Case No: 1601835/2018

EMPLOYMENT TRIBUNALS

Claimant: Miss N Kiyaga

Respondent: BMJ Publishing Group Limited

Heard at: Cardiff Employment Tribunal **On:** 26th July 2019

Before: Employment Judge Howden-Evans (sitting alone)

Representation
Claimant: Ms Klepere, Race Equality First
Respondent: Ms B Criddle, Counsel

Judgment on an Issue

Judgment on an Issue was sent to the parties on 4th August 2019, following the employment judge's decision and oral reasons at the preliminary hearing. The Respondent has requested written reasons. The employment judge's reasons for her decision are as follows:

REASONS

1. The claimant has presented claims of unfair constructive dismissal and direct race discrimination claim. The last act alleged in the race discrimination claim is the alleged constructive dismissal on 16th July 2018.

2. S111 Employment Rights Act 1996 provides an unfair dismissal claim must be presented within 3 months of the date of dismissal. S123 Equality Act 2010 provides a discrimination claim must be presented within 3 months of the act complained of.

3. The claimant commenced ACAS early conciliation on 28th August 2018 and that conciliation concluded on 28th September 2018. The starting point is that both claims should have been presented by 15th October 2018 – the effect of the ACAS EC provisions is that this was extended to 15th November 2018. The 15th November 2018 was the last day on which the claimant should have presented both claims. The ET1 was presented on 20th December 2018.

4. In relation to an unfair dismissal claim, there is an exception to the 3-month time limit where it was "not reasonably practicable" for the complaint to be presented within that 3-month period. The burden is upon the claimant to prove it was not reasonably practicable for her to present the claim within 3 months and she has presented the claim within a reasonable period of time. As the respondent's counsel has explained reasonably practicable means reasonably feasible; it is a high threshold to meet.

5. In considering whether it was or was not reasonably practicable for the claimant to present the claim within the 3 month period, the authorities suggest I should focus on what was the substantial cause of the claimant's failure to comply with this deadline

6. Here the claimant says it was not reasonable practicable for her to submit her claim in time as she was unwell with stress-related illness and she was reasonably ignorant as to how she should calculated the time limit as extended by the ACAS early conciliation provisions and the advice given by her adviser, Mr Hughes, was erroneous and he himself was unwell.

7. Considering the first issue, the claimant's health: The claimant was signed off work between 18th April 2018 and 2nd May 2018 with stress related illness. Having returned to work she was signed unwell between 26th June 2018 and 25th July 2018 with stress related illness. She was unwell with stress related illness at the point of her resignation on 16th July 2018.

8. She was then well enough to travel to Barcelona in Summer 2018 and started new employment in October 2018. She also made a subject access data request at this point. Subsequently, in March 2019 her GP reported she was being treated in that month with ongoing issues due to stress related illness. The claimant has confirmed that she tried antidepressants for a month in March 2019, but is no longer taking these.

9. The second factor relied upon by the claimant is a submission that she mistakenly believed the time limit expired on 28th December 2018 and that she was reasonably ignorant of the correct method of calculating the time limit. In 2017 the claimant raised concerns about discrimination with her trade union representative and in May 2018 she raised concerns with the respondent's HR department and consulted Mr Hughes of Race Equality First. She explained she approached Race Equality First after her parents suggested she contact that organisation.

10. Mr Hughes is not a solicitor and does not appear to have legal qualifications. His profile describes him as providing advocacy for victims of hate crime and discrimination and providing training on equality and diversity for schools and other organisations.

11. The claimant confirmed was that she was aware of the possibility of bringing an unfair dismissal claim as she has studied a module related to law as part of her degree. Her resignation letter does use some legal language. The claimant explained she was not previously aware of the time limits for presenting an unfair dismissal claim but discussed this with Mr Hughes at some point in September or October 2018.

12. I accept that having been in contact with Mr Hughes for a while, at some point in September or October 2018 the claimant had some advice from Mr Hughes as to the time limits involved in presenting an employment tribunal claim. However, I note from p102.85 of the bundle, Mr Hughes's response to the claimant, that between their joint ill health, the Claimant and Mr Hughes appear to have been confused in their calculations - The claimant and Mr Hughes had been exchanging emails about the subject access data request. In response to the claimant's email enquiring *"Hope you're well. How long do I have to submit now?"* Mr Hughes responded by email,

"I am sadly unwell at present and not in work so unable to check exact dates. You have 3 months minus one day to submit your ET1 form which simply is the formal application to go to tribunal."

13. The claimant responded to this email

"I hope you get better soon. Date of receipt by ACAS of the EC notification is 28th August and the date of issue by ACAS is the 28th September. It's the 28th December then?"

