THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**

BETWEEN:

Mrs R Honeysett **Claimant**

AND

Mercer Limited **Respondent**

ON: **17 April 2018**

Appearances:

For the Claimant: In person

For the Respondent: Ms D Masters (Counsel)

JUDGMENT

1. The Claimant's application to amend her claim to add a complaint that she was discriminated against because of race on 17 August 2017 when the Respondent sent her a grievance outcome letter by post rather than email is refused.
2. The Claimant's claim of constructive unfair dismissal under s95(1) Employment Rights Act 1996 ("ERA") was not brought within the statutory three month time limit set out in s111 ERA when it would have been reasonably practicable for her to bring her claim in time. The Tribunal therefore has no jurisdiction to hear that claim which is hereby dismissed.
3. The Claimant's claim of race discrimination, was not presented within the statutory three month time limit set out in s 123 Equality Act 2010 ("Equality Act"). It is not just and equitable to extend the time limit in respect of her claim. The Tribunal therefore has no jurisdiction to hear the claim which is hereby dismissed.

Reasons

1. The case was listed for a preliminary hearing to deal with the Respondent's application that the Claimant's claims should not proceed because they had been brought out of time and the Tribunal did not therefore have jurisdiction to hear them. The Claimant had also made it clear through her responses to the case management agenda that she was making an application to amend her claims. This was resisted by the Respondent. The Claimant, Mrs Honeysett, gave evidence at the hearing and there were two separate bundles of documents, although these were substantially the same.

2. Dealing first with the amendment application, the Claimant wished to amend her claim by adding to her list of complaints the fact that when the Respondent replied to her grievance, it opted to do so by post only rather than post and email. She relied on this as an act of race discrimination and submitted that if her amendment were permitted the effect would be that her race discrimination claim would potentially have been brought in time. My reasons for refusing the application to amend were as follows:

    a. The basis of the Claimant's application was not clear and seemed to depend on a number of potential factors none of which was compelling by itself, but the Claimant seemed unable to say which one had been the real reason for her not having set out all of her claim at the start. She relied firstly on being a very busy person and on having completed her original claim form late at night leading her it seems, to append her grievance letter to the claim form by way of particulars of her claim, rather than writing a fresh statement. I do not consider that to be a credible reason for not having put forward all her claims at the outset. Claimants are expected to commit the necessary time, energy and resources to completing their forms fully and accurately so that Respondents understand the case they have to meet and tribunals can manage cases effectively. The Claimant relied secondly on ACAS having informed her that she did not need to set out all of her claim at once. That assertion also lacks credibility. She relied thirdly on ignorance of employment tribunal procedure, despite acknowledging in cross examination that the tribunal claim form is very clear in requiring Claimants to set out the basis of their claims in full. Even allowing for the Claimant's lack of legal representation, her own evidence was that she learned from a friend in September 2017 that employment tribunals have various strict requirements. The Claimant is moreover an intelligent and well educated woman and could have been expected, to find out the Tribunal's requirements and act upon her knowledge promptly. I do not therefore consider her ignorance of the requirement to set out her claim in full at the outset to have been reasonable. The fact that the Claimant was not clear which of these reasons was the real reason for her omitting the whole of her claim at the outset also undermines the credibility of her position.
    b. The facts forming the basis of the amendment application occurred outside the statutory time limit.. That is not a determining factor in and

of itself, but it imposes a duty on the Claimant to explain the lateness. She did not in my judgment given a satisfactory explanation as to why the amendment application was not made sooner.

c. The amendment to the claim in my judgment has little reasonable prospect of success. The Claimant was wholly unable to explain why she considered that the sending of the grievance outcome by letter was consciously or unconsciously affected by her race. The fact that it was considered by her to have been unfair did not make it discriminatory and she adduced no evidence to suggest that her race played a part in this part of the Respondent's actions. It was the Claimant's case, as I understood it, that this act potentially brought the previous matters of which the Claimant complained within the statutory time limit under s123 Equality Act. It seemed to me that the most likely explanation for the Claimant seeking to amend her claim was to improve her chances of persuading the Tribunal that the other matters on which she relies as acts of race discrimination were not outside the statutory time limit because they were somehow linked to the Respondent's decision in August to send the grievance outcome letter by post. In my judgment that argument has a negligible chance of succeeding.
d. The amendment involved a wholly new allegation, involving protagonists who were not part of the Claimant's original complaints and it would the prejudicial to the Respondent to have to deal with these new allegation. In light of the limited prospects of the new allegation succeeding, the balance of prejudice points away from allowing the amendment as it would be onerous to the Respondent to have to respond to and defend an allegation that had so little chance of succeeding.

For all those reasons I refused the application to amend the claim.

3. Turning now to the question of time limits, I will deal first with the time limit under s 111 ERA. The effective date of termination was 17 February 2017. The Claimant did not approach ACAS until 27 October 2017, when the time limit for doing so expired on 16 May 2017. The time limit under s 111 is very strict and I heard no evidence from the Claimant that suggested that she even approached the required threshold of showing that it was not reasonably practicable to approach ACAS and then submit the claim within the primary time limit. Even if she had put forward a reason that explained an initial delay, she did not show how the submission of the claim in December 2017 constituted submission within such further period as was reasonable. At its highest her case was that she became aware of the existence of time limits through a friend in September 2017. Yet she still delayed until October in contacting ACAS. Furthermore for the purposes of the statutory test an intelligent and well educated Claimant is expected to understand that there are time limits in tribunal proceedings and to inform themselves of those limits. The Claimant's evidence suggested that her real reason for delaying was her ambivalence about acting sooner and the time it took her to reach a decision to do something about the treatment she complained about. But even her ability to rely on that assertion was undermined by her willingness to submit a grievance to the Respondent about her treatment, but not to take the

further step of protecting her position by issuing proceedings within the time limit. The Claimant did not explain the apparent contradiction in that position.

4. Her evidence that she had faith in the Respondent and that she wished to allow the internal proceedings to take their course, would not constitute an adequate explanation for the purposes of the test under s111 and was in any event contradicted by the Claimant's email to the Respondent in May 2017, in which she stated that she did not have confidence in the Respondent's processes and was in the process of taking advice on commencing legal proceedings. I note that May 2017 was the point at which the primary time limit for approaching ACAS expired and I consider it more likely than not that the Claimant was aware that there was a time limit that would expire at around the time that she wrote that email. For all these reasons I conclude that it would have been reasonably practicable for the Claimant to submit a claim under s 95(1)(c) in time and that she did not do so and has not provided an acceptable reason for not having done so. The tribunal therefore has no jurisdiction over that part of the claim.

5. Turning to the race discrimination claim, as discussed at the hearing, the starting point is that time limits should be adhered to unless there are good reasons to extend them (Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA). The first question therefore is whether the Claimant has put forward coherent reasons for her request to extend the time limit in this case – it is not to be assumed that time will be extended and the onus is on her to show the reasons. There were a number of weaknesses in the Claimant's overall approach to her case which I have outlined in relation to her amendment application and the application to extend time under s111 ERA. In particular the Claimant's credibility was undermined by a number of changes of position as she was giving her evidence. Furthermore the contradiction in her position as regards her faith in the Respondent's ability to deal appropriately with her grievance, as set out in the preceding paragraph, also undermines the strength of her application for an extension of time in relation to her race discrimination claim.

6. 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; in this case I acknowledge that the delay is considerable in that at some of the acts relied upon occurred in 2013 and 2014. The reasons for the delay were explained by the Claimant in her evidence as reasoned decisions not to initiate proceedings against her employer in order not to jeopardise he career and working life. As decisions these are valid and understandable, but they do not amount to adequate reasons for commencing proceedings some years after the event when the employment has ceased. Tribunal

time limits serve the purposes of enabling claims to be dealt with as soon as possible after the events giving rise to them so that memories are fresh and evidence cogent. Not wishing to "rock the boat" during employment is not without some additional and compelling factors that were absent in this case, a valid reason to delay.

