EMPLOYMENT TRIBUNALS

Claimant: Mrs C J Bines

Respondent: Norwood Trust Ltd

HELD AT: Manchester **ON:** 19 April 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Ms E Seers, Trustee

WRITTEN REASONS

Introduction

1. These are the written reasons for the judgment delivered orally with brief oral reasons at the conclusion of the hearing on 19 April 2017, and sent to the parties in writing on 21 April 2017.

2. The purpose of this preliminary hearing was to consider whether the complaint had been presented within time. It was presented on 20 October 2016. The claimant complained that she had been unfairly dismissed from her post as a Registered Manager of the Home run by the respondent. The dismissal had taken place in May 2014. She also complained that there had been discrimination because of pregnancy and maternity during her employment, or in the alternative of direct sex discrimination in respect of events after the "protected period", and that there had been detriments imposed on her on the ground of a protected disclosure.

3. Although the proceedings were served upon the respondent no response form was required until the question of time limits had been determined.

4. The matter came before Employment Judge Feeney at a preliminary hearing on 31 January 2017. It became apparent that the claimant was saying she had made

at least two previous attempts to present the claim. It was necessary for there to be full documentation before the Tribunal. The hearing was therefore adjourned and directions given for production of documents and witness statements.

5. As a consequence of those directions I had the following information. There was a bundle of documents prepared by the claimant which exceeded 40 pages. Any reference to page numbers is a reference to that bundle unless otherwise indicated. The respondent did not have any documents of relevance to be added.

6. I had a written witness statement from the claimant and she also gave evidence in person answering questions from the Tribunal and from the respondent. The respondent relied on three written witness statements but none of its witnesses were called to give evidence. Those statements came from the trustees, Ms Seers and Mr Wilson, and from the Manager, Angela Seisay. There was no challenge to the content of those statements which was relevant to the issues for this hearing.

Issues

7. The issues to be determined at this hearing were as follows:

(a) Whether the claimant could show that it had not been reasonably practicable for her complaints under the Employment Rights Act 1996 to have been presented within time, and that she had presented those complaints within a further period which the Tribunal considered reasonable, and

(b) Whether the claimant could establish that it would be just and equitable for the Tribunal to allow a longer period than the three months specified in section 123 of the Equality Act 2010 so as to mean that her discrimination complaints were within time.

Relevant Legal Framework

<u>Employment Rights Act 1996</u>

8. The time limit for an unfair dismissal complaint appears in section 111(2) of the Employment Rights Act 1996 :

> **(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.**

9. The time limit for complaints of detriment in employment appears in section 48(3) and is for present purposes identical save that time runs from the date of the act or failure to act to which the complaint relates.

10. Two issues may therefore arise: firstly whether it was not reasonably practicable for the claimant to present her complaint in time, and, if not, secondly whether it was presented within such further period as is reasonable.

11. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372** Court of Appeal). Ignorance of one's rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** Employment Appeal Tribunal ("EAT").

12. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

Equality Act 2010

13. The time limit provision appears in section 123 as follows:-

> **"(1) subject to Section 140A proceedings on a complaint within Section 120 may not 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 thinks just and equitable.**
>
> **(2) …**
>
> **(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."**

14. The case law on the application of the "just and equitable" extension includes **British Coal Corporation –v- Keeble [1997] IRLR 336**, in which the EAT confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in **Keeble**:-

> **"that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –**
>
> **(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 had cooperated with any request 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;**
>
> **(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."**

15. In **Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]** the Court of Appeal recognised that the Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

> **"it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a 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 discretion is the exception rather than the rule."**

16. Subsequently in **Chief Constable of Lincolnshire –v- Caston [2010] IRLR 327** the Court of Appeal in confirming the Robertson approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

Relevant Findings of Fact

17. There was no dispute between the parties as to the primary facts in this case. What follows is a chronology drawn from the bundle of documents and the witness statements, supplemented by reference to documents on the Tribunal file where appropriate.

Termination of Employment 16 May 2104

18. Having been employed by the respondent since October 2003, the claimant was dismissed by a letter of 13 May 2014 at pages 1a-1c. It was common ground that dismissal took effect on 16 May 2014.

19. The claimant appealed by a letter of 19 May 2014 and wrote a further letter on 11 June 2014 (pages 2a-2e). An appeal hearing took place in her absence on 12 June, and by a letter of 14 July 2014 at pages 3a-3b her appeal was rejected. The letter came from the secretary of the respondent, Mr Shaw, and made clear that there was no further right of appeal.

