



EMPLOYMENT TRIBUNALS

Claimant: Ms R Kemp
Respondent: L&R Medical UK LTD

Heard at: Tribunal Hearing Centre, Carrington Street,
Nottingham, NG2 1EE

On: 21 October 2019

Before: Employment Judge Adkinson sitting alone

Appearances

For the claimant: Mr M Neighbour, lay representative

For the respondent: Mr R Ryan, Counsel

JUDGMENT

After hearing evidence from the claimant, and after considering the documents before the Tribunal, and after hearing argument from both the claimant and respondent,

1. The claim for unfair dismissal (Employment Rights Act 1996 section 111) was not presented in time when it was reasonably practicable to do so, or presented in such time as was reasonable. The Tribunal does not have jurisdiction to consider it. Therefore, it is dismissed.
2. The claim for direct age discrimination (Equality Act 2010 section 13 and Part III) was presented out of time and it is not just and equitable to

extend time. The tribunal does not have jurisdiction to consider it. Therefore, it is dismissed.

REASONS

1. The claimant Ms R Kemp presents a claim to the Tribunal of unfair dismissal and direct age discrimination.
2. The respondent L&R Medical UK Limited deny those claims. The respondent says that it dismissed her because of redundancy.
3. Ms Kemp alleges that dismissal is unfair. Ms Kemp alleges both the dismissal and refusal of the appeal are continuing acts of direct discrimination because of her age.
4. On 13 August 2019, Regional Employment Judge Swann ordered that the case was listed to determine if Ms Kemp's claims were in time, and if not whether time should be extended.
5. In her ET1, Ms Kemp identifies the date on which her employment ended as 30 November 2018. At today's hearing however, Ms Kemp's case is that the effective date of termination is 22 February 2019. Her case was that because of her anxiety that was heightened by her redundancy, it was not reasonably practicable for her to present the claim for unfair dismissal in time, and that she could not present her discrimination claim in time for the same reason. She argues that she did present the claim for unfair dismissal within such time as was reasonably practicable, and that it is just and equitable to extend time to bring a claim for discrimination.
6. L&R argue that the effective date of termination is 30 November 2018. They say it was reasonably practicable for her to present the claim for unfair dismissal in time, or if it were not, that she did not go on to present it in such time afterwards that was reasonable. They say it is not just and equitable to extend time for the claim for discrimination.

The Hearing

7. Ms Kemp was assisted by Mr M Neighbour. He is a family friend but has experience as a trade union official in the education context. His wife, Mrs Neighbour attended also. Mr Neighbour acted as a lay representative. I am grateful to both of them for their help.
8. Mr Richard Ryan, a barrister, appeared for L&R. I am grateful for his assistance also.
9. Ms Kemp was very anxious at the start of the hearing. She found it very difficult to speak and became partially paralysed with anxiety at one point. She described her own symptoms as being like someone having a stroke. I think the description was apt. I agreed to take a break every half hour. I allowed her to use the Tribunal room as a waiting area because her anxiety meant that she had difficulty walking.
10. We began at 10am and we took a break at 10:30am.
11. Though offered breaks afterwards, Ms Kemp declined them except at about midday when she requested a break during cross-examination. I agreed so we took another break. I made it clear to all parties if any of them required a break they should not hesitate to say so.
12. Ms Kemp found the idea of giving evidence distressing. I allowed her to give evidence from next to Mr Neighbour rather than the witness table.
13. After the first break, and with both Ms Kemp's and Mr Ryan's agreement, the Tribunal modified the process as follows: Ms Kemp sat with Mrs Neighbour throughout who provided comfort and support. Mr Neighbour, who had clearly discussed the case with Ms Kemp and had quite some knowledge of it, provided information to the Tribunal on Ms Kemp's behalf. Ms Kemp then confirmed that she believed what he had told the Tribunal was true – in essence meaning she adopted his words as her own.
14. Both Mr Neighbour for Ms Kemp and Mr Ryan for L&R presented closing arguments.

15. The parties provided me with a slim bundle of documents. I also read the Tribunal file before the case commenced but the relevant documents on the file were nevertheless in the bundle.

Issues

16. I believe that these are the issues I must resolve:

- 16.1. What is the effective date of termination?
- 16.2. What then is the deadline for presenting the claim for unfair dismissal?
- 16.3. What is the deadline for presenting the claim for direct age discrimination?
- 16.4. If the claim for unfair dismissal is out of time, was it reasonably practicable to present the claim before the deadline?
- 16.5. If not, has it been presented in such time as was reasonably practicable?
- 16.6. If the claim for direct age discrimination is out of time, is it just and equitable to extend time?

Facts

17. I have taken into account the oral evidence of Ms Kemp, the arguments of Mr Neighbour on her behalf, the arguments of Mr Ryan on the respondent's behalf and those documents in the bundle to which the parties referred me.

18. I now set out what, based on the evidence, I believe are the relevant facts to allow me to resolve the issues. I make no assessment of the underlying merits of the claims.

19. L&R employed Ms Kemp as an accounts manager from 7 February 2000 to 30 November 2018.

20. In 2018 L&R started a redundancy process. L&R told Ms Kemp she was at risk of redundancy.

21. On 14 November 2018 Ms Kemp's doctor, Dr Mann, wrote a letter informing L&R that Ms Kemp had anxiety and would have difficulty as a

consequence of that processing the information in relation to her redundancy.

22. On 20 November 2018 the respondent wrote a lengthy letter setting out the redundancy process. In the letter they wrote:

“4. You do not have a pay in lieu of notice clause in your contract of employment. However, we would like to propose that in the event of a redundancy, you would receive a payment equivalent to your 12 weeks’ notice, at the date of termination. The benefit to you, if you accept this proposal, is that you would be released from your contractual responsibilities at the termination date. This way if you found new employment, you would be in a position to start straightaway, rather than having to wait until your employment terminated 12 weeks later. All the of the next points have been made, based on your acceptance of this: ...”

23. On 22 November 2018 Ms Kemp send a lengthy email to L&R setting out her detailed observations about the redundancy need and exercise. Ms Kemp told me that a Sally Gwilliams wrote this for her. Ms Gwilliams is an employment lawyer but a cousin and acted as a family friend rather than as professional representation. They communicated by telephone and email. Ms Kemp approved the contents and she sent it to L&R. Ms Kemp told me that communications with Ms Gwilliams were limited. I accept this is correct.

24. L&R nevertheless selected Ms Kemp for potential redundancy. Ms Kemp alleges that it was an unfair process but I do not need to decide that at this stage.

25. L&R replied on 26 November 2018, and Ms Kemp sent more correspondence that have not seen on 29 November 2018.

26. On 30 November 2018 L&R confirmed her redundancy. The letter was written by Nicola Wolff-Donitz of L&R. The letter attached a schedule showing a calculation of her final payment. It confirmed she was entitled to 12 weeks’ notice. She received that payment in December in what I conclude was the usual payroll run. She was allowed to keep her

company car until 22 February 2019 (12 weeks' later). Ms Kemp says that she would only have been insured to drive it if she remained an employee but I have seen no insurance policy that confirms that. I do not believe I can reach a conclusion on that without seeing the policy. Therefore I do not believe it assists me in this case.

27. Part of that letter read as follows

“in the letter [the respondent] wrote dated 20 November 18 it was explained to you that you do not have a pay in lieu of notice clause in your contract and therefore the company could either serve you with your 12 weeks' notice to terminate your contract of employment, or with your permission, terminate your contract today and pay your notice in lieu. You have made no objection about this in your letter of 29 November and this does provide you with the benefit they would be released from your contractual responsibilities at the termination date. This way if you found new employment would be in a position to start straightaway, rather than having to wait until your employment terminated 12 weeks later.

