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EMPLOYMENT TRIBUNALS

Claimant: **Miss Fulbahar Ruf Begum**

Respondent: **Ministry of Justice**

Heard at: **East London Hearing Centre** **On:** **10 March 2020**

Before: **Employment Judge Housego**

Representation

Claimant: In person
Respondent: D Ruck-Keene, of Counsel, instructed by Womble Bond Dickinson LLP

JUDGMENT

The claims are dismissed as out of time.

REASONS

1. The claimant has brought claims of unfair dismissal and of disability discrimination. Her claims were filed on 19 September 2019. It is common ground that her employment ended with her resignation on 31 October 2018. There is no need to have detailed consideration of the effect on time limits of the Acas early conciliation period: the claims were brought a long time after the 3 month time limit for such claims. There is a separate point about lack of 2 years service, which I indicated would be dealt with only after the time point was resolved.

2. Time can be extended for a claim for unfair dismissal only if it was not reasonably practicable to bring that claim within the 3 month period, and then only if it was brought within such further period as was reasonable. While a liberal approach is to be taken towards a claimant who is out of time, the test is still reasonably practicability which is an assessment of factual possibility, not whether it is just and equitable to extend time.

3. The criterion for extending time in a disability discrimination claim is whether it is just and equitable to do so. That involves considering factors such as are relevant to S33 of the Limitation Act 1980. The starting point is that time

limits are exactly what they say they are. The has to be a good reason for the delay. There has to be an assessment of relative prejudice.

4. I had before me 5 documents:

4.1. The claim form.

4.2. The respondent's ET3 response.

4.3. A list of issues prepared by the respondent dated 20 February 2020.

4.4. An agenda for this hearing (which was listed as a Case Management Hearing with the time point as a Preliminary Hearing) which was prepared with input from the claimant.

4.5. A bundle of papers from the respondent with a revised agenda, a revised list of issues, and case reports of;

4.5.1. Moseka v Sheffield Hospital NHS Foundation Trust UKEAT/0517/13/SM,

4.5.2. John Lewis Partnership v Charman UKEAT/0079/11/ZT

4.5.3. Paczkowski v Sieradska UKEAT/111/16

4.5.4. Apegun-Gabriels v Lambeth LBC [2001]EWCA Civ 1853

5. I heard the respondent's application, and then adjourned for 45 minutes, the time requested by the claimant, so that she might consider the application and submissions before responding. I checked that the claimant felt that she had had sufficient time. The claimant is 8½ months pregnant, but felt well. I told her that if she felt that she needed a break at any time, it would be granted, without question. At the conclusion of the hearing the claimant said that she had been afforded all possible opportunity to present her case.

6. The basic facts are not in dispute: the claimant started work on 29 May 2018. She resigned on 31 October 2018. She claims that she sought adjustments to her work by reason of disability (she describes this as a learning disability requiring more time to assimilate and process information and to respond to it). She claims that as a result of so requesting she was harassed, and that she then sought the help of her trade union representative, who supported and advised her throughout. Eventually she resigned, while a grievance process was under way for two separate grievances. She says that the process has not ended, even today, with the appeal outcome delayed from last Friday to next Friday.

7. The claimant says that her union representative told her that she could not bring a claim for unfair dismissal as she had not been employed by the respondent for 2 years. She says that he did not tell her of the possibility of claiming for asserting a statutory right. She says that he also told her that she could not bring a claim for disability discrimination against the respondent until after she had exhausted the internal grievance process.

8. The claimant says that on 19 August 2019 she was told that her grievance had been rejected and that she said to her union representative that she felt the internal process was not worth pursuing further (by appealing the outcome) and that on that day she asked him to put in her claims. She says he then told her that she had only 3 months from the ending of her employment to do so, and that the last date was 29 May 2019, so she was much out of time. (The claimant does not say how that date was calculated.) She says that the trade union representative told her that he had only realised that this was the position that very morning. She then brought these claims without his help, filing the claim exactly 1 month later.

9. I have not heard from the trade union official, and so make no finding of fact that this is so, but take the case of the claimant at its highest, and so on the basis set out above.

10. The position of the claimant in respect of the unfair dismissal claim is one which case law indicates is not sustainable. *Paczkowski* summarises the law, which has been the same ever since Dedman v British Building & Engineering Appliances Ltd [1974] 1 All ER 520. As the headnote has it, a claimant's ignorance of her right to bring a claim did not mean that it was not *"reasonably practicable"* for her to do so, since when aware of the relevant facts she could be expected to take reasonable steps to obtain advice, and where a claimant had consulted a skilled adviser (in *Paczkowski* both Acas and a trade union representative) she could not claim to be in reasonable ignorance even if wrongly advised (unless the adviser's failure to give the right advice was itself reasonable).

11. The claimant does not say that she was in some way misled by the respondent, and even if (I make no finding of fact that this was so) they deliberately spun out the grievance process past the time limit nothing they did deceived the claimant.

12. The case put forward by the claimant is simply that her adviser got it wrong, and only realised he was wrong on 19 August 2019 when he read a case which made him realise that he had been so. He had not advised her about S104 of the Employment Rights Act 1996 (dismissal for asserting a statutory right does not require a minimum period of service). He was wrong to advise that it was required to exhaust internal procedures before bringing a discrimination claim. No other reason was put forward why the claims were late.

13. The claimant says that her adviser is an unskilled colleague, and so should not be treated as a *"skilled adviser*". He was an accredited union representative from the PCS union. I make no finding of fact that he was or is incompetent or unskilled, for he is not here to put his point of view, but taking the claimant's case at its highest, if so that does not assist her. Some solicitors or CAB representatives are not competent. They are still regarded as skilled advisers. It is the category of person advising that is the criterion, and there is no additional individual assessment of the capability (or otherwise) of that individual. A trade union official counts as a skilled adviser.

14. The claimant told me that it was a PCS rule that until internal process had concluded there was no access to full time union staff or the PCS legal team.

Assuming (but not making any finding of fact it is so, and solely to take the case of the claimant at its highest) that is not the responsibility of the respondent.

15. The claimant says that if the respondent had followed its own procedures the grievance would have concluded by December 2018, and she would then have filed her claim and been in time to do so, so that it is perverse to allow the respondent to benefit from its breach of its own procedures. While making no findings of fact that this was so, there is some moral force in this argument. It runs into the same difficulty, which is that it is the mistaken advice which is the root cause of the problem.

16. Those being the circumstances case law requires me to find that it was reasonably practicable to file the claim for unfair dismissal in time, and therefore I am obliged to dismiss that claim.

17. The test is different for a discrimination claim, as the test is whether it is just and equitable to permit the claim to proceed out of time.

18. The claimant's primary assertion is that there was a series of matters either side of her resignation. There is reference in the claim form to an asserted failure to make reasonable adjustments after she resigned. I asked the claimant for some detail of what and when this was. It was in respect of the grievance hearing in February 2019, to allow more time to process information. This is also very much out of time. For that reason I do not need to assess Counsel's argument that any such allegation would be very different to an allegation of harassment so not part of a series. The claimant also said that she considered it harassment for a manager to come to her new place of work to collect her laptop. That could be part of a series of harassment allegations, but she started work in her new job immediately after resigning from the respondent, and does not say that this claim was in time.

19. The claimant says that finally her grievance about lack of reasonable adjustments was partially upheld. She provided no evidence of that, but again taking her case at its highest, I assume that to be so. The claimant says that the outcome of her appeal was due last Friday but has been delayed a week, she suspects to await the outcome of this hearing. I take both these factors into account, but even if so, these are not factors of sufficient weight in the assessment of whether it is just and equitable to permit the discrimination claim to be allowed to proceed.

20. Dismissing a claim is plainly a matter which prejudices a claimant – she loses. Relative prejudice has to be assessed. The respondent is right to point out that the claim relates to allegations of harassment and bullying. While there have been statements taken and so there is some evidence which is nearer to the time of the allegations than now, the case if heard would very likely turn on the assessment of the witnesses to matters now stale. There is a reason why the time limit is as short as 3 months. It is because the value of fresh evidence is recognised as being important. The interests of the witnesses is also relevant: they stand accused of matters for which they might themselves be subject to disciplinary action, and the strain on them is also a relevant factor.

21. The lateness of the grievance outcome is not a good reason (on its own) to extend time. This is made absolutely clear in paragraph 16 of *Apelogun-Daniels*.

> *"It has long been known to those practising in this field that the pursuit of domestic grievance or appeal procedures will normally not constitute a sufficient ground for delaying the presentation of an appeal. The very fact that there have been suggestions made by eminent judges in 1973 and 1982 that the statutory provisions should be amended demonstrates that, without such amendment, time would ordinarily run whether or not the internal procedure was being followed. … the fact, if it be so, that the applicant had deferred commencing proceedings in the tribunal while awaiting the outcome of domestic proceedings is only one factor to be taken into account."*

There are no other factors in this case that might lead to a finding that it is just and equitable to permit the discrimination claim to continue.

22. I record that I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in British Coal v Keeble [1997] IRLR 336 EAT. I deal with each of these in turn.

23. The first is the length of, and the reasons for, the delay. The delay is probably about 9 months. The reasons given, that the claimant was wrongly advised, and that the respondent did not deal with her grievance in accordance with its own policies, did not of themselves prevent her or her advisers from issuing protective proceedings within time.

24. Secondly I have considered the extent to which the cogency of the evidence is likely to be affected by the delay. It is not a case where the documents are key, but where oral evidence is of importance.

25. Thirdly I have considered the extent to which the parties co-operated with any request for information. The claimant says that the respondent has failed, and continues to fail, to comply with a subject access request. This is not of great weight where the case would turn on oral evidence and where, should the case proceed there would have to be full disclosure of documents, most of which will already have been provided in the grievance procedure.

26. Fourthly, I have considered the promptness with which the claimant acted once she knew the facts giving rise to the cause of action. She got on with it as quickly as can be expected, although it still took a month (exactly) to get the claim issued.

27. Finally, I have considered the steps taken by the claimant to obtain appropriate professional advice. She relied on her union, which was a reasonable thing to do.

28. I have also considered the comments of Auld LJ in Robertson v Bexley Community Service [2003] IRLR 434 CA:

> *"It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their*

discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".

29. For these various reasons, I conclude that all the claims of the claimant are out of time, that it was reasonably practicable for her to bring her claim for unfair dismissal in time, and that it is not just and equitable to extend time for her discrimination claim, and therefore dismiss all the claims.

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Employment Judge Housego
Date: 13 March 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE