

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - *claimant*

CASE NO.

UD1031/2011

against
EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr. W. O'Carroll
Mr F. Dorgan

heard this claim at Thurles on 13th December 2012

Representation:

Claimant(s) :

Respondent(s) :

Preliminary Issue

An application was made on behalf of the claimant, under section 8 (2) of the 1977 Act as amended to extend the time for initiating a claim under the Unfair Dismissals Acts.

Summary of Evidence

The claimant worked with the respondent from 2000 until her employment was terminated on 30 April 2010. The claimant was upset at losing her job. She missed the job and the money. In or around mid-summer 2010 the claimant consulted a trade union official (TU) about her dismissal; she wanted to find out why she was dismissed and two other employees were kept on. TU instigated a grievance with the respondent on 31 August 2010. Subsequently, TU indicated to her that the matter would be pursued through the Limerick office. The claimant made a number of phone calls to the Limerick office before contact was made with the union official there.

The claim under the Unfair Dismissals Acts was lodged with the Rights Commissioner Service on 29 November 2010, the claimant having signed the appropriate form on 19 November 2010. By letter dated 21 February 2011 the Rights Commissioner Service informed the respondent of the claim against it. By notice dated 15 March 2011 the respondent objected to the claim being heard by a Rights Commissioner. The claim was subsequently lodged with the Tribunal on 27 April 2011.

In her earlier life, the claimant had suffered two serious illnesses (cancer and peritonitis) and required a number of operations. During the course of her employment with the respondent the claimant had not been absent on sick leave; because she worked on a week on week off basis she could rest on her week off. Shortly after her dismissal the claimant developed a painful condition, affecting her nerves and muscles and causing weakness in her limbs and neck. This condition was ultimately diagnosed on 28 June 2010 and her symptoms were so severe she was hospitalised for rehabilitation treatment from 28 June 2010 until 9 July 2010. While hospitalised the claimant developed another condition, which can be life threatening and to deal with this she has to wear a mask while sleeping. The former condition requires on-going treatment. On 8 September 2010 she had a further medical investigation for another health problem which will require surgery in London. She was hospitalised from 30 October 2010 to 1 November 2010 due to abdominal pain. The Tribunal was provided with a medical report from the claimant's general practitioner, which outlined the complaints suffered by the claimant in the six months following her dismissal and in summary he stated, "*Basically, she had an exceptional degree of medical problems in mid-2010, with an associated sense of related stress, to the degree one would expect of anyone in similar circumstances*". The statutory six-month period prescribed for lodging a claim under the Unfair Dismissals Acts expired on 29 October 2010. The claimant's application was based on the fact that the health problems she suffered during the six months following her dismissal amounted to exceptional circumstances preventing her from initiating her claim within the prescribed time.

The respondent urged the Tribunal to reject the claimant's application on the grounds that she had consulted with her trade union about her dissatisfaction about her dismissal within the prescribed statutory period.

Determination

The Tribunal considered the evidence and detailed legal submissions made by the parties' legal representatives.

Section 8 the Unfair Dismissals Act 1977 provides, inter alia:

- (2) A claim for redress under this Act shall be initiated by giving a notice in writing (containing such particulars (if any) as may be specified in regulations under section 17 of this Act made for the purposes of subsection (8) of this section) to a rights commissioner or the Tribunal, as the case may be –
 - (a) within the period of 6 months beginning on the date of the relevant dismissal, or

(b) if the rights commissioner or the Tribunal, as the case may be, is satisfied that exceptional circumstances prevented the giving of the notice within the period aforesaid, then, within such period not exceeding twelve months from the date aforesaid as the rights commissioner or the Tribunal, as the case may be, considers reasonable,

and a copy of the notice shall be given by the rights commissioner or the Tribunal, as the case may be, to the employer concerned as soon as may be after the receipt of the notice by the rights commissioner or the Tribunal.

Thus, the Tribunal must ask itself (i) whether exceptional circumstances existed within the six month period immediately following the dismissal and if they did (ii) whether those circumstances prevented the appellant from lodging the claim within that six month period.

The term ‘exceptional circumstances’ is not defined in the Act but it was considered by the Employment Appeals Tribunal *In Byrne v PJ Quigley Ltd* [1995] ELR 205 where it was stated that the words ‘*exceptional circumstances*’ are ‘*strong words*’ and should be contrasted with the milder words ‘*reasonably practical*’ ... or ‘*reasonable cause*’ . ‘*Exceptional means something out of the ordinary. At the very least the circumstances must be unusual, probably quite unusual but not necessarily highly unusual.*’ The term ‘*exceptional circumstances*’ also allows for the extension of the time for initiating claims with the Residential Institutions Board (the Board) under the Residential Institutions Redress Act 2002. The Board in a number of cases before defined the term ‘*exceptional circumstances*’ in almost identical terms to Byrne and the High Court in judicial review proceedings approved or accepted the Board’s definition (See *J O’B v The Residential Institutions Redress Board* [2009] IEH 284, in *M G v The Residential Institutions Redress Board* IEHC and in *AG v The Residential Institutions Redress Board* [2012] IEH 492.

In the *J O’B case* O’Keeffe J recited the Board’s decision in great detail:

“[When] considering applications for an extension of time. ... the Board will determine each application according to its individual merits and particular circumstances. In this respect the Board does not consider that it is possible to define in advance what circumstances might be considered exceptional.

...

However, such an approach does not prevent the Board from envisaging or surmising what sort of exceptional circumstances in a particular case might be considered exceptional, e.g. the effect or impact of mental or physical health problems (emphasis added) or conditions in a particular individual’s; personal family circumstances whether in the applicant’s own life or in

the lives of others for whom he or she cares; communication problems; or difficulties with legal advice. Any of these considered circumstances prevailing at a relevant time could have the effect of preventing or inhibiting (emphasis added) an applicant from making an application within the prescribed period and could be considered exceptional.”

O’Keeffe J commented that it was clear that the instances of exceptional circumstances outlined related to the personal circumstances of the Applicant. In all three cases cited, ignorance of the existence of the institutional redress scheme and/or the closing date (in and of itself) for applications were found not to constitute exceptional circumstances.

From the claimant’s evidence it is clear to the Tribunal that from early in the prescribed six-month period, immediately following her dismissal, the claimant, by any standard, suffered an exceptional number of ‘*physical health problems*’. The report of the claimant’s general practitioner (who was unavailable to give oral evidence to the Tribunal), having confirmed the claimant’s evidence of her health problems, stated in summary: “*Basically, she had an exceptional degree of medical problems in mid 2010, with an associated sense of related stress, to the degree one would expect of anyone in similar circumstances.*” The Tribunal is of the unanimous view that the number and nature of the claimant’s ‘*physical health problems*’ that arose during the relevant period and continued to arise right up to the expiry of that period were ‘out of the ordinary’, ‘quite unusual’ and constituted exceptional circumstances.

The Tribunal proceeded to ask itself whether the claimant’s physical health problems prevented her from initiating her claim during the prescribed period. Both the Unfair Dismissals Act as amended and the Residential Institutions Redress Act provide that the exceptional circumstances must ‘prevent’ the lodging of the claim. Case law on this point under both Acts has held that the word prevent includes the meaning ‘inhibit’ (See *Rathfarnham Delicatessen Ltd v Patricia Nolan* (UD. 295/2002) and the passage above quoted from the Board’s decision by O’Keeffe J in *J O’B* and indeed also quoted by the learned judges in the two other High Court cases cited above).

The Tribunal notes that the claimant signed the initiating form for her unfair dismissal claim on 19 November 2010 and it was lodged with the Rights Commissioner Service on 29 November 2010 which was outside the prescribed six-month period. From the case law it is clear that knowledge (or the lack of it) of the prescribed time limits is not a relevant factor to be considered in determining whether to extend the prescribed period. In this case, the claimant was upset by her dismissal and consulted her trade union about it within the prescribed time and he was to raise a grievance about it. The Tribunal is of the view that this does not defeat her claim to extend the time as it feels that the number and nature of some of the physical health problems that beset the claimant during the prescribed period would have an overbearing effect on the claimant’s mind such as to inhibit and prevent her from initiating her claim within the prescribed six month period. Indeed, her doctor’s report refers to her suffering ‘associated stress’. In all the circumstances the Tribunal determines that the time for initiating the unfair dismissals claim be extended. In light of the delays which

occurred between the end of November 2010 (subsequent to the lodging of her claim with the Rights Commissioner Service) and mid-March 2011 (when the claimant was informed of the objection to a Rights Commissioner hearing her claim) for which the claimant or her representative bears no responsibility, the Tribunal extends the time for initiating the claim up to twelve months from the date of dismissal, being up to 29 April 2011. Thus, the claim having been lodged with the Tribunal on 27 April 2011 is within time and the Tribunal has jurisdiction to hear the claim under the Unfair Dismissals Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)