“On this basis we have taken the absence of a response about the proposal is acceptance of the same and I can confirm that your dismissal on the grounds of redundancy is effective from today, 30 November 18. If this is not your wish, please advise us by 3:30 PM Monday three December 18 and we will revert back to issuing you with 12 weeks' notice. Please note that an absence of any further response will be taken as acceptance of this action

“The end of your notice period will be Friday 22 February 19. And this date you would have completed 19 years' service with the company and sales – a redundancy payment has been increased to reflect this. I am enclosing the reworked redundancy package information to show this amendment, which details the payments to be made to you as follows:...”

28. I conclude that the decision to dismiss her was communicated to her on 30 November 2018. This is apparent from her own evidence, her ET1 where she identifies that as the date, and the documents which show the letter was sent to her on 30 November 2018 by email to her email address.
29. On 12 December 2018 Dr Mann again wrote a letter confirming Ms Kemp had anxiety and that “[s]he is a stoical individual who manages her clinical condition as best she can.”
30. Ms Kemp tells me that the redundancy had a profound effect on her. It caused her severe anxiety and stress. She told me she had suffered it for many years and took medication prescribed by her doctor to help to manage it. Mr Neighbour told me that after being informed of her redundancy, she would awake at 9am, walk the dog, and then sleep for the remainder of the day because of the tiring effect of the stress. Ms Kemp confirmed this was correct. Based on what I saw of Ms Kemp today, I conclude that this is true. It tallies also with the tenor of the contemporaneous letters from her doctor.
31. Ms Kemp lodged an appeal. Her appeal was drafted by Ms Gwilliams, after speaking to and emailing Ms Kemp. Ms Kemp approved what Ms Gwilliams wrote and sent it to L&R. The appeal itself is thorough and detailed. It does not raise any objection to the termination taking place on 30 November, with a payment in lieu of notice.
32. L&R dismissed her appeal on 21 December 2018. It was emailed to her that day. Ms Kemp did not suggest she found out the outcome only at a later date. There is no reason to conclude she did. Because she used email regularly and that she does not suggest otherwise, I find as a fact that she became aware of the outcome of her appeal on 21 December 2018.
33. From reading the documents, it is apparent that Ms Kemp never expressly agreed to waive notice. However, at the same time she never raised any objection either. On her evidence she did not object to the

rolled up payment in December of her wages, notice pay, redundancy payment and payment for leave which she had not taken but was entitled. Furthermore in her detailed notice of appeal, she did not raise any objection to L&R's approach of paying her in lieu of notice. Even though I accept the effect of the redundancy on her was profound, I conclude that if Ms Kemp truly objected to L&R's approach she would have said so. The letter drafted by Ms Gwilliams is detailed and thorough. She clearly wrote it after discussing Ms Kemp's concerns with her. Given the level of detail into which it goes I would expect that if there were an objection to L&R approach of paying her in lieu of notice, it would have been spelt out in that letter. It would also be in the ET1. I therefore conclude Ms Kemp never objected to the payment in lieu of notice.

34. In mid-February 2019 Ms Kemp met up with a former director of L&R at a trade fair. Based on her evidence she was still anxious by this point because she had to take a friend with her as support. However I conclude her anxiety had subsided quite considerably because she was able to meet people and travel notable distances.

35. The former director offered her some part time work in a role similar to her role with L&R and, she has continued to work for his company since. She has since February 2019 regularly used email and the internet for her new job.

36. In April 2019 Dr Mann wrote a letter that read as follows

"I can confirm that she has been really suffering with severe anxiety since November when she learnt about her redundancy. It has really very much affected her mental health and it has only really been in the last few weeks that she has started to feel more like herself again.

"She has not really been able to analyse and assess the situation properly until quite recently. She is now in a position to be more objective about the decisions that were made and is keen to appeal against the appeal regarding her redundancy settlement. She is keen to take things

forward now and although I understand she is out of the 3-month timeframe within which she needs to log an appeal she really wasn't in a fit state of mind to be able to do this until quite recently."

