Case Number: 2200053/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss A Kamali Servestani	**v**	Foxtons Limited

Heard at: Central London Employment Tribunal On: 7 August 2019
Before: Employment Judge Norris, sitting alone

Appearances
For the Claimant: Mr R Robison, FRU
For the Respondent: Mr B Randle, Counsel

JUDGMENT
ON A PRELIMINARY HEARING

1. The Claimant's claim was submitted out of time
2. In the case of the complaints of unfair dismissal and breach of contract, it was reasonably practicable to submit the complaints within the time limit.
3. In the case of the complaint of sex discrimination, no good reason for the delay has been given and the complaint lacks merit so that notwithstanding the prejudice to the Claimant, time is not extended on a just and equitable basis.
4. The claim is therefore struck out and the full merits hearing listed for 21-23 October 2019 is vacated.

REASONS

Background and chronology

1. It is common ground that the Claimant was employed by the Respondent from 10 August 2015 until her summary dismissal purportedly for gross misconduct on 22 August 2018.

2. The Claimant accordingly had until 21 November 2018 to present an Early Conciliation (EC) request to ACAS. She did so on that last day and her

certificate was issued on 6 December 2018. Hence she had until midnight on 6 January 2019 to present her claim.

3. The claim form is marked as having been received on 7 January 2019, i.e. a day late. However, that is not the whole story, as the Claimant has produced an automated receipt to her Gmail address, which is dated "Mon Jan 7, 2019 at 12.00 AM". Therefore, her claim appears to have been presented within one minute after the deadline expired. Nonetheless, it is out of time, the deadline having expired the previous day.

4. The matter was listed before EJ Goodman on 18 July 2019 for a Preliminary Hearing (PH). She listed it for an open PH on 7 August 2019 before a Judge sitting alone, and confirmed the listing of a full Hearing between 21 and 23 October 2019 before a full panel. The issues to be determined at the PH were whether the Tribunal has jurisdiction to hear the claim, applying the different statutory tests to the claim of unfair dismissal/breach of contract and discrimination. If the claim proceeded, the Claimant was applying to amend to add complaints of sex and race-related harassment. The Respondent was intending to apply to have the claim or parts of it struck out or deposit(s) paid because it says the complaints have no or little reasonable prospects of success.

5. The complaints of unfair dismissal and breach of contract relate to the Claimant's dismissal without notice. The dismissal was said to be unfair because the Respondent did not conduct a reasonable investigation and/or the decision to dismiss was one which fell outside the band of reasonable responses. There was no evidence before me relating to this complaint. The decision to dismiss without notice was said to be wrongful.

6. The matter before EJ Goodman was said also to involve direct sex discrimination because of sex and/or race (the Claimant describes herself as Iranian nationality or national origin). The Claimant confirmed however in evidence before me that she was not seeking to advance a complaint of direct race discrimination.

7. That left the sex discrimination complaint. The less favourable treatment had been said to be the Claimant's dismissal. The Claimant said in evidence however that in dismissing her, Mr Horvat (one of the Respondent's managers) believed what her manager Mr Marchant had said in preference to what the Claimant had said, and that Mr Horvat acted in this way because Mr Marchant is a man and the Claimant is a woman. The Claimant fairly volunteered the suggestion that this was a "feeling" she had had and that one alternative may be that Mr Horvat believed Mr Marchant because he had been with the Respondent for longer than the Claimant had. There was no prior or other complaint of sex discrimination alleged against Mr Horvat.

8. The Claimant also now complains of prior acts of race and sex-related harassment by Mr Marchant, which as I have noted above would have required an application to amend if I had found the claim to be in time or extended time so that the Tribunal had jurisdiction to hear it (or part of it). The race-related harassment is said to involve a "joke" or "jokes" by Mr Marchant on unspecified dates which on the face of it do appear to relate to nationality or at any rate

ethnicity. The sex-related harassment is said to be that Mr Marchant told the Claimant she should stop being "the voice of the office". I indicated I was unable to see how that was related to sex. The Claimant said in evidence that Mr Marchant had said this on a number of occasions (again the dates were not specified) every two months or so between approximately August 2016 and her dismissal two years later, and that on roughly half of those occasions he had prefaced it by saying that she was a "strong woman".

9. The Claimant gave evidence on oath and was cross examined by Mr Randle; she also answered some questions from me. Mr Robison had handed up some evidence on her behalf, which was a generic description of the side effects for a drug called Decapeptyl (to which I return below) and an extract from the Claimant's medical records. The latter were in such small font as to render them largely illegible. The Claimant had also produced a short witness statement which I have read carefully.

Law

10. I was referred in the representatives' careful written submissions to the relevant tests in the Employment Rights Act 1996 (ERA) and the Equality Act 2010 (EqA).

11. At section 111(2) ERA, the Tribunal may allow a complaint to proceed if it determines it was not reasonably practicable to present it in time (provided it was submitted within a further reasonable period). The same test applies to claims of wrongful dismissal/breach of contract (failure to pay notice) under the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 (article 7).

