
8. It would seem that part of the chronology is agreed. Matters then become more complex, with the respondent conceding the dates are confusing or not clear and admitted it does not know what date the claimant's employment (which could also be the last act of alleged discrimination) terminated. Following the lifestyle break, the claimant commenced a 'career break'. This break has the effect of terminating employment.
9. There is a letter from Emily Grabowska (People Manager) dated 16/3/2016 which gives period of the lifestyle break dates as 14/3/2016 to 6/6/2016.
10. Ms Grabowska however says (Witness Statement paragraph 21) the career break commenced on 15/6/2016 and she remembers sending a letter confirming that date, but she cannot now produce a copy of that letter.

11. An extract (page 16) from the respondent's Attendance Management System (annexed to Ms Grabowska's witness statement) which is undated, refers to 'Career Break' and this document has a handwritten note which reads

'wk 16 15/6/2016'

12. The date at the bottom of the subsequent page (page 17) is 15/6/2016. Under the heading 'special instruction' it says:

'taking career break as from 06.06.16, minus al contracted hrs tesco wks 15, 16 and 17'

13. It could be, that the 15/6/2016 was the date this form was printed off and authorised by means of a manuscript signature and the 15/6/2016 is not the date of the career break; it is the date it was approved. That is not consistent however with page 17 saying the career break was to start on 6/6/2016.

14. Neither of those dates however is consistent with the date of leaving in the P45 (page 20), which gives a leaving date of 22/7/2016. It also refers to week number 16. The 16th week of the tax year in 2016/2017 was 20/7/2016 to 26/7/2016. The 22/7/2016 was the Friday of that week.

15. Acas early conciliation took place between 27/6/2016 and 27/7/2016 (pausing to note the claimant does not have the requisite period of service to claim unfair dismissal and her claim is for unlawful discrimination under the Equality Act 2010 and for unlawful deduction from wages).

16. The claimant says she received the P45 on 3/8/2016 in her 'statement of separate incidents as requested' dated 3/5/2017, following the Preliminary Hearing on 5/4/2017.

17. On 23/8/2016 the claimant presented an ET1 (the original claim form). In that form, she ticked the box (5.1) to say her employment was continuing and she did not complete the date employment had ended. She did not tick the box to claim unfair dismissal and she left box 8.2 blank. She did however tick the box (9.1) to reflect the remedy she was seeking 'if claiming unfair dismissal, to get another job with the same employer or associated employer and compensation (re-engagement).'

18. The claimant says she had been advised by the CAB that her case could take a year.

19. On 23/8/2016 the claimant made an application for help with fees.

20. On 24/8/2016 letter was sent to her saying the application had been rejected and a notice to pay a fee was enclosed. The claimant says that this email went into her 'junk' mail and she did not see it. She was therefore unaware of the requirement to pay a fee. She was not unduly concerned not to have heard further to her claim form as she understood it would be a long process.

21. On 13/10/2016 the claimant received a notification of a rejected employment tribunal application due to the failure to pay the fee requested on 24/8/2016.
22. On 18/10/2016 the claimant wrote to the 'ETHelpwithfees' email address. She said she had misunderstood the information provided and asked if she could just now pay the issue fee.
23. The claimant says she was told by the Employment Tribunal to submit a second claim and she did this on 26/10/2016. It is not clear if the claimant then paid the fee or if remission from fees was granted, but it is the case the second claim was accepted.
24. In the second ET1 the claimant gave her dates of employment as 28/3/2015 to 7/7/2016 (box 5.1). She ticked the box to claim unfair dismissal. In box 8.2 she said 'Unknown if I am still employed'. She also ticked the box (9.1) to indicate she was claiming reinstatement, re-engagement and compensation. Reinstatement and re-engagement are only available as remedies if unfair dismissal is claimed.
25. In the ET3 (dated 29/11/2016) the respondent did not tick box 3.1 to state that it agreed with the dates of employment given by the claimant. It said in paragraph the claimant's career break commenced on 6/6/2016.
26. In the Case Management Summary following the hearing on 5/4/2017, it is stated the claimant said she was dismissed on 7/7/2016 (paragraph 5).
27. It therefore appears the claimant's employment could have terminated on the following dates:
 - 6/6/2016;
 - 15/6/2016;
 - 7/7/2016;
 - 22/7/2016; or
 - 3/8/2016.

The original ET1 dated 23/8/2016 post-dating all of these dates was rejected on 13/10/2016 for the failure to pay an issue fee

28. It is clear, following the judgment of the Supreme Court on 26/7/2017 that as the requirement to pay fees in respect of Employment Tribunal claims under the relevant Fees Order was unlawful ab initio and was quashed; the rejection of the original ET1 was incorrect and unlawful.
29. The afternoon prior to the hearing, the President of the Employment Tribunals England and Wales issued a Case Management Order. The President Ordered that any claim or application brought in reliance of the Supreme Court's decision, was to be stayed.
30. The claimant was informed that should she seek to progress the original ET1 or make any application in respect of it, the original ET1 would be stayed in accordance with the President's Order.

