Case No: 1401798/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Moustakim**

Respondents: **Sussex Partnership NHS Foundation Trust (1)**
Mr Simon Street (2)

PRELIMINARY HEARING

Heard at: **Southampton Employment Tribunal** **On: 24 September 2019**

Before: **Employment Judge O'Rourke**

Representation
Claimant: **Mr Doughty - counsel**
Respondents: **Mr Jupp - counsel**

JUDGMENT

The Tribunal does not have jurisdiction to hear the Claimant's claims of discrimination, related to age, sex, race, religion, disability and marriage, as they are out of time and are accordingly struck out.

REASONS

Background and Issues

1. On 8 May 2019, the Claimant brought the above-mentioned claims, against her former employer, the First Respondent (R1) and her former manager, the Second Respondent (R2). She also brought a claim of unfair dismissal against R1, but withdrew that claim at this Hearing, which was accordingly dismissed, by way of separate judgment of same date.

2. The Claimant resigned with effect 27 June 2018, from her position as a Complaints and Patient Advice and Liaison Officer, following the bringing of a grievance in relation to the matters now raised in her claims. That grievance related to events between April and December 2017.

3. The Respondent (I shall use the singular from hereon) contends that the claims are out of time and also that the Claimant had not properly complied with the ACAS Early Conciliation process and that accordingly the Tribunal does not have jurisdiction to hear the claims and that applying s.123 Equality Act 2010, it would not be just and equitable to extend time to permit such jurisdiction.

4. These issues, therefore, were to be considered at this Preliminary Hearing.

The Law

5. I referred myself to s.123 of the Equality Act 2010. Counsel also referred me to s.18A of the Employment Tribunals Act 1996 ('ETA') and the Early Conciliation Rules of Procedure 2014 ('EC Rules').

6. I was referred to the following authorities by counsel:

   a. **Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298**, as to the exercise of judicial discretion in such cases, being a question of fact and judgment, not of policy or law, considered case by case, on their facts. The Court considered **Robertson v Bexley Community Centre [2003] EWCA IRLR 434** and indicated that that case was not authority for any '*principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised.'*

   b. **Chohan v Derby Law Centre [2004] UKEAT IRLR 685**, which found that in a case where a claim is presented late, due to incorrect advice from solicitors (or other legal advisors), such failure should not be visited upon the Claimant.

   c. **Watkins v HSBC Bank plc [2018] UKEAT IRLR 1015**, which stated that in considering medical conditions, it is not a matter of whether any such condition caused the delay, but whether it would be just and equitable to take the condition into account.

   d. **British Coal Corporation v Keeble [1997] UKEAT IRLR 336**, which sets out the factors to be considered when applying the 'just and equitable' principle.

The Facts

7. I heard evidence from the Claimant and on behalf of the Respondent, from Ms Tina Deacon, a senior HR Adviser of R1.

8. The main points of the Claimant's evidence were as follows:

   a. She had been represented by her trade union, up to the point of her resignation, but thereafter she sought advice from One Assist Legal Services Limited ('the Advisor'), a claims management company, which had been recommended by a friend of hers. She had a

Skype interview on 26 June 2018, following which she received a client care letter from her Advisor [176-185]. That letter referred, twice, to a '*time limit for making a tribunal claim'* and to the Early Conciliation (EC) procedure extending such time, by up to a maximum of a month and a half. The Claimant said that the Advisor had referred to the EC procedure '*stopping the clock'*. She said that she didn't '*recall'*, when it was suggested to her that the Advisor had told her what the length of the limitation period was. When pressed further on this point, she said '*no, he just said what he was going to do'*. Having reviewed this evidence and considering that the Advisor's company was entitled as 'employment law specialists', I find it hard to believe such an issue will not have been at the forefront of his mind and therefore that he will not have mentioned it to the Claimant. I consider, particularly as her first answer was that she didn't recall whether he had mentioned it, or not that, on the balance of probabilities, he did do so.