37. Ms Kemp confirmed that her mental health improved from about March onwards when she started her new job. Dr Mann confirms it was in "*the last few weeks*" before mid-April that Ms Kemp's health had improved. I conclude that the anxiety levels had significantly subsided at the end of March 2019, not only because of the letter, but because of her new job.
38. Ms Kemp says she cannot remember taking advice on the time limits before that date but must have done so. I conclude that she did because Dr Mann expressly mentions the time limit in her letter and that she is out of time. Dr Mann can only have known Ms Kemp was out of time and decided to mention it if Ms Kemp had spoken to her about it.
39. Early conciliation ran from 14 to 15 April 2019.
40. Ms Kemp presented her claim on 13 June 2019. Ms Kemp explained her focus from April onwards was on her new role. I accept that. She tells me that she did not decide to bring the claim until about April, when she felt better. I accept that also.

The law

41. The Employment rights Act 1996 ["ERA"] section 86 provides minimum statutory notice that an employer must give to terminate an employee's employment. For Ms Kemp, that is 12 weeks' notice. The only basis on which no notice is required under section 86 is where the conduct of the other party allows the contract to be ended without notice.
42. ERA section 97 provides for the effective date of termination. This is from when the period within which to bring a claim for unfair dismissal starts to run. Section 97(5) provides for the effective date of termination to be extended where an employee receives less notice than they are entitled to under section 86.
43. However, that section does not have the effect of moving the effective date of termination for the purposes of when time starts to run for a claim

for unfair dismissal. The effective date of termination is a statutory concept. Time starts to run for the purposes of bringing a claim when the dismissal takes effect: that is when it is communicated to the employee by the employer: *Cosmeceuticals Ltd v Parkin* UKEAT/0049/17/BA per Her Honour Judge Eady QC at [11]-[19].

44. ERA 1996 section 111(2) requires a claimant to present a claim for unfair dismissal within 3 months beginning with the effective date of termination unless it is not reasonably practicable to do so, in which case it must be presented in such further period as the Tribunal thinks is reasonably practicable.
45. An internal appeal does not postpone the effective date of termination: *West Midlands Co-operative Society Ltd v Tipton* 1986 ICR 192, HL.
46. As to the approach to take, I understand the law to be as follows:
 - 46.1. The words should be given a 'liberal construction in favour of the employee' *Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53, CA
 - 46.2. It is a factual question: *Wall's Meat Co Ltd v Khan* 1979 ICR 52, CA
 - 46.3. It is for the claimant to prove it was not reasonably practicable to present the claim in time.
47. The focus is on what could be done: *Schultz v Esso Petroleum Co Ltd* [1999] ICR 1202 CA. 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*": *Asda Stores Ltd v Kauser* EAT 0165/07.
48. The existence of an internal procedure is not enough to justify not bringing a claim in time: *Palmer v Southend-on-Sea Borough Council* 1984 ICR 372, CA.
49. Where a person relies on medical evidence, that evidence should not only support the claimant's illness but demonstrate that the illness prevented the claimant from submitting the claim on time. Medical

evidence is not however essential. I can take into account what I am told and what I have observed in the Tribunal room: *Norbert Dentressangle Logistics Ltd v Hutton* EATS 0011/13.

50. The Equality Act 2010 ["EqA"] section 123 requires a claim to be presented within 3 months of the act complained of, or such other period as the Tribunal thinks just and equitable. Where there is conduct extending over a period of time, time runs from the end of that period. The factors in the Limitation Act 1980 section 33 can be a useful aide but are not prescriptive: *Southwark London Borough Council v Afolabi* 2003 ICR 800, CA.
51. Ultimately the Tribunal has a broad discretion when weighing up all the circumstances, but length of delay and reasons for it are always relevant, as is the prejudice to the respondent if a claim that is out of time is allowed to proceed: *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194, CA.