31. If however, the claimant wished to proceed with the first issue identified at the Preliminary Hearing on 5/4/2017, she could do so - i.e. to ask the Tribunal to determine whether or not the second ET1 was out-of-time. The fact that she presented the original ET1 was part of the chronology and could be referred to in seeking to persuade the Tribunal it is just and equitable to extend the time limit. When it was considered Mr Kirk was straying into perhaps attempting to resurrect the original ET1, he was reminded and again expressly told that if he made an application respect of the original ET1, the claim would be stayed. Mr Kirk confirmed that he was not seeking to do so and was only referring to the original ET1 in terms of the chronology and the fact that it had been presented in time.

Law

32. The Equality Act 2010 at section 123 provides:

(1) 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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Submissions

33. It is now the respondent's position the last act of discrimination was the 15/6/2016. The respondent accepted the claimant's second ET1 is not identical to the original

ET1. It was the respondent's case that there was no evidence why the claimant did not pay the issue fee in respect of the original ET1. It is the respondent's case there was a seven week delay when the claimant's application for help with fees was rejected on 24/8/2016 and the 13/10/2016 when her original claim was rejected. The claimant does refer to chaos in that period and refers to stress, being three months pregnant, struggling financially, caring for her two daughters, her mental health and her landlord threatening to possess her home, but her evidence is not fleshed out and there are not particulars.

34. The respondent submitted the time limits are strict and there is no presumption in favour of extending time. The burden is on the claimant and time should not be extended unless the claimant overcomes that burden. Extending time is an exercise of discretion and it is incumbent on the claimant to provide evidence to discharge that burden. There was no evidence in respect of the seven week delay or why the claimant did not pay the £250 fee at the start.
35. It was submitted the claimant had set out her case skeletally in her witness statement and it would be expected that she would orally expand upon that evidence at the hearing, although it the reasons why the claimant was not able to do so were accepted.
36. In short, the respondent submitted the second claim was 12 days out of time. The respondent was not clear about the effective date of termination and that was unfortunate and unsatisfactory, the date could be the 6/6/2016 or 15/6/2016 and in fairness to the claimant, the latter date had been taken. The claimant had not satisfied the burden placed upon her and as such, the claim was out-of-time and the Tribunal for those reasons was invited not to exercise its discretion in favour of the claimant.
37. The claimant referred to a bundle of documents which had been filed and served upon the respondent. Mr Kirk has not referred earlier to those documents as they had not appeared to be relevant. They were: a letter dated 25/5/2016 referring the claimant to a Consultant Psychiatrist on 7/6/2016; an extract from the claimant's GP notes dated 2/9/2016 which referred to prescribing her anti-depressants; and a letter dated 18/1/2017 confirming the claimant had been referred to and assessed by the Bedale mental health team in March 2016 and she was re-referred by her midwife in November 2016.
38. In replying to the respondent's submissions, there was now medical evidence which explained the reason for any delay, which was in part due to the claimant's poor mental health.
39. In respect of the effective date of termination, the respondent says it has taken the later of 2 dates: the 15/6/2016 not the 6/6/2016. That does not address the date given on the respondent's own P45, which gives a date of 22/7/2016. This feeds into point the respondent made some concession on and it is regretful the respondent is not fully versed what the correct effective date of termination was.
40. It can be said the respondent's lack of certainty is carried on by the claimant when she says in the second ET1 she is not sure she has been dismissed. If there was any doubt, in the original ET1 dated 23/8/2016 the claimant had ticked the box to

say her employment was continuing. The claimant was understandably confused and she set out the reasons for that in her witness statement. There was also the advice from the CAB.

41. The claimant went onto submit that she had addressed the burden placed upon her. If the respondent is correct on dates, there is not a huge delay; it is on the respondent's case 12 days. That does not affect the ability to conduct a fair trial and there is no real prejudice to the respondent.
42. If the claimant has received poor or bad advice, she should not be penalised for that. There is evidence of four factors which were affecting the claimant at this time: her mental health; her stressful financial situation including potential repossession; the advice of a time-scale of a year; and her pregnancy. In these circumstances, it is understandable she missed the email requesting her to pay a fee on 24/8/2016.
43. A fair trial is still possible and if there is any issue of memories failing due to the passage of time, there has already been a delay due to this second Preliminary Hearing being listed, although that is a natural consequence of the case going through the tribunal system. If there is any prejudice due to delay then it affects both sides.
44. The claimant did act promptly and her original claim was in time. In addition, it may be that the effective date of termination was not the last in a series of acts of discrimination. The claim could well be in time based upon the various dates put forward. It would be hugely ironic if in view of the Supreme Court's judgment on fees, that as that claim was unlawfully rejected and she sought to rectify that, her second claim was held to be out-of-time. In summary, the claimant asks the Tribunal to allow the application.