b. the extent to which the cogency of the evidence is likely to be affected by the delay; I have heard submissions form the Respondent as to the difficulty that would be caused by allowing the claim to proceed. There is an inherent difficulty the Respondent says, in recalling matters that took place as long ago as 2013.
c. the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; in this case the Claimant's evidence was clear – she was well aware of the possibility that she was being discriminated against as long ago as 2014. Her decision not to act sooner was deliberate in relation to both these earlier acts and her decision to resign in February 2017. Not approaching ACAS until October of that year was explained by the Claimant by reference to her decision to await the outcome of the internal grievance proceedings but it could not on any analysis be described as prompt. Even after the grievance outcome was communicated to the Claimant she delayed further before taking the decision to approach ACAS.
d. the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action. I do not find it credible that the Claimant could not have availed herself of at least some basic information about her legal rights once she had concluded in 2014 that she might have ben discriminated against because of her race. As Ms Masters pointed out there is an abundance of information available online about employment rights and tribunal proceedings. The Claimant's evidence was that she liked to weigh things up and act when the time felt right to her. Whilst that is understandable, it is not an approach that can be supported in the Employment Tribunals where statutory time limits need to be adhered to unless there are compelling reason for relaxing them. The Claimant left it too late by waiting until her friend informed her that there were time limits and she needed to take care. Even after receiving that warning the Claimant delayed further before approaching ACAS. The Claimant should in my view have taken some steps to take advice far sooner than she did and should at the very least have acted immediately once explicitly warned about the existence of time limits.

7. What is also essential is that I balance the respective prejudice to the parties if I allow the claim to proceed. Other relevant authorities on this point are: Szmidt v AC Produce Imports Ltd EAT 0291/14, Pathan v South London Islamic Centre EAT 0312/13 and Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283, EAT. The Claimant's account of the delay in bringing the claim and the reasons for it is only one of the relevant factors and going on to weigh the respective prejudice to the parties is an essential step and in that regard the prospective merits of the claim are also relevant. I can only adopt a very broad brush approach to the merits of this claim as neither party came equipped with evidence. On the face of it the Claimant has put

forward an account of events that could potentially give rise to justiciable claims of race discrimination in breach of the Equality Act. The claims extend as far back as 2013 but it is clear from the Claimant's claim form that there are later matters including matters that prompted her ultimate decision to resign. There are therefore potentially fact sensitive issues as to whether there is a series of discrete acts in the case, or a continuing act, or a continuing discriminatory state of affairs which cannot be determined at this stage of the proceedings. The possibility that some of the Claimant's earlier complaints potentially have merit in my judgment is a factor that points towards allowing the claim to proceed. However I have not lost sight of my conclusion that the Claimant's assertion that the Respondent discriminated against her by choosing to deliver the grievance outcome by post is a weak and potentially manufactured assertion that is unlikely to succeed. That factor is one that tips the balance of prejudice towards the Respondent for the reasons set out above.

8. There is one more case that is relevant to these proceedings - Edomobi v La Retraite RC Girls School EAT 0180/16. In that case the EAT upheld a tribunal's decision not to extend time when there was a delay of some two months in the Claimant bringing her claim after she had received the outcome of a grievance that she had been waiting for. The Claimant in this case waited several weeks after receiving the letter of 17 August (even accepting that it did arrive by post and not email) before approaching ACAS. I am unable to find that that amounted to prompt action and even if I were to accept the Claimant's reasons for her earlier delays, her further hesitation before approaching ACAS in my judgment clearly tips the overall balance of prejudice away from allowing an extension of time in this case. An unexplained delay in acting in a case in which some of the the facts relied upon occurred several years in the past is my judgment a factor that should be given considerable weight when determining which of the parties is most likely to be prejudiced by the decision not to extend time.

9. Taking into account the guidance from the authorities, the Claimant's evidence and the relevant factors under s33 Limitation Act I conclude overall that the balance of prejudice falls in favour of not extending the time limit to allow the Claimant's claim of race discrimination to proceed to a full merits hearing. I therefore conclude that the Tribunal does not have jurisdiction to determine the claim of race discrimination which is hereby dismissed.

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Employment Judge Morton
Date: 28 April 2018