12. At section 123 EqA, the time limit is three months "or such other period as the Employment Tribunal thinks just and equitable". Conduct extending over a period is, for these purposes, deemed done at the end of the period.

13. A delay of a matter of seconds, meaning that a claim is submitted technically the day after the deadline expires is still to be taken as meaning the claim is out of time (e.g. *Miller v Community Links Trust Limited EAT/0486/07* in which the delay was just eight seconds; the EAT upheld a decision that the Tribunal had no jurisdiction to hear it because it could reasonably practicably have been presented in time).

14. While the discretion is widely considered to be more lenient in discrimination cases than for complaints of unfair dismissal, the rule is still that Tribunal limits are to be enforced strictly and it is for the Claimant to make out a sufficient case for the Tribunal to exercise its discretion (*Bexley Community Centre v Robertson [2003] IRLR 434).*

15. There is to be applied a balance of prejudice as between the parties, and the factors in section 33 Limitation Act 1980 are to be taken into account, including the length of and reasons for the delay, the extent to which the evidence is likely to be less cogent as a result of the delay, the extent to which the Claimant acted promptly once they knew of the alleged actions of the Respondent and the steps taken to obtain professional advice once the Claimant knew of the possibility of taking action. The potential merits of a claim are also a relevant

factor to be taken into account (*Rathakrishnan v Pizza Express (Restaurants) Limited [2016] IRLR 278).*

16. I reminded myself that the burden of proof in discrimination cases starts with the Claimant having to show facts from which the Tribunal could conclude that there has been discrimination and if she does so, it passes to the Respondent to disprove it (EqA section 136). I also reminded myself that in direct discrimination cases, it is the actions and associated reasons of the alleged perpetrator that must be examined, and their state of knowledge, even if they have been unwittingly duped by another who has discriminatory motives.

Findings and conclusions on delay

17. The Claimant started work for a competitor, Hamptons, some four weeks after her dismissal by the Respondent. She gave evidence that she had been contacted by a recruitment agent via LinkedIn, had "tweaked" her CV and given it to him, and he had put her forward for around ten roles, for roughly five of which she had been given interviews; in the case of Hamptons, she had had two interviews on the same day before being given the job and starting on 17 September. She remained working at Hamptons, doing a five- or six-day week, throughout the relevant period, i.e. until around 10 January 2019. She told me that she had taken some five days off because of her medical condition during that four-month period.

18. In cross-examination, the Claimant said that she thought of bringing a claim to the Tribunal in around November. She knew before generically that such things existed but had not contemplated complaining herself. She Googled the matter and saw that she had three months to go to EC, and as I have noted above, she then did approach ACAS on the last day of the period. The certificate was issued around three weeks later.

19. Thereafter, the Claimant's evidence was confused as to the timing of her application. She was asked whether the drafting of the application had taken her more than half a day and she said it had, she thought as much as two days. She said that she had started it and did "bits" here and there; then she said she had completed the tick box elements on 5 January and then answered question 8.2 during 6 January 2019; then she seemed to be saying she had done the whole thing on 6 January.

20. I cannot accept the Claimant's evidence that it took her two days to complete such an extremely short and vague ET1. The Tribunal is of course familiar with claimants who struggle to make themselves understood in English, and those where the claimant has a mental impairment of some description; but the Claimant does not fit into either category. The online guidance says that a claimant can add an additional "rtf" document if there is insufficient space for all the details, but this Claimant did not add such an item (although she stated at the end "I have summarised as I have no space"). Her claim in its entirety was just 26 lines. She did not enter any details about the compensation sought because she said she needed to seek legal advice.

21. The Claimant's argument is that throughout this period she was suffering from endometriosis and that from November 2018 onwards, she was given hormone injections (the Decapeptyl referred to above) which cause a number of

unpleasant side effects. The print off from the internet which Mr Robison handed up listed these as including in women: pain at the injection site, hot flushes, sweating, feeling dizzy, headache, reduced sex drive, mood changes including depression, disturbances of the gut such as constipation, feeling sick, vomiting or abdominal pain, weight changes, visual disturbances, difficulty sleeping, fluid retention and pain the muscles and joints. I noted that in neither men nor women was a lack of concentration listed a possible side effect of Decapeptyl.

22. There was no medical evidence to support the side effects from which the Claimant claimed to be suffering, but the Respondent accepted the case at its highest, as I do, in finding that the injections caused mood swings, hot flushes and tiredness and adversely affected the Claimant's well-being. In her witness statement, the Claimant says that she was not her normal self for some time and this was also because of a meeting that led to her dismissal from her new job. However, her evidence was that this was after the submission of the claim, so it cannot have been a factor in the late presentation of her ET1 against this Respondent.

23. The Claimant's evidence also confirmed that she was aware of the deadline to submit her claim. She claims that the stress and medication stopped her functioning normally as previously, meeting deadlines had not been something with which she struggled.