Decision on the first issue

45. The Tribunal allows the claimant's application for an extension of time within which to present her ET1 under s. 123(1)(b) of the Equality Act 2010 and accepts the second claim, if indeed the claim is out of time.
46. Various dates which could be the effective date of termination and/or could be the last alleged act of discrimination were put forward. There is no finding of whether or not there was conduct extending over a period s.123(3)(a) EqA 2010 as the claim may well not be out-of-time.
47. Ms Grabowska says there was letter informing the claimant her career break would commence on 15/6/2016 and that her employment would terminate on that date, however, although a copy cannot be produced, she remembers writing such a letter. She says the claimant was moved onto a career break on that date, however the correspondence which is available (letter of 16/3/2016) states the lifestyle break will end on 6/6/2016 pages 2 and pages 16 and 17 give the same date as the start of the career break.

48. The respondent's preferred date for the last act is 15/6/2016, which would mean the claimant's second ET1 is out of time by 12 days (according to the respondent and the claimant agreed this calculation).
49. The P45, which is not determinative of the date of termination, but in these particular confused circumstances is very helpful gives a leaving date of 22/7/2016 (claimant's bundle page 20). It also refers to week number 16.
50. The respondent cannot explain why the P45 is dated 22/7/2016 and or why looking at Ms Grabowska's letter of 16/3/2016 and pages 16 and 17 appended to the witness statement, there is reference to 6/6/2016.
51. The burden being on the claimant, it is accepted on the balance of probabilities, the respondent's muddle may have confused the claimant; nobody at the hearing was clear what the relevant date is. The claimant says and it is accepted she was suffering from mental health problems. Indeed, the respondent's motivation for putting the claimant on lifestyle leave and then a career break was her absence from work due to ill health and her statements that she 'could not cope'. So there has to be some acceptance that the claimant was unwell and struggling to cope.
52. The claimant says she had financial difficulties, which is also accepted if she had been on unpaid leave during the earlier part of 2016. She also says her landlord was trying to evict her, along with her money worries.
53. She was pregnant and had two young children to look after, which again can only be accepted and is a factor to weigh in the balance.
54. If, about which the Tribunal makes no finding the second ET1 is 12 days out of time, in view of the complete confusion regarding the date of the final alleged act of discrimination and in view of the claimant's evidenced mental health difficulties, coupled with her other problems and taking into account that her original ET1 was clearly in time (and was now as we know now, unlawfully rejected); taking all of those factors into account, the claimant has satisfied the burden on the balance of probabilities. It is just an equitable to allow an extension of time of 12 days (on the respondent's case) to present the second ET1, based upon the date of 15/6/2016.
55. After dealing with the out of time point as a preliminary matter, the respondent withdrew the application for a strike out or deposit order. The hearing then progressed to issue case management directions, which are the subject of a separate order sent to the parties.

A determination on whether the PCP which the claimant contends for in Mr Kirk's revised further and better particulars dated 9/8/2017 9(c) is a mere relabelling or is seeking to include a PCP which has not previously been pleaded

56. The claimant's second ET1 pleaded her entire case in five lines. As such, she was ordered to provide further and better particulars, which she did at some point prior to the first Preliminary Hearing on 5/4/2017. She then provided a second version on 3/5/2017. Her counsel provided a third version dated 9/8/2017 and the claimant has been directed to provide a fourth version by 26/10/2017, refined

further to the representatives' discussions at this hearing and subject to this one discrete point.

57. The claimant contends for a PCP in respect of her reasonable adjustment claim of:

9(c) The claimant working in a customer facing role

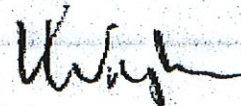
58. The claimant's case is that this PCP has been raised a number of times, and she relies upon it as continuing omission. In the paragraphs to which the Tribunal was taken, the claimant's case is she was not just talking about having to work alone (9 (a)), she also talks about working in a customer facing role. The claimant submitted it does not make sense to complain about one and not the other. It is her case that it is a combination of the two PCPs which puts her at a particular disadvantage. There is no prejudice to the respondent and the respondent has been aware of this issue since at least February 2017.

59. The respondent says Counsel's revised further and better particulars are the fifth bite of the cherry (following two ET1s and this third version of further and better particular). Looking at the claimant's versions there is no reference to a customer facing aspect; albeit there is reference to her not working alone. The customer facing aspect of simply not set out by the claimant. If the claimant had an issue with a provision which required her to work in a customer facing role, she would have said so and that is not the case.

60. Subject to the other matters which have been agreed, the respondent does not accept the inclusion of 9(c) is a mere relabelling and the point should not be allowed by way of amendment now.

61. The Tribunal finds, from review of the paragraphs to which it was referred, of the claimant's two versions of further and better particulars, that there is not a reference or complaint by the claimant of working in a customer facing role. She certainly does complain about working alone. She does not however make reference to working in a customer facing role. The Tribunal does not find that there is some indirect reference to working alone. If that was what the claimant complained of, she would have said so.

62. The PCP set out at 9(c) of the further and better particulars dated 9/8/2017 is therefore to be deleted from the refined document directed to be produced by 26/10/2017.



Employment Judge Wright

Sent to the parties on:

.....4 September 2017.....

For the Tribunal:

..... R. Israel