Discussion and conclusions

52. On the facts as found and applying the law, the effective date of termination is 30 November 2018. The time limit for bringing a claim for unfair dismissal runs from that date and expired on 28 February 2019. The claim for unfair dismissal was presented out of time.
53. The parties did not make submissions as to whether the discrimination in the form of the dismissal and appeal are a continuing act. Without deciding the point, it is difficult to see that they are not. For present purposes I assume they are. Therefore, the time limit to bring a claim for direct age discrimination runs from 21 December 2018 when the appeal decision was finally communicated to Ms Kemp. Therefore, she had until 20 March 2019 to commence her claim. The claim for direct age discrimination was presented out time.
54. If the claims proceed, the respondent will have to deal with claims that otherwise it would not have to face. However only a small amount of time has lapsed and so the fading of memories is of little risk. Further the

redundancy process will have been documented and because of the small amount of time that has lapsed, the risk of the loss of documents should be minimal.

55. Dr Mann's letters do not confirm that she was medically unable to present a claim to the Tribunal in time. However, I am able to take into account what happened in the hearing. It is obvious that Ms Kemp can suffer crippling anxiety. I accepted her evidence that from 30 November 2018 she did suffer crippling anxiety. While she was able to speak to Ms Gwilliams the communication was minimal and limited. On balance her anxiety was such that it was not reasonably practicable for her to bring a claim until mid-February.
56. I conclude mid-February is a turning point because she went to the trade fair and gained some employment. I have no doubt that she was very anxious still. However the fact that she was able to go to the fair, albeit with support, and took steps that secured her current employment show that by that stage she was able to make decisions and the debilitating effects of anxiety had mellowed. I conclude therefore that from the middle of February it became reasonably practicable for her to present her claim. The effect of the early conciliation is she would have been given a month at least in which to present it, provided she commenced early conciliation in time.
57. Because the expiry date for the claim for unfair dismissal is the end of February, it follows that she did not present it when she could have done so, and so it must be dismissed.
58. If I am wrong about my conclusions, and in fact it were the case she could not present the claim for unfair dismissal until after the end of February, I would still conclude the claim is out of time. The reason is that on the medical evidence and her own evidence, the anxiety had significantly subsided by the end of March. She had clearly had access to some advice from Ms Gwilliams and, even if she could not consult her again, she knew advice was available. She was able to use the internet

and email by this point and so could look at ACAS or the Equality and Human Rights Commission's resources. The doctor's letter of April confirmed that Ms Kemp by that point knew of the time limits.

59. She was in alternative employment. The reason she delayed was she chose to prioritise her work. That is understandable. However the circumstances show she was certainly able by that point to present the claim if she wished to do so. She chose not to. I conclude that the delay until 13 June 2019 is more than a reasonable period in which to present the claim. Therefore the claim would still be out of time.
60. I consider now the claim for direct age discrimination.
61. I take into account what I have already said above about the circumstances. I have not repeated it here for the sake of brevity.
62. Because the test for extending time is different I have balanced the factors and ignored comments about reasonable practicability.
63. Balancing everything I have concluded it is not just and equitable to extend time because I believe these factors outweigh other factors in favour of extending time.
64. I have considered Ms Kemp was unable to bring a claim until mid-February as I have set out above. However, there is then a further delay of more than one month within which the claim would have been in time, but in which Ms Kemp took no action when she could have. She knew of her rights – at the very least that she had some rights – and that she could seek advice. From the end of March she knew of the time limit because Dr Mann confirms that is the case, but she did not take any action, waiting a month and a half to commence early conciliation. She delayed further because she wanted to put her job first. There is a delay of almost one month between the early conciliation ending and presenting the claim. This was a conscious choice as she wanted to prioritise her new job.
65. There will clearly be a prejudice to the claimant if she cannot proceed but that is tempered somewhat by the fact she chose to prioritise her

new work over bringing a claim when she knew of the time. As I have said, that is not a criticism of her choice – I quite understand it – but nevertheless is an important fact that I believe cannot be ignored and means any prejudice is not to be given as much weight as otherwise might be the case.

66. Therefore the claims are out of time. The Tribunal lacks the jurisdiction to consider them. Accordingly they are dismissed.

Employment Judge Adkinson
Date 22 October 2019

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.