First Claim: 2403866/2014 Presented 18 August 2014

20. The claimant was not aware of her right to bring an Employment Tribunal complaint or of the time limits and procedures which applied. However, just over a month after her appeal was rejected she conducted some internet research through the search engine, Google, and ascertained that she had to lodge a claim form on form ET1.

21. She completed form ET1 on 18 August 2014 (pages 5a-5z). Box 2.3 asked her whether she had an ACAS early conciliation certificate number. The claimant had not contacted ACAS. She ticked the box marked “no” and the box that said that ACAS did not have the power to conciliate on some or all of her claim. That claim form was submitted online on 18 August 2014 and a copy sent in the post to the Employment Tribunal Central Processing Office in Leicester (“Leicester”) with the form applying for remission from fees.

22. As a consequence of what she saw on the claim form the claimant contacted ACAS the same day to initiate early conciliation by filling in the online form. The early conciliation certificate was issued by ACAS on 20 August 2014 under reference R032608/14/65 (page 4).

23. The claimant's application for remission was rejected by Leicester in late August, and she appealed on 11 September 2014. The claimant heard nothing further from Leicester. On 11 November 2014 she emailed the Employment Tribunal Regional Office in Manchester (“Manchester”) saying that she was worried that she had had no response to her claim. She asked where the case was up to.

24. A reply came the following day from Leicester. It appeared at page 7. It said that due to administrative error the remission appeal had not been dealt with, but had been considered that day and full remission granted. The case would therefore be transmitted to Manchester.

Rejection of 2403866/2014 19 November 2014

25. When the claim reached Manchester it was allocated case number 2403866/2014. On 19 November 2014 Manchester wrote to the claimant to inform her that Employment Judge Jones had rejected the claim because all the complaints were relevant proceedings to which the early conciliation provisions applied. The claimant had therefore wrongly ticked the box saying ACAS had no power to conciliate. The claim form was returned together with some explanatory notes headed “Claim Rejection – Early Conciliation: Your Questions Answered!” (Page 16a). Those notes explained that if the claimant had now followed the early conciliation rules she could ask the Tribunal to reconsider its decision. They went on to say in bold type the following:

> **“The time limit for asking the Tribunal to reconsider its decision is 14 days from the date of the rejection letter, but there is also an overall time limit for starting a claim. The Tribunal will allow late claims only in very limited circumstances. So if you want the Tribunal to reconsider its decision to reject your claim, don’t delay in writing in.”**

26. The claimant sought to rectify the defect on 15 December 2014. She filled in by hand on the existing claim form the early conciliation number from the certificate issued by ACAS on 20 August 2014. She then sent the form to Leicester. On 18 December 2014 Leicester rejected the form by a letter which appeared at page 9. It was rejected because the form had not been accompanied by payment of the fee or an application for remission. Understandably the claimant was concerned by this and contacted Leicester by email on 21 December 2014 to say that her remission form had been submitted in August. She engaged in further correspondence by email with Leicester and Manchester in the days leading up to Christmas 2014, and that correspondence came to an end on 6 January 2015 when Manchester emailed her

to say that she should submit a new claim form to Leicester with the early conciliation certificate and a fresh application for remission (page 13).

Second Claim 2402498/2015 Presented 11 February 2015

27. The claimant took that step on 11 February 2015. The ACAS certificate she supplied was the certificate issued in August 2014. She also included an application for remission, but used the wrong form for the type of Jobseeker's Allowance to which she was entitled. On 13 February 2015 her application was rejected for that reason but notice to pay the fee of £250 was issued instead (pages 15a-15b). The claimant paid that fee.

Rejection of 2402498/2015 2 April 2015

28. Leicester then sent the form to Manchester, but by a letter of 2 April 2015 (page 16) Manchester rejected this claim form which had been given case number 2402498/2015. The reason given was that the form did not contain a valid early conciliation number. A further copy of the explanatory notes was attached to the letter.

29. The claimant did not challenge that decision by way of reconsideration or appeal. Instead she contacted ACAS to start early conciliation once again. That began on 21 April 2015 and the early conciliation certificate was issued on 5 May 2015 under reference R037107/15/20 (page 17). At some point later in May the claimant had her fee of £250 refunded. However, she did not contact either Leicester or Manchester again with the fresh ACAS details. In fact she took no action until 15 July 2015 when she emailed Manchester to ask where her claim was up to (page 18).

30. In her oral evidence the claimant suggested that there was a fresh attempt to lodge a claim form in this period but I rejected that. No documents relating to any claim were produced, and there was no mention of it in her witness statement. It seemed to me the claimant had become confused about the sequence of events. I was satisfied on the balance of probabilities that following the rejection of her claim form by a letter of 2 April 2015 the claimant did not contact the Tribunal again until her email of 15 July 2015.

31. The reply to the email of 15 July came from Manchester on 29 July 2015 (page 20). It explained that the claim had been rejected and the fee refunded in May 2015. The response from the claimant the same day at page 20 said that she had not been told that the claim had been rejected. This was an error: the claimant had not properly considered the letter of 2 April at page 16 which made it clear the claim had been rejected. The claimant asked whether she should now resubmit the claim and by email of 30 July 2015 at page 21 Manchester confirmed that she should take that step.

Third Claim 2404460/2016 Presented 20 October 2016

32. It was clear to the claimant at the end of July 2015 that she had to start again from scratch. One can appreciate this must have been disappointing news for her given the efforts she had made so far.

33. However, she did not do anything for almost nine months. She started early conciliation for a third time on 28 April 2016, and that resulted in an early conciliation certificate being issued on 12 May 2016 (page 22) under ACAS reference R138572/16/87.

34. The claimant then took no further steps until 20 October 2016 when she lodged the claim form in these proceedings.

Reasons for Delay

35. In her oral evidence I explored with the claimant the reasons for the delay at the various stages in the chronology as set out above.

36. The reason why the claim form was not lodged within the initial three month period starting with dismissal is recorded above. She was not aware of her rights and of time limits until making internet enquiries in mid August 2014.

37. There were subsequently a number of gaps of several weeks between different stages in the procedure. It was clear that the claimant was frustrated (understandably) with the administrative nature of the processes for fees/remission and for obtaining an ACAS early conciliation certificate. There were two particularly significant periods of delay.

38. The first significant period was between 30 July 2015 and 28 April 2016. The claimant was aware on the former date that she needed to start afresh and resubmit a claim form with an early conciliation certificate, but it was not until the latter date that she took any action. I accepted the claimant's evidence that this was because she had other priorities during this period. She was not in a steady job until September 2015 when she started full-time work at a nursery, and she had a demanding family situation given her role as carer for her young children whilst her husband was engaged on shift work. She could not afford to pay for legal advice and her priority was to look after her children and to make sure the mortgage was paid. She was only able to give consideration to taking her claim forward once the financial position had stabilised and there were settled arrangements for her children. At no stage was she given firm advice by ACAS or anyone else as to the time limit position even though (as she put it in oral evidence) she “thought there might be a time limit problem”.

39. The second significant period was between the issue of the ACAS certificate on 12 May 2016 and the presentation of this claim form on 20 October 2016. The claimant said that in this period she was again preoccupied with childcare and finding time to sit down and complete the form again online. She had to work round her husband’s shifts to find a time when he could look after the children to give her sufficient time to focus on getting the claim lodged once again.

The Respondent

40. Throughout all this period the respondent was unaware that the claimant was trying to lodge a claim and contacting ACAS. None of the early conciliation officers contacted the respondent. On each occasion once the claimant had commenced early conciliation there was no contact with ACAS and the certificate was issued by

the conciliation officer without any contact with the respondent. The respondent knew nothing about these proceedings until November 2016.

41. In the meantime there had been a number of changes in personnel in the respondent. Mr Shaw developed a serious and deteriorating dementia-like neurological condition and resigned as a trustee on 1 September 2015. The chairman at the time, Mr Evans, resigned as a trustee in January 2015. None of the trustees in post in late 2016 had been in post at the time of the claimant's dismissal. Further, twelve individual members of staff who were named in various documents produced by the claimant had left the respondent according to the witness statement of Ms Seisay.

Submissions

42. At the conclusion of the evidence each party made a brief oral submission.

43. For the respondent Ms Seers submitted that it had been reasonably practicable for the claimant to have lodged her complaint within the initial time limit. She had been able to do that in mid August 2014 and there was nothing preventing her doing it a few days earlier. In any event even if the claimant succeeded on that point, Ms Seers submitted that she had not lodged it within a further reasonable period. As to whether it would be just and equitable to extend time, Ms Seers emphasised that the respondent would not be able to defend the case properly given the passage of time and the effect on the memory of the relevant witnesses, even if they could be compelled to attend. Although there were documents available from a flexible working request and the disciplinary proceedings, the nuances would be lost in the memory of those involved at the time. That was particularly the case with Mr Shaw who would not now be able to give evidence because of his medical position. She invited me to dismiss all the complaints.

44. The claimant submitted that it would be appropriate to allow her complaints to succeed. She had not been aware of the three month time limit but had done her best to find out what she could. At each stage she had tried her best to comply with the procedures, not being able to afford legal advice and not having proper advice from any other source. She admitted not having read the guidance notes properly in November 2014, but over that period she had kept matters running until she found that her February 2015 application was rejected in April 2015. She had then sought to obtain a fresh early conciliation certificate and had not appreciated that her claim was rejected and she had to start again until the email of 30 July 2015 from Manchester. In the period which followed she had been unable to find the time to devote to this, being more concerned with running her family and making sure the bills were paid. At no stage was she given any clear advice about time limits and she could not afford to get legal assistance or advice.

Discussion and Conclusions – Employment Rights Act 1996

45. I reminded myself of the legal framework summarised above. For the unfair dismissal complaint time started to run on the agreed effective date of termination of 16 May 2014, meaning that the primary three month time limit expired on 15 August 2014. Had the claimant commenced early conciliation on or before that date, the early conciliation period would not have counted towards time limits. However, she

had not contacted ACAS until 18 August 2014, when the time limit had already expired. As a consequence her first early conciliation certificate did not impact on time limits, and nor did any subsequent certificates about the same matter (**Commissioners for HMRC v Serra Garau EAT/0348/16/LA** 24 March 2017).

46. The claimant explained in her evidence that she was able to present her claim form on 18 August because she had carried out some internet research, and that reading the claim form told her about the requirement to go to ACAS first of all. However, she did not identify any factor preventing her from having taken those steps earlier. In particular it seemed to me that there as nothing to stop her undertaking that research upon receipt of the appeal outcome letter. That letter was dated 14 July 2014, and was received by the claimant with about a month to go before the time limit expired. I did not doubt that the claimant was concerned about the need to sign on at the Job Centre and to look after her children at the time, and of course there is no criticism of her for prioritising those matters rather than the pursuit of a claim. However, the test is not whether she acted reasonably but rather whether it would have been reasonably practicable (in the sense of reasonably feasible) for her to have researched the position and taken the appropriate steps within the three month period rather than just outside it. The difficulties she faced are not uncommon difficulties for people who have lost their job, and in my judgment they did not assist the claimant. It was reasonably practicable for her to have lodged her unfair dismissal complaint within the primary three month time limit, particularly given that she could have taken advantage of an extension of time provided by the early conciliation process.

47. The same was true, I concluded, of the complaint of detriment because of a protected disclosure. Although the limitation period might have run from an earlier date if the last detriment preceded the decision to dismiss her, it was still reasonably practicable for that complaint to have been lodged within time as well.

48. Even if my conclusion on that point had been different, I would still have found that the claim was not presented within a further reasonable period. It would be wrong to weigh too heavily against the claimant those periods where she was actively engaged with the Tribunal administrative staff in Leicester. There was some delay in dealing with her remission appeal between September and November 2014 for which she cannot be regarded as responsible. A failure properly to understand the complicated inter-relationship between the fee/remission requirements, the early conciliation requirement and the process for presenting a claim could also be reasonable, particularly where the claimant has no access to specialist advice. One might also take a tolerant view of the failure of the claimant to ask for reconsideration within 14 days of the rejection of her claim on 19 November 2014, even though the accompanying note made it clear that she ought to act promptly and that there were only 14 days in which to do so.

49. Notable, however, were the two periods in 2015 and 2016 where there was significant delay well beyond what is reasonable. The first was the period between 30 July 2015 and 28 April 2016 when the claimant was aware that she needed to start from scratch and resubmit her claim and yet took no action. Even with the other priorities facing her, in my judgment that went well beyond what would be regarded as a reasonable period. The second was the period between 12 May 2016 (when a further early conciliation certificate was issued) and 20 October 2016 when the claim

form was actually lodged. Again that delay in itself went well beyond what would be regarded as reasonable for a complaint that concerned events in mid 2014.

50. For those reasons the complaints brought under the Employment Rights Act 1996 were brought out of time. It was reasonably practicable for the claimant to have undergone early conciliation and to have presented a claim form within the primary time limit. The Tribunal has no jurisdiction to consider those complaints and they were dismissed.

Discussion and Conclusions – Equality Act 2010

51. The claim form included complaints of pregnancy and maternity discrimination contrary to section 18 Equality Act 2010. In so far as the claimant was complaining about treatment after the "protected period" which ended when she returned to work in September 2013, the complaints would have to be pursued as complaints of sex discrimination contrary to section 13 of that Act. Looking at time limits on the basis most favourable to the claimant for these purposes, the last act which the claimant might allege was an act of discrimination was the rejection of her appeal on 14 July 2014. That would mean that at the very latest time started to run on that date, and the three month period for lodging a claim ended in mid October 2014 (not counting the three days in the conciliation period 18-20 August 2014). The claim form was not lodged for a further two years.

52. In accordance with the guidance given by the Employment Appeal Tribunal in **British Coal Corporation v Keeble**, I considered those factors in section 33 of the Limitation Act 1980 which appeared relevant.

Length of Delay

53. The first factor was the length of the delay. It was extremely significant. The purpose of having a short time limit of three months is to enable employers to know whether they are likely to face a claim in relation to a particular matter. This was not a claim lodged a few weeks or even a few months outside the primary limitation period. It was over two years late.

Reason for Delay

54. The second factor was the reason for delay. I was satisfied there was no single over-arching reason such as incapacity or the receipt of bad advice. The reason the claim was not lodged within time was a combination lack of access to advice, a lack of understanding of time limits, and a failure to obtain an early conciliation certificate before presenting the claim in August 2014.

55. When that claim was rejected by Employment Judge Jones on 19 November 2014 the claimant should have applied promptly for reconsideration as explained in the guidance note, but failed to do so. Her second attempt to lodge a claim form in February 2015 ended unsuccessfully on 2 April 2015 when Manchester rejected it (page 16). The claimant initiated early conciliation for a second time at that stage, and it is clear from her email of 15 July 2015 at page 18 that she did not understand that she had to resubmit her claim with a valid early conciliation number. The delay in this period was due to her misunderstanding of what she had to do. That

misunderstanding was cleared up, however, by the email from Manchester of 30 July 2015 at page 21.

56. The reason for the very extensive delay which then ensued (until 20 October 2016) was essentially that the claimant prioritised other matters in her home and family life. Although she should not be criticised for having taken that decision, it is not a factor which weighs in her favour when she asks the Tribunal to exercise its discretion to extend the time limit.

Effect of Delay on Evidence

57. The third factor I considered significant was the effect on the evidence of the delay. Ms Seers candidly accepted that the paper record of the relevant events was still available. However, she was right in my judgment to submit that the nuances of the explanation of events in that period will have been lost through the passage of time. That difficulty is likely to be particularly acute in a discrimination complaint where the "reason why" actions were taken is generally at the heart of the Tribunal's enquiry.

58. The position was not helped by the fact that the witnesses concerned had left the Trust, although I acknowledged that it would be possible trace those people and require them to attend the hearing by means of a witness order if unwilling to do so.

59. Most significant, however, was the unfortunate position of Mr Shaw. The evidence of Mr Wilson was not challenged and I accepted that Mr Shaw would not be able to give evidence now for medical reasons. He had not resigned from his position as a trustee until September 2015, and had the complaint been lodged within time in 2014 it would almost certainly have been heard by then. The effect of the delay in presenting a valid claim, therefore, was to deprive the respondent of its primary witness in these proceedings.

60. Mr Shaw's importance to the case was evident from the claim form. The claimant said that he was responsible for the alleged change in attitude towards her when she reported her pregnancy, and she alleged that Mr Shaw had written the witness statements of members of staff used in the disciplinary proceedings against her. He was involved in the procedural arrangements for the appeal and was the author of the letter conveying the decision of the management committee. I was satisfied that the respondent would not have a fair opportunity to defend itself against these serious allegations without the benefit of evidence from Mr Shaw.

Conclusion

61. Putting these matters together I was satisfied that the balance of prejudice meant that it would not be just and equitable to extend time. The fact that the claimant had at various times chosen to give priority to other matters over this claim suggested that it was not as important to her as it might have been, but more importantly a fair trial was no longer possible because of the delay in presentation. The respondent would be substantially prejudiced if these proceedings were allowed to go forward and it had to defend these allegations without calling Mr Shaw to give evidence.

62. I therefore decided that it was not just and equitable to extend time and the discrimination complaints were also dismissed.

Employment Judge Franey

27 April 2017

REASONS SENT TO THE PARTIES ON

28 April 2017

FOR THE TRIBUNAL OFFICE