14. Mr Hughes responded

"Yes that's correct".

15. I note that in his email of 13th December 2018, Mr Hughes states *"I will be returning to work next Monday after a prolonged period of illness. Can you kindly remind me when the deadline date is for your Tribunal submission please? We need to submit something very soon I believe*". It is apparent that Mr Hughes had been unwell and continuously away from his office for a considerable number of weeks in November and December 2018.

16. Erroneously believing the deadline expired on 28th December 2018, the claimant submitted her ET1 claim form on 20th December 2018.

17. In considering whether it was reasonably practicable for the claimant to present the claim prior to 15th November 2018, I have considered the line of authorities flowing from *Dedman v British Building and Engineering Appliances Ltd* [1974] 1 All ER 520, [1974] ICR 53, CA. In Dedman, Lord Denning MR explained *"if you engage skilled advisers and they mistake the time limit you are out of time – your remedy is against them".* This principle has been held to apply to volunteer advisors, such as the CAB, as well as to paid legally qualified advisors.

18. However, this is not a case that involves just a mistake on the part of the advisor – the claimant was recovering from stress related illness – she has described how she was finding it difficult to make decisions at all during Autumn 2018, as her confidence had been knocked by the events she alleges she experienced during her time working for the respondent. This meant she did not progress her claim as quickly as she might have done if she had not been affected by stress illness. It also meant she accepted her advisor's guidance without further questioning it. The claimant's advisor was also ill and away from his office during this period, which also

explains how between them they miscalculated the time limit as extended by the ACAS early conciliation provisions.

19. In consulting Race Equality First, an organisation that has a history of supporting victims of discrimination, the claimant had taken reasonable steps to seek legal advice to find out the time limits and progress her claim. The claimant faced two impediments, namely her own illness (she was recovering from stress illness, which was still having an impact in March 2019) and the illness of her advisor that affected their joint ability to accurately calculate the time limit as extended by the ACAS early conciliation provisions. I accept it was not reasonably practicable for the claimant to submit her claim in time - she made reasonable enquiries about the time limit and as a result of her health and her advisor's health they miscalculated the extended time limit and this was the substantial cause of her failure to comply with this deadline.

20. As the claimant issued proceedings on 20th December 2018 (believing the time limit expired on 28th December 2018) I have found she has issued proceedings within a reasonable period of time.

21. Turning to consider whether it is just and equitable to extend time for the discrimination claim, I have considered the guidance in *British Coal Corpn v Keeble* [1997] IRLR 336 and s33 Limitation Act 1980. 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 or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action

22. I have already discussed the reason for the delay and length of the delay in this judgment. The delay was 5 weeks and would not appear to have a significant impact on the cogency of evidence, particularly as the claimant had previously made a complaint to the Respondent's HR and had, in October 2018, made a subject data access request, putting the respondent on notice that it was likely to face a discrimination claim. Whilst there has been some failure on the part of the claimant to comply with requests for medical documents, this is a litigant in person that has had health issues this year and was responding to the proceedings to the best of her ability. I have already discussed the promptness with which the claimant acted and her reasonably ignorance of how to calculate the time limit as extended by the ACAS early conciliation provisions. Having weighed up all the factors and the prejudice caused to the respondent by granting an extension (which means they will have to defend a discrimination claim, albeit there has not been any specific prejudice such as fading memories or loss of documents) against the prejudice caused to the claimant (by preventing her from pursuing a discrimination claim, in which she says discriminatory acts are still having an impact on her health) – I have determined it is just and equitable to extend the time limit for this discrimination claim. By presenting the claim on 20th December 2018 the claimant has presented this claim within such a period of time as the tribunal thinks is just and equitable.

23. This decision means that the claimant's constructive dismissal claim and her allegation that the constructive dismissal was an act of discrimination have been presented within the relevant time limits in the Employment Rights Act 1996 and the Equality Act 2010 and the Tribunal has jurisdiction to hear them. The claimant has made a number of other allegations of discrimination – at the forthcoming preliminary hearing (for case management) the employment judge will need to consider whether to make directions in relation to time limits in respect of these other allegations of discrimination or whether to leave it to tribunal conducting the final hearing. Unfortunately, given the number of documents that I had to consider on this particular issue, there was insufficient time at this preliminary hearing, to consider case management directions to prepare the case for final hearing. A further preliminary hearing (by telephone) will be listed at the first available opportunity.

_____

Employment Judge Howden-Evans
Dated: 2nd October 2019

REASONS SENT TO THE PARTIES ON

……6 October 2019……...

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS