EMPLOYMENT TRIBUNALS

Claimant: **Ms G Boateng**

Respondents: **(1) Epping Forest District Citizens Advice Bureau**
(2) Citizens Advice South East

Heard at: **East London Hearing Centre (via Cloud Video Platform)**

On: **3 March 2023**

Before: **Employment Judge Brewer**

Representation
Claimant: In person
1st Respondent: Mr W Lane, Solicitor
2nd Respondent: Mr C Howells, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The Tribunal does not have jurisdiction to hear the Claimant's claim for unfair dismissal,
2. The Tribunal does not have jurisdiction to hear the Claimant's claim for race discrimination, and
3. The Tribunal does not have jurisdiction to hear the Claimant's claim for disability discrimination.

Accordingly, those claims are dismissed.

REASONS

Introduction

1. This case was listed for an open preliminary hearing to consider whether the Claimant's complaints were made out of time and if so whether they should be dismissed on the basis that the Tribunal has no jurisdiction to hear them.

2. At the hearing, the Claimant represented herself. The first Respondent was represented by Mr Lane and the second Respondent by Mr Howells. The Claimant gave evidence and was briefly cross examined by both Respondent' representatives. I then heard submissions both representatives (who had also provided written skeleton arguments).

3. I had a bundle of documents extending to 112 pages and was taken to various documents in the bundle during the course of the hearing.

4. At the end of the hearing, given the time we finished, and the limited time set aside for the hearing, I reserved my decision at which I set out here.

Issues

5. As I have indicated above, the issue before me was in relation to time limits and whether the claims were presented in time and if not whether the time should be extended.

6. There was a subsidiary issue in relation to whether I should make an unless order given that the Claimant has failed to comply with the Tribunal's order to provide a schedule of loss but in the circumstances, I do not need to address that for the reasons which follow.

Law

7. The Claimant pursues claims for unfair dismissal and for both race and disability discrimination.

Time limits – unfair dismissal

8. The relevant legislative provision in relation to time limits for unfair dismissal claims is set out in the Employment Rights Act 1996 as follows:

> ***111 Complaints to employment tribunal***
>
> *(1) A complaint may be presented to an employment tribunal**]** against an employer by any person that he was unfairly dismissed by the employer.*
>
> *(2) Subject to the following provisions of this section, an **e**mployment 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.*

9. This is subject to the extension of time for presenting a claim to take account of early conciliation, but for reasons which I set out below that does not apply in this case.

10. S.111(2)(b) should be given a 'liberal construction in favour of the employee' (**Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA).

11. 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 Ltd** 1978 ICR 943, CA).

12. Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable (**Sterling v United Learning Trust** EAT 0439/14).

13. 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'* (see below).

14. In **Palmer and anor v Southend-on-Sea Borough Council** 1984 ICR 372, CA, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in **Asda Stores Ltd v Kauser** EAT 0165/07 explained it in the following words:

> *'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'.*

Ignorance of right to claim

15. A claimant's complete ignorance of his or her right to claim unfair dismissal may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. As Lord Scarman commented in **Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA, where a claimant pleads ignorance as to his or her rights, the tribunal must ask further questions:

> *'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?'*

16. In **Porter v Bandridge Ltd** 1978 ICR 943, CA, the majority of the Court of Appeal, having referred to Lord Scarman's comments in Dedman, ruled that the correct

test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them.

Ignorance of time limits

17. Where the claimant is generally aware of his or her rights, ignorance of the time limit will rarely be acceptable as a reason for delay. This is because a claimant who is aware of his or her rights will generally be taken to have been put on inquiry as to the time limit. Indeed, in **Trevelyans (Birmingham) Ltd v Norton** 1991 ICR 488, EAT, Mr Justice Wood said that, when a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right. Failure to do so will usually lead the tribunal to reject the claim.

Claimant's illness

18. A debilitating illness may prevent a claimant from submitting a claim in time. However, this will usually only constitute a valid reason for extending the time limit if it is supported by medical evidence, particularly if the claimant in question has taken legal advice and/or in any event was aware of the time limit. Such medical evidence must not only support the claimant's illness; it must also demonstrate that the illness prevented the claimant from submitting the claim on time.

19. If it was not reasonably practicable for the claim to be presented in time, then I should go on to consider whether it was presented within a reasonable time thereafter.

