EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Elizabeth Quick	v	West Hertfordshire Hospitals NHS Trust

Heard at: Watford (in person and by CVP) **On:** 22 June 2021
Before: Employment Judge Alliott (sitting alone)

Appearances

For the claimant: In person
For the respondent: Ms Joanne Twomey (Counsel)

JUDGMENT

The judgment of the tribunal is that:

1. It was not reasonably practicable to bring the claimant's unfair dismissal claims within three months and the claim was presented within a reasonable time thereafter.

2. The claimant's claims for discrimination were not presented in time and it would not be just and equitable to extend time.

3. The claimant's claim for sex discrimination is dismissed upon withdrawal.

4. The claimant's claims of disability and religion/belief discrimination are dismissed.

REASONS

1. This open preliminary hearing was ordered by Employment Judge Manley on 27 March 2021 to determine the following issue:

> "Whether the claim has been presented in time and, if not, whether to extend time to allow any parts of the claim to proceed."

Unfair dismissal

2. Due to the equivocal nature of the dismissal letter dated 22 May 2020, the effective date of termination of the claimant's employment has been taken

as 31 May 2020. Consequently, the primary three-month time limit for the presentation of a claim would have expired on 30 August 2020.

3. The claimant presented her claim on 3 November 2020, two months and three days late.

The law

4. Section 111 of the Employment Rights Act 1996 provides as follows:-

> "111
> …
>
> (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."

5. From the IDS Employment Law Handbook "Employment Tribunal Practice and Procedure" at 5.41:

> "When a claimant tries to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:
>
> - (2)(b) ERA should be given a "liberal construction in favour of the employee" – Dedman v British Building and Engineering Appliances Limited [1974] ICR53, CA
>
> - What is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. An appeal will not be successful unless the tribunal has misdirected itself in law or has reached a conclusion that no reasonable tribunal could have reached. As Lord Justice Shaw put it in Walls Meat Co Limited v Khan [1979] ICR52, CA:
>
> "The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications in what should be a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the employment tribunal, and that their decision should prevail unless it is plainly perverse or oppressive".
>
> - The onus of proving that presentation in time was not reasonably practicable rests on the claimant. "That imposes a duty upon him to show

> precisely why it was that he did not present his complaint" – Porter v Bandridge Limited [1978] ICR943, CA.
>
> Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented "within such further period as the tribunal considers reasonable".

6. I need to take into account all the circumstances of the case. When dealing with ignorance of rights or time limits, then I need to consider whether such ignorance was reasonable by addressing such questions as, what were the opportunities for finding out what the rights were and did the claimant take them and if not, why not?

7. In addition, the factors under the Limitation Act maybe relevant in considering the reason and the length of the delay, the extent to which the cogency of the evidence maybe affected, the extent to which the parties have cooperated, the promptness of the party who acted once they knew of their rights and steps taken to obtain advice.

The facts

8. The length of the delay is two months three days.

9. The reasons for the delay appear to be as follows:-

    9.1 The claimant has been a Unison member at all times. She had Unison representation at the disciplinary hearing on 19 May 2020. As such, I find that the claimant at all material times had access to advice as to how she could bring a claim and the time limits for doing so.

    9.2 The claimant gave no specific reason why no action was taken prior to 17 August 2020. The claimant simply told me that she relied on the union to advise her and she was being advised to refer her case to Acas in that time in August 2020.

    9.3 A background to this case is that the claimant appealed her dismissal and the appeal was not actually heard until 11 September 2020. Waiting for internal disciplinary process to be concluded is one factor that I can take into account when considering the overall delay.

    9.4 The Acas certificate relied upon for the issue of these proceedings is dated 18 September 2020. The date of notification was also 18 September 2020.

    9.5 However, the claimant produced to me at this hearing evidence that the claimant notified Acas about the dispute on 17 August 2020. The respondent was unaware of this reference. As recited above, the claimant's primary limitation period for bringing this claim would have expired on 30 August. The date of the first certificate was 17

September 2020. As the primary limitation period expired during the period of early conciliation, so the claimant would have had an extension of time until one month after Day B. Consequently, had she relied upon the first certificate, the primary limitation period would have expired on 17 October 2020. In those circumstance, her claim was only 16 days late.