24. I cannot accept that the Claimant's medical condition was the cause of her delay, and I find that it was reasonably practicable for her to bring the claim within time. On her own account, the Claimant was working full time, sometimes six days a week, throughout the period from issue of the EC certificate until she submitted the claim. She had access to the internet and she knew what the deadline was. She gave evidence that she had articulated her complaints when she sent the EC request to ACAS so there is no reason why she would have taken two days to set out the simple facts that she did include. She sat down on 5 or 6 January (the latter a Sunday when she did not work) but did not press "send" until 7th, albeit clearly seconds in to that day. I cannot accept that it was not reasonably feasible for her to have pressed "send" even one minute earlier.

25. It is of course a different matter for the question of whether time should be extended on a "just and equitable" basis. I might be minded to allow that element of the claim to proceed, notwithstanding that the Claimant technically failed to comply with the time limits, were it not for the lack of merit in her complaint. I agree that the delay was negligible and will not have affected the cogency of the evidence in any way whatsoever, and Mr Randle was not suggesting, contrary to *Pizza Express*, that a failure to give a good reason for the delay would of itself have meant time should not be extended. However, the Claimant was unable, despite careful submissions by Mr Robison, to advance any evidence on which she might be able to rely for the suggestion that Mr Horvat was influenced in any way by sex in dismissing her.

26. The complaint seems rather to be that Mr Marchant was influenced in his conduct towards the Claimant by sex and/or race and that he in turn influenced Mr Horvat, who took his word on something. The Claimant drew my attention to

evidence she proposed to adduce from a client, who said that Mr Marchant had chased him to encourage that client to bring a complaint or complaints about the Claimant. The client refused to do so.

27. However, even if that client was to attend the Tribunal and come up to proof in terms of this pursuit by Mr Marchant of a complaint which was never forthcoming, that does not assist in showing that Mr Horvat was influenced in any way by sex when dismissing the Claimant. The direct discrimination complained of is less favourable treatment (dismissal) than the Respondent would have given to a hypothetical male (though this was not what the Claimant said in evidence – as I have noted, she said "possibly" it was believing Mr Marchant because he was a man, rather than the Claimant herself); but I can see from the pleadings that the allegation against the Claimant, which Mr Horvat appears to have believed, was that the Claimant had been releasing confidential information to a competitor. It is impossible to imagine that a man in similar circumstances would have been treated any differently. I cannot see how the burden of proof would shift. The Claimant no longer seeks to suggest that the dismissal was anything to do with race.

28. Therefore, having regard to *Pizza Express*, the Claimant not only has no good excuse for the delay, albeit it is of the smallest period imaginable, she has a complaint of direct sex discrimination which on the face of it has no merit. Mr Robison did not seek to suggest that Judge Peter Clark's decision in this matter has been overturned subsequently.

29. I accept that the prejudice to the Claimant is far greater in disallowing her claim, because it means that she does not then have a basis on which she can go on to apply to amend it to add the two complaints of harassment. However, these complaints are much further out of time. The Claimant still cannot give any dates of the alleged conduct with any certainty (not even to the nearest month until I pressed her to think of significant events and the season in which they occurred) and they were not raised at all at the time.

30. The sex harassment complaint is also particularly weak. The Claimant accepted that in fact Mr Marchant listened to her and that she was the mouthpiece for others (both men and women) in the office to whom he would not listen. I accept the Respondent's submission that in terms, telling the Claimant not to be "the voice of the office" was telling her that she should not be acting as a sort of unofficial trade union representative. It is impossible to see how that "relates" to sex, even if he added "you are a strong woman" as a preface on roughly half the occasions.

31. In relation to the race-related harassment, I could see that this might well have more merit if a tribunal found that the acts complained of had taken place. However, the fact remains that the latest the Claimant could put these alleged acts were at the end of June 2018. The Claimant would have had to go to ACAS by the end of September, when in fact she did not go until the end of November, two months late. There has been no explanation at all for the failure to raise it at the time or to comply with the deadline once the Claimant had looked up the issue of time limits.

32. In any event, the race-related harassment particulars were not before the Tribunal for many months thereafter. It appears they were sent to the Tribunal and to the Respondent by email from Mr Robison the night before the previous PH, i.e. on the evening of 17 July, more than a year after they allegedly occurred for the last time (assuming the Claimant could show that there had been a continuing act). Despite the Claimant having been represented for several weeks, there has been no explanation for this further delay since the claim was originally submitted on 7 January, more than seven months earlier.

33. Were I to permit the direct discrimination claim to proceed on a just and equitable basis, I would very likely have gone on to strike it out on the basis that there were no reasonable grounds of success. It is also impossible to see on what basis I could have allowed the amendments proposed, given the critical issue that the Claimant had been aware of the alleged basis for those complaints of sex- and race-related harassment for over a year but at no stage whether during her employment or since has she raised them until the eve of the PH; and her evidence is vague and imprecise even now, so that it would be impossible to see in relation to the sex-related harassment in particular how the Respondent could be expected to defend itself if the Claimant still cannot say with any precision when the acts complained of began, when they took place and when they ended.

34. Accordingly, the claim is struck out on the basis that the Tribunal has no jurisdiction to hear it, and the Hearing listed for October is vacated.

Employment Judge Norris

07/08/2019

Sent to the parties on:

08/08/2019

For the Tribunal:

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