Time limits - discrimination claims

20. The relevant legislative provision in relation to time limits for discrimination claims is set out in the Equality Act 2010 (EqA), as follows:

> ***123 Time limits***
>
> *(1) Subject to section 140B 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.*

21. Thus, the three-month time limit for bringing a discrimination claim is not absolute: employment tribunals have discretion to extend the time limit for presenting a complaint where they think it '*just and equitable'* to do so — S.123(1)(b) EqA.

22. However, in **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, the Court of Appeal stated that when employment tribunals consider exercising the discretion under S.123(1)(b) EqA,

"'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 claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

23. This does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable.

24. The Court of Appeal in the **Robertson** case also stressed that the EAT should be very reluctant to overturn the exercise of an employment tribunal's discretion in deciding what is 'just and equitable'. In order to succeed, it would have to be shown that the tribunal took into account facts that it ought not to have done or took an approach to the issue that was very obviously wrong, or that the decision was so unreasonable that no tribunal properly directing itself could have reached it.

25. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in **S.33 of the Limitation Act 1980** (as modified by the EAT in **British Coal Corporation v Keeble and ors** 1997 IRLR 336, EAT). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular,

    a. the length of, and reasons for, the delay,
    b. the extent to which the cogency of the evidence is likely to be affected by the delay,
    c. the extent to which the party sued has cooperated with any requests for information,
    d. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

26. In **Department of Constitutional Affairs v Jones** 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and Tribunals do not need to consider all the factors in each and every case. However, while a Tribunal is not required to go through every factor in the list referred to in **Keeble**, a Tribunal will err if a significant factor is left out of account — **London Borough of Southwark v Afolabi** 2003 ICR 800, CA.

27. A Tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other.

Ongoing internal procedure

28. The fact that a claimant has awaited the outcome of his or her employer's internal grievance procedures before making a claim is just one matter to be taken into account by an Employment Tribunal in considering whether to extend the time limit for making a claim — **Apelogun-Gabriels v London Borough of Lambeth and anor** 2002 ICR 713, *CA*.

29. In **Aniagwu v London Borough of Hackney and anor** 1999 IRLR 303, EAT, A's claim of race discrimination was presented one day out of time. The EAT found that he had delayed presenting his claim until after the relevant time limit had passed because he had hoped that an internal appeal would be resolved in his favour. The EAT held that A had been entitled to take the view that it would be sensible to redress his grievance internally before embarking on legal proceedings, and accordingly concluded that it would be just and equitable to allow A's claim to proceed

30. However, in **Robinson v Post Office** 2000 IRLR 804, EAT, R, who suffered from a chronic skin condition, was dismissed following a disciplinary hearing on 2 March 1999. He appealed under the internal disciplinary procedure. The appeal hearing was held on 20 April 1999 but was adjourned and the appeal process was continuing when R presented a Tribunal application on 23 June 1999. The Employment Tribunal refused to allow R's claim of disability discrimination to proceed out of time. The EAT upheld this decision, stating that the **Aniagwu** decision did not mean that whenever an internal procedure is ongoing it will be just and equitable to extend the time limit. The correct approach is to consider the ongoing appeal as one factor to be balanced with all other relevant factors. The Tribunal in this case had correctly weighed all the relevant factors, including the facts that R had been aware of the time limit, had ignored union advice and had been capable of dealing with his affairs.

31. An Employment Tribunal is unlikely to allow an extension of time in circumstances where, having received the outcome at the end of the internal grievance process, a claimant thereafter delays submitting his or her claim. (see for example **Edomobi v La Retraite RC Girls School** EAT 0180/16).

Findings of fact

32. The Claimant is well educated having a degree in law with psychology.

33. The Claimant worked for the first Respondent from 24 March 2019 until 31 March 2022 at which point her employment transferred to the second Respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

34. The second Respondent terminated the Claimant's employment by reason of redundancy, the effective date of termination being 21 April 2022.

35. The Claimant was employed as a 'help to claim advisor' and in her previous employments she had worked for other CABs and had also worked in solicitors' practises.

36. The Claimant has experience of pursuing previous Employment Tribunal proceedings. In 2017 she brought claims against her then employer the Financial Ombudsman Service.

37. The Claimant says that she is disabled by reason of dyslexia.

38. The Claimant was aware that she was in scope for a TUPE transfer from 25 January 2022 and that the service in which she was engaged would transfer, as would she, to the second Respondent, on 31 March 2022.

39. The first Respondent undertook a consultation process with staff about the transfer and on 24 March 2022, following that consultation, the Claimant's transfer was confirmed. The second Respondent was the transferee. The TUPE transfer duly took place.

40. On 4 April 2022 the Claimant raised a grievance with her former employer, the first Respondent. Despite not being required to, the first Respondent dealt with the grievance and a grievance meeting took place with the Claimant on 16 May 2022.

41. The Claimant's grievance was not upheld, and she appealed. The Claimant did not attend the grievance appeal meeting but in her absence the appeal was determined, and the outcome was emailed to the Claimant on 28 June 2022. The Claimant's appeal was not upheld

42. The Claimant contacted ACAS for early conciliation in respect of both Respondents on 27 July 2022.

43. Early conciliation certificates were issued in respect of both Respondents on 18 August 2022.

44. The Claimant presented her claim to the Employment Tribunal on 22 August 2022.

45. On 11 October 2022 an employment judge directed that this preliminary hearing be listed to take place today in order to consider the out of time point. The notice of hearing says specifically that prior to the hearing the Claimant should send to the Tribunal:

> *"a copy of all documents and witness statements upon which you intend to rely in the hearing…"*

46. The Claimant did not provide a witness statement neither did she provide any documents for this hearing although I did allow her to give oral evidence.

Discussion and conclusions

47. I started off by clarifying with the Claimant what claims she was pursuing against which Respondent.

48. The Claimant confirmed that she understood what a TUPE transfer was, that the first Respondent had not dismissed her, and that therefore she was not claiming

unfair dismissal against them. She did say that she was claiming race and disability discrimination against the first Respondent in relation to what she referred to as the TUPE process.

49. In relation to the second Respondent the Claimant is claiming unfair dismissal, race and disability discrimination. Essentially the Claimant claims that her selection for redundancy and subsequent dismissal, was unfair and discriminatory because of either race and/or disability.

50. In relation to the first Respondent therefore, the last point at which they could have discriminated against the Claimant, given that there is no allegation of discrimination in relation to the grievance which the Claimant raised, was 31 March 2022. This means that the normal time limit for bringing a claim against the first Respondent was, at the latest, 30 June 2022. Given that the Claimant did not contact ACAS until 27 July 2022, the claims against the first Respondent are out of time and no question of an extension of time for early conciliation arises.

51. In relation to the second Respondent, the last point at which any claim could have arisen against them is 21 April 2022. The normal time limit for bringing claims ended on 20 July 2022 which again is prior to the date which the Claimant contacted ACAS for early conciliation and those claim are also out of time.

52. The Claimant relies upon the following matters to explain why she did not bring her claims within the relevant time limits:

    a. that she was unaware of the time limits,
    b. that she did not realise she could bring claims against both Respondents,
    c. that she believed she was advised to, or wished to exhaust the internal procedures first,
    d. that she was unwell during the relevant period.

53. I shall deal with each of these in turn.

Ignorance of time limits

54. In the Claimant's previous Employment Tribunal claim, time limits were an issue. In the Tribunal's judgment the matter is expressly dealt with. At paragraph 55 of the judgment the Tribunal says as follows:

    "turning to the agreed list of issues, the jurisdictional issue of whether the claim was presented in time potentially arises in relation to events predating 16 April 2016, effectively four months before the presentation of the Claimant's ET1. However, since the Claimant's case is essentially that the Respondent intentionally discriminated against her because of her disability from 27 January 2016 onwards, when they became aware of her dyslexia, and that all subsequent incidents were part of a continuing act, the out of time point does not arise for determination independently of the specific allegations themselves…"

55. In her evidence, under cross examination, the Claimant confirmed that she had gone through the judgement with her solicitor at the time it was received.

56. The Claimant also confirmed that as part of her various jobs she had to, and therefore knew how to, access information, to in effect, do research.

57. Given all of those circumstances I cannot accept that the Claimant was unaware of the relevant time limits to commence Employment Tribunal proceedings or in the alternative, that she ought reasonably to have been aware.

