Case Number: 2300877/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Miss S Miah**

Respondent: **Anita Sumessur**

Heard at: London South Tribunals On: 15 June 2017

Before: Employment Judge Freer

Representation:
Claimant: Ms L Marshall-Bane, Counsel
Respondent: Mr T O'Donohoe, Counsel

REASONS FOR JUDGMENT AT A PRELIMINARY HEARING

1. These are the written reason for the judgment of the Tribunal that the Claimant's application to amend her particulars of claim to include claims of unfair dismissal; direct and indirect religious belief discrimination; and direct disability discrimination is refused and the Respondent's application to amend its response, from accepting that £3,952.80 is owed to the Claimant in respect of annual leave pay to conceding £917.75 is owed, is accepted.

2. The reasons are provided at the request of the Claimant. Oral reasons were given at the hearing.

3. This is a preliminary hearing to consider two applications, one an application by the Claimant to amend her particulars of claim, and one by the Respondent to amend its Response.

4. Dealing with the Claimant's application first, it being the most substantial matter, the Claimant is seeking to amend her particulars of claim to include claims of unfair dismissal; direct and indirect discrimination because of religion and/or philosophical belief, the Claimant being of Muslim religion; and direct disability discrimination, the Claimant's pleaded condition being Dyslexia.

5. The relevant dates are that the Claimant's employment ended on or around 12 December 2016, the employment Tribunal claim was presented on 17 March 2017 and the application to amend was made at a preliminary hearing before Employment Judge Spencer on 16 May 2017.

6. I have heard evidence, both written and oral, from Ms Miahh. I have seen the original claim, the amended claim form, and importantly a medical report on the Claimant's Dyslexic condition by Ms Cathy Evans of 'Dyslexia Croydon'

7. The legal principles are well established and derive from a general discretion to grant leave to amend (see **Selkent Bus Co Ltd –v- Moore** [1996] IRLR 661, EAT; **Cocking –v- Sandhurst (Stationers) Ltd** [1974] ICR 650, NIRC). This is a judicial discretion to be exercised "in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions".

8. The circumstances to be taken into account may vary according to each case, but there are certain matters that will always require to be considered such as the nature of the application itself; relevant time limits, and the timing and manner of the application. As emphasised in **Selkent,** "the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment".

9. A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of, the same facts as the original claim (usually described as putting a new 'label' on facts already pleaded); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

10. With regard to time limits, in an unfair dismissal claim an employment tribunal shall not consider a complaint 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.

11. There are two essential limbs to these statutory provisions. First, the Claimant must show that it was not reasonably practicable to present their claim in time. The burden of proof is on the Claimant (**Porter-v- Bandridge Ltd** [1978] IRLR 271, CA). Second, if the Claimant proves the first limb, the time within which the claim was in fact presented must be reasonable.

12. The Court of Appeal in **Palmer and Saunders –v- Southend-on-Sea Borough Council** [1984] IRLR 119 stated: "Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [**Singh –v- Post Office** [1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic—"was it reasonably feasible to present

the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection."

13. The possible relevant factors are not exhaustive. Each case depends upon its own facts.

14. Factors may include matters such as the substantive cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance; whether and if so when, the claimant knew of their rights; whether the employer had misrepresented any relevant matter to the claimant; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

15. The mere assertion by a claimant of ignorance of the right to claim, the time limit, or the procedure for making the claim, is not to be treated as conclusive.

16. **Schulz v Esso Petroleum Ltd** [1999] ICR 1202, states: "In assessing whether or not something could or should have been done within the limitation period, while looking at the period as a whole, attention will in the ordinary way focus on the closing rather than the early stages".

17. The Court of Appeal held in **Marks & Spencer –v- Williams-Ryan** [2005] IRLR 562 that: **"**when deciding whether it was reasonably practicable for an employee to make a complaint to an employment tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and of the time limit for making such a complaint. Ignorance of either does not necessarily render it not reasonably practicable to bring a complaint in time. It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances".

18. The Court of Appeal in **Dedman –v- British Building and Engineering Appliances Ltd** [1974] ICR 53, held that: "If a man engages skilled advisers to act for him—and they mistake the time limit and present [the complaint] too late—he is out. His remedy is against them". However, in **Riley –v- Tesco Stores Ltd** [1980] IRLR 103, the Court of Appeal also established that the issue of reasonable practicability is an issue of fact and must be determined by examining all the circumstances. Matters relating to advisers are relevant only as part of the general overall circumstances of the case.

19. In a discrimination claim an employment tribunal can consider a claim presented out of time "if, in all the circumstances of the case, it considers that it is just and equitable to do so". This gives a tribunal a wide discretion and to take into account anything which it judges to be relevant. The discretion is broader than that given to tribunals above under the 'not reasonably practicable' formula.

20. Notwithstanding the breadth of the discretion, the exercise of discretion is the exception rather than the rule' (see **Robertson –v- Bexley Community Centre** [2003] IRLR 434*,*). In **Chief Constable of Lincolnshire Police –v- Caston** [2010] IRLR 327, the Court of Appeal stated that whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case "is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it"

21. The discretion to grant an extension of time under the 'just and equitable' formula has been held to be as wide as that given to the civil courts by s 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions (**British Coal Corpn –v- Keeble** above).

22. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, 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 had co-operated with any requests for information; (*d*) the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

23. Although, these factors often serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, provided no significant factor has been left out of account.

24. With regard to the nature of the amendment, in my conclusion the amendments are all new claims. There is not a reference to unfair dismissal in the original particulars of claim and neither are there references to religious discrimination or disability discrimination.

25. The reference to any discrimination in the claim form is one of race discrimination which in my view was confirmed by Ms Miah in her evidence. It is a clear reference to there being discrimination due to the Claimant's Pakistan ethnic origin/nationality and a claim of race discrimination.

26. The new claims are significant in breadth. They are detailed and long allegations and I accept the summary of them set out by Mr Donohoe behalf of the Respondent in his skeleton argument at paragraphs 12 and 13.

27. With regard to time limits, there are two tests to apply to claims that have clearly been presented out of time. Whether or not it was reasonably practicable submit the claim in time and if so, whether it was submitted within reasonable time on the unfair dismissal claim and whether it is just and equitable with regard to the discrimination claims.

28. I have taken fully into account the Claimant's Dyslexia condition as set out in the report by Ms Evans and also the Claimant's personal circumstances as appropriate as described to me in Ms Miah's oral evidence.

29. Ms Miah confirmed in her evidence that she was aware that she had been discriminated against as alleged prior to the presentation of her Tribunal claim form. She also knew of the application of Tribunal time limits before the presentation of her claim form. That was confirmed, at the very least, in a letter to her from ACAS.

30. The Claimant did not seek to obtain any advice on the precise nature the time limits i.e. the length of them, either from ACAS, the Citizens Advice Bureaux, or the Internet. Ms Miah sent a text to her solicitor in May this year to ask if that solicitor dealt with employment matters, that solicitor having previously advised Ms Miah on immigration matters. Ms Miah obtained an immediate response from that solicitor who gave immediate and free advice.

31. I have received no evidence from Ms Miah as to why that enquiry of her solicitor could not have been taken at an earlier date by sending, as she did later, a simple text to the solicitor making an enquiry, but before her Tribunal claim was submitted.

32. It is also possible in my view for the Claimant to have printed off the claim form to check through for accuracy, as she stated in evidence she usually does with regard to a complicated documents having regard to her Dyslexia condition.

33. Ms Miah informed me that she has a local cafe where she can print off longer documents on blue paper to assist her to process the content. In my view that also could have been done by Ms Miah.

34. Even if processing the narrative of the particulars of claim for accuracy when writing the content was difficult for the Claimant, the Claimant has not ticked any of the simple boxes indicating the type of claim being pursued in relation to the amended claims.

35. Ms Miah's evidence varied on that point. Initially there was no recognition that there were any boxes, but she has actually ticked three boxes on her claim form relating to payments that 'I am also owed' of 'other payments' and 'making another type of claim' of unpaid holiday pay, but there is no tick next to the clearly described box of unfair dismissal and discrimination and the different types of discrimination that could be pursued.

36. Ms Miah was capable of filling and completing for herself, which is what she had done.

37. Therefore considering the time limit issues is my conclusion that it was reasonably practicable for Ms Miah to have presented the claim form to the Tribunal claiming all the matters within a within the normal time period. It was reasonably feasible to do so. Therefore no extension of time is granted.

38. With regard to the potential extension on the just and equitable principle, it is important to note that there was no material evidence before me to show that the Claimant's actions and inactions related to her medical condition.

39. I have taken into account section 33 of the Limitation Act 1980 and in particular the length of and reasons for the delay; the extent to which the cogency the evidence is likely to be affected; the promptness with which the Claimant acted when she knew of the facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice when she knew of the possibility of taking action.

40. In addition to the findings I have made above relating to the unfair dismissal claim, it is my conclusion that the cogency of evidence has been affected by the delay. The Respondent's business has now been sold and/or closed and the witnesses are no longer employees. Although that state of affairs existed at the time the normal time limit expired, the passage of time to the application has inevitably made that situation worse.

41. Therefore, it is my conclusion having considered all of the circumstances and the relevant factors that on balance it is not just and equitable extend time.

42. Picking up the **Selkent** guidance, with regard to the overall balance of hardship, given the nature of the amendments, the timing of manner the amendments and the time limit issues, it is my conclusion that the amendments sought would significantly increase the length and scope of the hearing, there will be witness evidence difficulty, and ultimately the amendment would, as a Respondent argues, transform the nature and scale of the proceedings. The balance of hardship tips in favour of the Respondent.

43. When balancing all the circumstances as a whole the Claimant's application to amend her claim is refused.

44. With regard to the Respondent’s amendment, it is an amendment only relating to remedy. The Respondent seeks to amend its agreement in the Response that the Claimant is owed £3,952.80 holiday pay, to an agreed sum of £917.75 now the Respondent had obtained legal advice, and the correct figures obtained as set out in the detailed calculation provided.

45. I conclude that the terms of the Response was not an abandonment of part of the claim by the Respondent and that a failure to consider the application would fetter the Tribunal’s obligation to rule on all relevant issues in the claim. It is not a new matter. It is easily evidenced and then is a matter of calculation. The ability to carry over annual leave is a matter of law (on a contractual or Working Time basis).

46. Therefore, having regard again to all the circumstances and relevant factors, as set out above, it is my conclusion that I will allow the Respondent’s amendment. The balance of hardship tips in favour the Respondent and the application is allowed.

Employment Judge Freer
Date: 06 November 2017