b. When the issue as to whether or not EC had been entered into by the Claimant, as (as is not disputed) neither party, nor the Tribunal, have a copy of the EC certificates, was first raised, the Tribunal made enquiries of ACAS and were sent an email of 29 May 2019 [Exhibit 1 to a statement of a Ms Scott-Rebera, the Respondent's solicitor). This stated that copies of the certificates could not be provided as they had been deleted due to data protection, but that ACAS records showed that certificates had been emailed out on 12 July 2018, with EC numbers corresponding to the numbers referred to in the Claimant's ET1.

c. It was not disputed that contact thereafter between the Claimant and her Advisor was as follows:

    i. 31 July (all dates 2018) – the Advisor calls her, to say they '*needed to catch up'*.

    ii. 17 September, 23, 24 and 30 October, the Claimant calls or emails him, but without either action, or response. These are the last emails she sends.

    iii. 1 November – he calls her, referring again to 'catching up', but it was not a convenient time for the Claimant to speak. He promised to call the next day, but didn't and that was the last the Claimant heard from him.

    iv. She called his office and left messages on 22 November and 5 December, but without response. She was challenged as to her lack of effort to make contact with the Advisor and she said that she '*had complete faith in him'*.

    v. She made no further effort to contact the Advisor. When it was suggested to her that she must have been concerned as to what was, or wasn't, happening, she said she was and

that was why, on 1 March 2019, she mentioned the lack of contact to her friend (who apparently knew the Advisor), who told her she would make enquiries and that she '*would discuss it with me when she came to visit with her family'* (on 7 April 2019). The friend told her on that latter date that the Advisor '*had dropped the case'* and that it '*was out of time'*.

vi. She has subsequently become aware that the Advisor's company is in insolvency.

d. The Claimant phoned ACAS on 8 April 2019, who identified the EC certificate numbers appropriate to her claim and told her that her Advisor had commenced EC on 27 June 2018, but as they'd had no further response from him, subsequently issued the certificates on 12 July 2018. They told her the full detail of titles/names of R1 and R2, under which EC had been commenced. She also contacted the Tribunal, who informed her that no claims had been filed and confirming to her that she could still do so at this point, but that they would be '*well out of time'*.

e. She then '*spent the next few weeks preparing my case and completing the claim form'*, which she said she found '*overwhelming'*. She submitted the claim a month later, on 8 May 2019. She was challenged as to why it had taken her a month to do so, when she was aware how late her claim already was and she said that she'd not been well and had to collate all the information. She agreed, however that at this point she was working 25 hours a week and engaging in social activities. She was taken through the boxes in the claim form and asked as to what particular difficulties they posed, bearing in mind that it was considered that her claims had already been set out in detail in her grievance of January 2018 [C17]. She agreed that it specifically referred to several alleged incidents of religious harassment and direct discrimination on the same grounds.

f. She had commenced new employment in January 2019, initially working a 16-hour week, increasing to 25.

g. She agreed that despite having the contact details and website addresses of two bodies with regulatory authority over the Advisor's company (the Claims Management Regulation Unit and the Legal Ombudsman) and of ACAS and the CAB (as contained in the client care letter), all of whom may have been able to advise her about both her Advisor's failure to contact her and her claim, generally, she had neither attempted to contact these organisations, nor look at their websites, until she phoned ACAS on 8 April 2019.

9. Medical Condition. The Claimant said in her statement that from around December 2018, she began to start feeling unwell and that while her mental health had improved after her resignation, it was now again deteriorating. From then and throughout January 2019, she was '*struggling mentally'* and she and her husband were in financial difficulties.

Returning to work made her symptoms worse and her GP prescribed medication for anxiety and advised her to contact a counselling service called 'Time to Talk', commencing counselling in late February. However, she continued to be depressed and this contributed to her difficulties in completing her ET1. The corroborating medical evidence in this respect is as follows:

a. Her GP's notes [R68-75] – these refer to her being diagnosed with anxiety and depression in June 2018. There is then what appears to be a redacted section, followed by reference, in February 2019, to receipt of a letter from 'Time to Talk'. The notes refer to her being prescribed medication for anxiety on 14 May 2019.

b. A letter from Time to Talk, dated 6 August 2019 [R76], recording what the Claimant had told them as to her symptoms and stating that their psychological intervention was now concluded, following eight sessions of Cognitive Behaviour Therapy, up to May 2018, when she was assessed as having moderate levels of distress and symptoms of low mood and anxiety.

Conclusions

10. Having heard closing submissions from both Counsel and who also provided skeleton arguments, I came to the following conclusions.

11. EC Certificate. Mr Jupp focused on what he described as a 'short but decisive point' on this issue, reliant on sub-section (8) of s.18A ETA, namely that:

'*A person who is subject to the requirements in ss.(1)* (which is was not disputed the Claimant was) *may not present an application to institute relevant proceedings without a certificate under ss.(4)'*

Therefore, as the Claimant did not have a certificate, she was not entitled to institute these proceedings. Mr Doughty essentially argued that the possession of a physical certificate was not the point, but that the Claimant had completed the EC procedure and that certificates had been issued.

12. I approach s.18 ETA/EC Regulations purposively – the aim of the legislation, as contained in the explanatory notes to the Enterprise and Regulatory Reform Act 2013, was:

'57. At present there is no obligation on prospective claimants to contact ACAS and/or consider conciliation at any stage and an employment tribunal cannot refuse to accept a claim on the basis that a claimant has not contacted ACAS. In addition, there is no duty on ACAS to provide conciliation before a claim has been filed at an employment tribunal – there is only a discretionary power.
58. Of all the claims lodged at an employment tribunal, less than a fifth of claimants will have contacted ACAS for advice before submitting their claim. As a result, the opportunity for ACAS to offer pre-claim conciliation is limited. Section 7 therefore requires individuals to contact ACAS with

details of their claim and obtain written confirmation that pre-claim conciliation has been declined or unsuccessful before they can present a claim to an employment tribunal'.

13. It therefore sought to encourage parties to resolve their disputes outside the Tribunal system. S18A ETA accordingly set up the stopgap provision, namely, as the title of the section states, '*A Requirement to Contact ACAS before instituting proceedings'*, echoing the repeated use of the word 'contact' in the explanatory notes.

14. The Section then goes on to describe the steps to be taken, but, in the end, all a claimant needs to do is to contact ACAS (which can include by telephone), but is under no obligation thereafter to engage further in the process, or even to consent to their employer being contacted by ACAS. After a month, ACAS will then issue a certificate, entitling the claimant to proceed with a claim to the Tribunal.

15. It is clear to me that this is a 'minimalist' approach being taken by the legislators, which merely wishes to encourage, but not to force litigants to engage in meaningful conciliation.

16. In that context, I consider that it cannot have been the legislator's intention to create a sub-set of, for want of a better term, 'satellite litigation' on this issue, similar, in the memories of this Tribunal and both counsel, to the much-criticised and now repealed statutory disciplinary procedures. The intention is, instead, I find, a broad one and I apply it so.

17. Certificates were clearly issued by ACAS, as is plain from their email of 29 May 2019. They were issued by email on 12 July 2018 and clearly, as they were not sent to the Claimant, must have been sent to her then-Advisor. Applying Regulation 9 of the EC Regulations, there was, therefore, deemed service of such certificates, on the same day.

18. I don't consider that the fact that the Claimant does not have a physical copy of the certificates to be determinative – she had clearly complied with the aim of the legislation, by 'contacting' ACAS, engaging, even if only marginally in the EC process and referring to the correct certificate numbers in her claim form. I therefore dismiss this part of the Respondent's application for strike out.

Limitation

19. Turning to the question of jurisdiction in respect of the claims of discrimination and noting that the Claimant has conceded that she cannot meet the 'not reasonably practicable' test for her unfair dismissal claim, I considered the following factors (applying **Keeble**):

    a. The length of delay – the delay in this case, at least seven months over the statutory limitation period, is egregious.

    b. The reasons for the delay – the Claimant firstly blamed her then-Advisor, a claims management firm, who have since entered into

liquidation. Secondly, she said that a combination of personal circumstances, her mental health, her loss of long-term employment and the death of an uncle, prevented her, from, firstly, more effectively engaging in chasing her Advisor as to progress (of which, apart from the EC process, there was none) and, secondly, considering other options, such as approaching ACAS, or the Advisor's regulatory bodies for advice, until that is April 2019. Finally, when she did so, she was informed by ACAS/the Tribunal on 7 April that her claim was well out of time, but then further delayed a month before it was filed, on 8 May. My findings in this respect are:

i. Applying **Chohan**, I am content to accept that the Claimant cannot be held responsible for her Advisor's clear failure to meet the primary limitation period (in either late September, or early October 2018).