9.6 The claimant has placed before me emails indicating that she was having IT problems in submitting her claim on 17 October 2020. Her email refers to trying, on numerous occasions, to set her 'memorable password', but the system was not letting her and that she was getting quite stressed and anxious about getting her application in on time. Consequently, I find that the claimant was endeavouring to submit her claim online but, for whatever reason, was having difficulties technically in doing so. Thereafter, the claimant continued to have difficulties and enlisted the assistance of friends to print off a hard copy of the claim form which she filled in by hand and sent to the tribunal by recorded delivery.

9.7 The reason the claimant did not rely on her first certificate was that it had been issued in the name of West Hertfordshire Hospitals NHS and not in the correct name of West Hertfordshire Hospitals NHS Trust. The claimant told me, and I accept, that her union representative informed her that it was vital that she had the correct name on the certificate and that is why she obtained a new one on 18 September 2020.

9.8 I have two statements from the individuals who assisted the claimant after 17 October 2020.

9.9 I find that the claimant was being advised by her union. I have taken into account the fact that incorrect advice from union members may often not excuse a failure to comply with the time limits.

9.10 Nevertheless, the claimant was taking steps to obtain advice and was acting reasonably promptly to issue her claim.

9.11 The reason for the delay in presenting her claim was incorrect advice about the first Acas certificate combined with technical difficulties in submitting her claim online. This may have been exacerbated by the claimant's health.

9.12 I do not consider that the delay, whether it be sixteen days or two months three days, will significantly affect the cogency of the evidence.

9.13 Balancing hardship, in my judgment there would be significantly greater hardship on the claimant losing her claim for unfair dismissal than the respondent in having to deal with the claim following a short delay.

9.14 I find that it was not reasonably practicable for the claimant to present her claim in time and she presented it within a reasonable time thereafter.

The discrimination claims

10. At the outset the claimant told me that she did not wish to proceed with her sex discrimination claim and accordingly that claim stands to be dismissed upon withdrawal.

The law

11. Section 123 of the Employment Rights Act 2010 provides as follows:-

> "123 Time limits
>
> (1) Proceedings on a complaint within section 120 may bot be brought after the end of –
>
> (a) The period of three months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal things just and equitable."

12. From the IDS Employment Law Handbook "Employment Tribunal Practice and Procedure" at 5.103:-

> "While employment tribunal shave a wide discretion to allow an extension of time under the "just and equitable" test in section 123, it does not necessarily follow that exercise of the discretion is a forgone conclusion in a discrimination case. Indeed, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR434, CA, that when employment tribunals consider exercising the discretion under what is now section 123(1)(b) Equality Act, "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." The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit.

13. I am required to take into account all the circumstances of the case as set out above and I do not repeat them here.

The facts

14. The claimant's claim form was accompanied by an eight-page typed document setting out her claim in six sections. The sections are Overview, Timeline, Unfair Dismissal, Sex Discrimination, Lack of Support and Failure to Follow the Disciplinary Policy and Procedure.

15. On 23 March 2021 Employment Judge Manley directed that the claimant should provide further information about her discrimination claims. In

response, on 18 April 2021, the claimant sent a four-page document providing the further information of her discrimination claims.

16. In discussion with the claimant the basis of her claims was identified as follows. I deal with each in turn.

17. Direct discrimination on the grounds of religion/belief

    17.1 This is as pleaded in paragraph 5.2 of the claimant's original claim. The claimant told me she is Catholic. She worked 18 hours and she regularly asked to increase her hours by 2 hours. She told me she made this request on many occasions but the last two were at her Stage 1 sickness Absence Review Meeting on 6 November 2019 and at the Stage 2 Sickness Absence Review Meeting on 4 December 2019.

    17.2 The claimant's case is that when she asked for extra hours, she was denied this by the Deputy Director, her Co-Job share and the Director of HR. She identifies those individuals as Jewish. She says she was treated less favourably on the grounds of her religion and belief and points to her job share colleague's hours being increased.

    17.3 The last date of the treatment complained of was 4 December 2019. As such, the primary three-month limitation period would have expired on 3 March 2020. Her claim is consequently eight months late.

18. Disability discrimination

    18.1 The claimant claims a disability of a mental impairment, namely anxiety/depression.

    18.2 In discussion with the claimant it appears that her complaints relate to three issues.

    18.3 The first appears to be a s.15 disability discrimination claim. The claimant was off sick from 25 July 2019 until 30 March 2020. She had had two previous periods of long-term sickness absence. That is the 'something arising' in consequence of her disability.

    18.4 The unfavourable treatment was as follows:-

        18.4.1 During her sickness absence not being treated in accordance with the Absence Policy.

        18.4.2 On 30 October 2019 her manager emailing an OH Report to the Director Workforce in breach of confidence.

    18.5 Neither of these two allegations are contained in the claim form. The claimant told me that she was not aware of the second matter until she received email disclosure from the respondent some time in

2020. Consequently, she was aware of this matter as of the date she provided the further information in accordance with the order of Employment Judge Manley. Neither of these issues is pleaded in the further information. As such, were they to proceed, an application to amend would be required. Nevertheless, I have dealt with the time point on the assumption that those claims have been made. The claims are four and eleven months out of time.

18.6 The third matter of complaint appears to be an allegation of s.13 direct discrimination because of disability. The claimant alleges that at the Stage 2 Absence Meeting on 4 December 2019 she discussed her hair loss and requested compensation from the respondent as it was work related, but this was declined. The claimant's case is that other non-disabled employees who were injured at work were compensated through the claims department. This allegation is not pleaded in the original claim form but is included in the further information supplied pursuant to the order of Employment Judge Manley. The three-month primary limitation period would have expired on 3 March 2020 and consequently this allegation is eight months out of time.

19. **Harassment**

19.1 No claim for harassment is included in the original claim form. The harassment claim is included in the information provided pursuant to the order of Employment Judge Manley. The claimant's case is that when she returned to work in March 2020, she was not allowed access to the OH Office in Hemel Hempstead and that she felt this was humiliating. However, the claimant appeared unable to inform me how she says that treatment was related to a protected characteristic and, if so, what protected characteristic. Again, in my judgment, this issue would need to be subject to an application to amend but I have treated it as if it is a claim that has been made. On the basis that this was a continuing course of conduct that concluded on the claimant's dismissal, then the claim is two months and three days out of time.

20. As regards all these allegations, I take into account the fact that the claimant did not raise a grievance at the relevant time or take the issue up with her union representative.

21. The length of the delay is significant. The religion/belief claim is eight months old. The disability discrimination claims are over four months and eleven months out of time. The direct disability discrimination claim is eight months out of time. The harassment claim is two months out of time.

22. The reason given by the claimant for not bringing these claims sooner was that she was unaware that she could. The claimant told me that she was not confident due to anxiety and that her mental and physical health at the time was not good. In particular, she became forgetful. Unlike the unfair dismissal claim, where the claimant was actively seeking to advance her

claims, in my judgment the claimant took no active role in advancing these claims at the time or within a reasonable period thereafter. The claimant had access to union advice if necessary but did not take it. As such, I find that her ignorance of the ability to bring a claim in relation to discrimination was not reasonable.

23. Although cogency of the evidence is of less significance in employment tribunal proceedings where the limitation period is much shorter, any delay is the enemy of justice and some of these claims were presented eight months late. As such, there will be an adverse effect on the cogency of the evidence.

24. I do not accept that the claimant's health is a reasonable excuse for such a long delay. The claimant returned to work in March 2020 and the claim was only made on 3 November 2020. If she could return to work, then she can be taken as being fit to return to work and so able to function.

25. The fact that internal proceedings were pending with the appeal against dismissal only being dealt with on 11 September 2020 does not, in my judgment, explain the delay in the bringing of the discrimination claims. They are free standing claims unrelated to the dismissal and the claimant cannot be said to have been waiting for the outcome before launching proceedings.

26. Four of the five allegations of discrimination were not pleaded in the original claim form and would require permission to amend. Two of the five were not even contained in the further information provided pursuant to the order of Employment Judge Manley.

27. I have considered the balance of hardship. The claimant did not raise a grievance at the time of the alleged discriminatory treatment and most of it is very old. The lack of action on the claimant's part suggests that these were not foremost in her mind at the relevant times and consequently the loss of those claims is not, in my judgment, that serious. On the other hand, the respondent will have to deal with wide ranging allegations of some age.

28. Consequently, I find that the claimant's discrimination claims are out of time and it would not be just and equitable to extend time.

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Employment Judge Alliott
8 July 2021
Date: ……..
12/7/2021
Sent to the parties on: .....
J Moossavi
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For the Tribunal Office