Ignorance of the fact that she could bring claims against both respondents

58. The basis of this argument as a reason for not bringing the claims in time was less than clear. The fact is that the Claimant did bring claims against both Respondents at precisely the same time, using the same ET1, and she gave no evidence to suggest that the information which she had at the time she brought the claims was any different to the information that she had at any point that she thought she might bring Employment Tribunal proceedings. I therefore reject this as an argument for the claims not being able to be presented in time.

Grievance procedure

59. This was a somewhat confusing argument. The Claimant asserted that she was undergoing therapy and that her therapist said to her something like "*have you tried to resolve the issues internally*". The Claimant appeared to assert that this was tantamount to having received advice that she should try to resolve the matters internally before bringing Employment Tribunal proceedings.

60. It seems to me that this is something of an *ex post facto* attempt to use a question about whether the Claimant had thought about trying to raise her complaints with her employer or former employer to justify her failure to bring her claims in time. In my judgment, being asked whether she had considered raising matters internally is not the same as being told or advised that she should do that before she commenced litigation.

61. Given that the Claimant was or ought to have been well aware that there were time limits for bringing claims, even if she thought that her therapist was suggesting internal resolution before bringing proceedings, she ought to have rejected that and submitted her claims in time.

62. Furthermore, the Claimant did not raise any grievance with the second Respondent so even if seeing through the grievance procedure against the first Respondent justified waiting for the outcome of that process before bringing a claim against them, it was not a reason for delaying bringing a claim against the second Respondent.

63. Furthermore, even if I could accept the Claimant's argument that this was somehow an impediment to her bringing a claim in time, the fact is that her grievance was complete, that is to say she had had the result of the grievance and the result of her appeal, during the normal three month time limit and therefore it still would have been possible to bring her claim in time even having awaited the outcome of her grievance.

Ill health

64. The Claimant said that during the TUPE process she was diagnosed with anxiety and depression. She said that she was not in a fit state to bring her claims even after the outcome of her grievance appeal.

65. However, as is plain from the documentation in the bundle, the Claimant raised her appeal on 4 April 2022, she attended the grievance hearing on 16 May 2022, she considered the detailed outcome of that grievance, raised an appeal against the outcome and corresponded with the first Respondent about that appeal which ultimately took place on 23 June 2022 in the Claimant's absence.

66. The Claimant could not explain how she was fit and well enough to undertake all of that but not well enough to contact ACAS for early conciliation within three months of either 31 March 2022 or 21 April 2022.

67. The Claimant has produced no evidence of any ill health, and even if I accept her evidence that she was undertaking talking therapy during the relevant time, this does still not explain how she was able to deal with all of the matters I have set out above but not to make contact with ACAS for early conciliation. I stress that the notice of this hearing specifically refers to the provision of evidence both in terms of a witness statement and documentation and the Claimant has provided none.

Conclusion on unfair dismissal claim

68. I find given all the facts that there was no physical or mental impediment to the Claimant presenting her claim for unfair dismissal in the normal time limit and that it was reasonably practicable for her to do so. Given that, I do not have to go on to consider whether the extra time taken was reasonable. In short, the tribunal does not have jurisdiction to hear the claim for unfair dismissal which is accordingly dismissed.

Conclusion on discrimination claims

69. I take the point made by the Respondents to these claims that for me to extend time on a just and equitable basis It is not for me to presume that I should do so, the case has to be made by the Claimant and I cannot extend time unless she does so and, in that sense, extending time is the exception rather than the rule.

70. As I have set out above, the Claimant was given more than four months' notice of this hearing, there was a clear reference in the notice of hearing to providing witness and documentary evidence none of which the Claimant has done. I have rejected her reasons for not bringing her claims in time and she has provided no evidence or argument as to why it would be just and equitable to extend time. I accept entirely that if I do not extend time then none of her claims will proceed, but there are reasons for time limits in litigation which is why the case law says that extending time should be the exception rather than the rule.

71. I have found that the Claimant was not ignorant of time limits, she was not too unwell to bring claims, and even if she was acting reasonably in wishing to pursue

an internal redress of her complaints, that was concluded prior to the normal time expiring. There was simply nothing in the Claimant's evidence which expressly addressed or from which I could infer a basis for extending time and therefore I decline to do so. In the circumstances the Claimant's discrimination claims were presented out of time, the tribunal does not have jurisdiction to hear them and they are accordingly dismissed.

Employment Judge Brewer

3 March 2023