ii. Thereafter, however, the situation becomes less clear. The Claimant said that she was unaware of Tribunal time limits, but, firstly, I note that she was informed of the existence of time limits in the client care letter of June 2018 and while that letter does not say what those time limits are, the letter followed on from a Skype interview between her and the Advisor the previous day. She said, in evidence that the Advisor had not told her as to the length of such time limit, but I consider, as per my finding of fact above that that is not the case.

iii. In any event, by October/November 2018, nothing is happening with the claim and the last contact the Claimant had from her Advisor was on 1 November.

iv. In the context where the Claimant knew certainly of the existence of time limits and, I consider, was likely to have been informed of the nature of such time limit by her Advisor and is clearly an intelligent person, having done a responsible job for the Respondent, I find it inconceivable that she was not, by late November onwards, conscious that there was a 'problem' relating to time limits.

v. Although she says she is no expert in employment law, she does not have to be, to establish this point. While, in the pre-internet age, finding out such information may not have been straightforward, rendering it necessary, perhaps, to visit a library or the CAB, in this digital age, it is a matter of a few key-strokes. I take judicial notice that a simple Google search for ''how long do I have to bring an employment tribunal claim?' immediately brings up, as the first result, an accurate summary from the CAB website, stating '*There are very short, very strict time limits for making a claim to an Employment Tribunal. In most cases, you have three months from the date of dismissal.'*

vi. Nor did she, when it must have been plain to her that her Advisor was doing nothing, make any enquiries of the two regulatory bodies and ACAS, the details of which are set out in his letter.

vii. I consider it likely, therefore that she knew there was a problem, as early as late November 2018, but adopted a 'head in the sand' approach to the matter.

viii. I note what she says about her medical condition, but, firstly, there is no medical evidence, from the date of dismissal, of any medical problems, prior to her seeking psychological intervention, in January 2019. Secondly, there is no indication in such evidence that her condition prevented her from either seeking advice on her situation, or from completing and submitting the claim form. While I don't seek to downplay her condition in the period January to May 2019, it was not such as to prevent her from working in that period, increasing her hours from 16 to 25 per week. She also has a no-doubt supportive husband, who attended with her today and who could have also assisted her with such enquiries. I don't consider, therefore that this situation is sufficient to contribute to the continued 3/4 month delay, until she contacted ACAS in April 2018.

ix. Even then and this is, I find, symptomatic of her lackadaisical approach to these proceedings, having being told that her claim was well out of time, she delayed a further whole month, before presenting it. She said that she needed time to prepare her claim, but, firstly, many litigants-in-person manage to do just that and within the time limit and secondly, her claim was already effectively set out in her grievance letter, from over a year before.

x. I don't, therefore, accept the Claimant's reasons as justifying the delay in this case.

c. The taking of advice – she took no steps to take advice, when, as I have found, it should have been clear to her, in November 2018 that her claim was not being advanced, until approximately five months later. Free advice was readily available to her, both by phone and on the internet.

d. Balance of prejudice – I consider that the balance of prejudice in this case falls in the Respondent's favour, for the following reasons:

i. While the Claimant will be debarred from pursuing her claims, I must also consider the effect of allowing this matter to be prolonged, in particular on the individual Second Respondent, who has now, for almost two years, had serious personal allegations hanging over him and which would not be likely to be resolved for another year.

ii. I consider that the likely three-year delay before this matter gets to hearing will, inevitably and undoubtedly have an adverse effect on the Respondent's ability to present cogent evidence in response to the Claimant's allegations. Witnesses may have moved on or retired and memories will have inevitably faded over such a time period. It will not be, I consider, sufficient simply to rely on contemporaneous documentation.

20. Conclusion. For these reasons, therefore, I do not consider, applying s.123 of the Equality Act that it would be just and equitable to extend time to permit the Tribunal to have jurisdiction to hear the Claimant's claims of discrimination and they are therefore accordingly struck out.

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Employment Judge C H O'Rourke

Date **25 September 2019**