EMPLOYMENT TRIBUNALS

Claimant: **Ms HA Olayiwola**

Respondent: **Newham Training and Education Centre**

Heard at: **East London Hearing Centre**

On: **Thursday 6 February 2020**

Before: **Employment Judge A. Ross**

Representation

Claimant: In person

Respondent: Miss R Owusu-Agyei (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The Tribunal does not have jurisdiction to hear the complaints of unfair dismissal, breach of contract nor unlawful deduction from wages. These complaints are struck out.**

2. **The Tribunal has jurisdiction to hear the complaints direct race discrimination and direct age discrimination. These complaints will proceed to hearing.**

REASONS

Background

1. Between 18 April 2014 and 10 May 2019, the Claimant was employed by the Respondent as a maths tutor providing training to apprentices. By a Claim form presented

on 9 October 2019, the Claimant presented complaints of direct race discrimination, direct age discrimination, unfair dismissal, unlawful deduction from wages, and breach of contract.

2. The Respondent's case was that the Claimant was dismissed for the fair reason of redundancy or some other substantial reason entitling it to dismiss, there had been no discrimination, and no sums were owed to her. The Respondent also raised the issue of jurisdiction, because, on its face, the ET1 Claim form had been presented out of time.

3. At 10am, the Claimant had not attended this hearing. However, on checking the file, I considered that there may be good reason for that: the Claimant had been sent, on different occasions, both a Notice that this hearing was due to start at 2pm today, and that it was due to take place on an entirely separate date. In those circumstances, I asked the Tribunal staff to make enquiries of the Claimant. Having received contact from the Tribunal, and to her credit, she arrived at 12.10pm.

4. After her arrival, I confirmed that the Claimant's complaints were those set out above. I sought particulars about the Claimant's case, which were as follows:

4.1. In respect of the direct discrimination complaints, the less favourable treatment was (a) the failure to re-deploy her to suitable employment and (b) her dismissal on 10 May 2019.

4.2. This treatment was because of race or ethnicity, or age. The comparator relied upon, SA, was a younger colleague of Eastern European ethnicity. This tutor, SA, was a comparator because she had also been listed as someone whose post was redundant, but she had been re-deployed.

4.3. Other factors relied upon by the Claimant as showing that a reason for the treatment was race or age were the following:

a) The Claimant had been teaching maths; SA had not been teaching maths;

b) The Claimant had been longer in her post;

c) The Claimant was told that the colleague who would be redeployed to her role would be teaching maths with H&S Care – but she believed that this was not true because the H&S Care teacher continued in their role;

d) The Claimant believed that a job role existed in another department which needed a maths teacher. She had taught Young Learners before; and there was an opportunity to transfer there.

4.4. The breach of contract and unlawful deduction from wages complaints related to payments for Time off in Lieu ("TOIL") and travel expenses which the Claimant stated that she was entitled to. The Claimant stated that this should have been paid to her on 31 May 2019, with her redundancy money.

4.5. The Claimant admitted the following: she received notice of redundancy on 29 April 2019; on 7 May 2019 she had an individual consultation meeting (when she raised about her days off in lieu and her travel expenses); she submitted her TOIL and travel expenses to Human Resources department ("HR") after this, having been told to do so by the Respondent; when she received her payslip on 24 May 2019, which showed what she was to be paid on 31 May 2019, she could see that her TOIL and travel expenses were not paid.

5. Having gone through the complaints with the Claimant, I checked that the Claimant had the Respondent's Skeleton Argument, and told her to read it. I adjourned to 13.45 and explained that she would give evidence on her return from lunch.

6. After hearing evidence and submissions, I reserved Judgment because this hearing had only been listed for the morning and I had matters to deal with in a multi-day case due to begin the following day.

<u>The Issues for the Preliminary Hearing</u>

7. This issues for determination at this Preliminary Hearing were identified for the Claimant. These were as follows:

7.1. Were each of the Claimant's discrimination complaints presented within the three month time limit set out in section 123(1)(a) Equality Act 2010 ("EQA")?

7.2. If not, was each complaint of discrimination presented within such further time as was just and equitable?

7.3. Was the Claimant's complaint of unfair dismissal presented within the three month time limit set out in section 111(2)(a) Employment Rights Act 1996 ("ERA")? If not:

(a) Was it reasonably practicable for the complaint to be presented before the end of 3 months beginning with the earliest date of termination?

(b) If not, was it presented within such further period as the Tribunal considers reasonable?

7.4. Was the Claimant's complaint of unlawful deduction from wages presented within the three month time limit set out in sections 23(2) Employment Rights Act 1996? This requires consideration of:

(a) Was it presented before the end of 3 months beginning with the date of payment of wages from which the deduction was made?

(b) If the complaint is in respect of a series of deductions, was it presented before the end of 3 months beginning with the date of

payment of wages from which the last in the series of deductions was made?

(c) If not, was it reasonably practicable to present the complaint within that three month period?

(d) If not, was it presented within such further period as the Tribunal considers reasonable?

7.5. Was the Claimant's complaint of breach of contract presented within the three month time limit set out in Art. 7 Employment Tribunals (Extension of Jurisdiction) Order 1994? This requires consideration of:

(a) was it presented within the period of three months beginning with the effective date of termination of the contract giving rise to the claim;

(b) if not, was it reasonably practicable for the complaint to be presented within that period?

(c) If not reasonably practicable to do so, was it presented within such further period as the Tribunal considers reasonable?

Findings of Fact

8. The Claimant gave oral evidence. She had not prepared a witness statement; I make no criticism of her for that. She also relied on a document, being an email 4 September 2019 from ACAS which I marked "C1".

9. The Claimant was dismissed on 10 May 2019.

10. The Claimant appealed the decision to dismiss on about 22 May 2019. At the time, she believed that the Respondent had discriminated against her because of her ethnicity and age.

11. The appeal was heard on 13 June 2019, at which the Claimant was represented by a trade union representative.

12. The Claimant received the appeal decision (marked "R1") on about 12 July 2019. Because she was not happy about the decision, she contacted ACAS towards the end of July 2019.

13. The Claimant confirmed in evidence that she contacted ACAS so that she could bring an Employment Tribunal claim in respect of each of the above complaints; and she knew that the first stage for bringing a claim was to contact ACAS. She knew ACAS was an advisory service for both employers and employees. The Claimant did not, however, know, prior to presenting her ET1 Claim form, what the time limits for presentation of claims were.

14. Although the Claimant is no longer a member of a trade union, which is due to the cost involved, she was a member at the time that she approached ACAS.

15. The Claimant experienced a delay in being able to communicate with ACAS. She spoke to them first on 1 August 2019. She was told to complete an Early Conciliation form, which the Claimant could do because she had access to the internet. When she spoke to them, ACAS asked her if it was more than three months since her dismissal. Although she stated that she did not know why they asked this, I found that the Claimant must have realised from that conversation that the three months was significant in bringing an Employment Tribunal claim and that she should have investigated this time period further.

16. Although the Claimant's Early Conciliation Certificate is dated 17 August 2019, for some technical reason, the Claimant did not receive it by email until 4 Sept 2019; her evidence is corroborated by the email at C1. However, this email stated (my emphasis added):

> "*ACAS cannot advise you about when a tribunal claim should be submitted. It is your responsibility to ensure that any tribunal claim is submitted on time.*"

17. The Claimant's evidence as to the reason why she did not present her Claim before 9 October 2019 was inconsistent. On the one hand, she said that, had she known of the three month time limit, she would have presented the Claim in time. But the Claimant also gave various reasons why she had emotional and health problems and could not present the Claim despite the receipt of the above email:

- 17.1. She was depressed since her dismissal;
- 17.2. Her mother had had a stroke;
- 17.3. Her brother passed away;
- 17.4. She had diabetes which affected her ability to go out so that she could not go out.

18. The last reason was given right at the end of her evidence, which I found was inconsistent, if the disability had the effect contended for it, and which I found was irrelevant in its practical effect given her access to the internet.

19. There was no medical evidence in support of the evidence of illness relied upon (although the Claimant stated this could be obtained from her GP).

20. The evidence of the Claimant did not demonstrate that she could not have put in the Claim within the limitation period. After commencing Early Conciliation, the Claimant had been able to attend at a CAB (even though they could offer no employment law advice). In any event, the Claimant could do the Claim form online before 9 October 2019; her evidence was that she had started it before that date.

21. However, I found that the Claimant's emotional and mental state did have the effect of making it more difficult for her to deal with the formulation of her Employment Tribunal claim. I accepted that these factors did mean that she failed to make the necessary inquiries of ACAS or other sources so as to learn of the time limits for presenting her claim.

22. In respect of the sums claimed for unpaid wages or breach of contract, there was nothing in the Claimant's contract about payment for time off in lieu.

23. I asked when should TOIL have been paid. The Claimant contended that the Respondent should have paid this at the end of May 2019, with rest of her redundancy benefits (that is, on 31 May 2019).

24. The Claimant stated that her travel expenses should also have been paid on 31 May 2019. Her case was that during the consultation period, on 7 May 2019, she was told to submit everything to HR which the Claimant did after that date.

25. When the Claimant got her final payslip, she could see that these sums were not paid; the Claimant got the relevant payslip on 24 May 2019, which showed what she would be paid on 31 May 2019.

Jurisdiction: Time Limits

Extension of time: Unfair dismissal, Section 111 Employment Rights Act 1996; Breach of contract Reg 7(c) ETs Extension of Jurisdiction Order 1994; Section 23(4) ERA 1996

26. The relevant statutory provisions are within section 111 ERA 1996, Section 23(4) ERA 1996, Reg 7(c) ETs Extension of Jurisdiction Order 1994; which I incorporate into this judgment.

27. In respect of unfair dismissal and breach of contract, the primary limitation period runs from the effective date of termination.

28. In respect of unlawful deduction from wages, the limitation period runs from the last in a series of deductions.

29. The burden is on the Claimant to show that it was not reasonably practicable to present the Claim in time. Reasonably practicable does not mean “reasonable” nor “physically possible”. It means “reasonably feasible”: **Palmer v Southend on Sea BC** [1984] ICR 372.

30. In **Palmer**, May LJ explained that the test was an issue of fact for the Tribunal and gave examples of facts that may be relevant in certain cases: see p.385B-F. This concludes:

> “*Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the industrial tribunal taking all the circumstances of the given case into account*.”

31. I also remind myself that the fact that an appeal is pending does not, of itself, delay the running of the three month period: see **Palmer v Southend-on-Sea Borough Council** [1984] 1 WLR 1129. This was not, in any event, an argument made by the Claimant.

32. Delay in the appeal process does not do so either: see **Community Integrated Care v Peacock** [2010] UKEATS/0015/10.

*The question of reasonable practicabil*ity

33. The law is well-summarised in **Northamptonshire CC v Entwhistle** [2010] IRLR and **Lowri Beck Services Limited v Brophy** [2019] EWCA Civ:

(1) Section 111(2)(b) should be given 'a liberal construction in favour of the employee'. This was first established in *Dedman*. There have been some changes to the legislation since but this principle has remained: see paragraph 20 in the judgment of Lord Phillips MR in *Williams-Ryan*, at p.565; see more recently **Lowri Beck Services Ltd v Brophy;**

(2) In accordance with that approach it has consistently been held to be not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit: see paragraph 21 **Williams-Ryan** and, in particular, the passage from the judgment of Brandon LJ in **Walls** there quoted, at p.565 (followed in **Lowri Beck Services v Brophy**).

(3) In **Dedman** the Court of Appeal appeared to hold categorically that an applicant could not claim to be in reasonable ignorance of the time limit if he had consulted a skilled adviser, even if that adviser had failed to advise him correctly.

(4) Subject to the **Dedman** point, the trend of the authorities is to emphasise that the question of reasonable practicability is one of fact for the tribunal and falls to be decided by close attention to the particular circumstances of the particular case: see, for example, the judgment of May LJ in *Palmer* at p.125. I should refer also to the comment by Stephenson LJ in *Riley*, at p.108 that: '*When judges elaborate or qualify the plain words of a statute by gloss upon gloss, the meaning of the words may be changed, the intention of Parliament not carried out but defeated and injustice done instead of justice*.'

Jurisdiction: Time limits in discrimination cases

34. Section 123 EQA 2010 provides so far as relevant that:

"(1) … proceedings on a complaint … may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.
…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when a person does an act inconsistent with doing it, or

(b) if a person does no inconsistent act, on the expiry of the period in which the person might reasonably have been expected to do it."

35. The principles to be applied in the application of section 123 EQA 2010 are as follows:

35.1. The Tribunal's discretion to extend time under the "just and equitable" test is the widest possible discretion: *Abertawe Bro Morgannwg University Local Health Board v Morgan*, paragraph 17.

35.2. Unlike section 33 Limitation Act 1980, section 123(1) EQA 2010 does not specify any list of factors to which the Tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a Tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble [1997] IRLR 336*), the Court of Appeal has made it clear that the Tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800* , paragraph 33.

35.3. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, nor that time cannot be extended in the absence of an explanation of the delay from the Claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal must have regard. If a Claimant gives no direct evidence about why she did not bring her claims sooner a Tribunal is not obliged to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended: *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 25.

35.4. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are:

(a) the length of, and reasons for, the delay and

(b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

See *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 19.

36. I remind myself that the exercise of the power to extend time is the exception, not the rule: see *Robertson v Bexley Community Centre* [2003] IRLR 434.

Submissions

37. I read the written submissions prepared by the Respondent. I heard oral submissions from Counsel and the Claimant.

38. There was no evidence from the Respondent that it would suffer any prejudice by the extension of time sought in respect of the complaints of race discrimination. However, Counsel argued that delay beyond the limitation period, and an extension of time, would be inherently prejudicial. This point I accepted.

39. Counsel went on to argue that two key witnesses for the Respondent no longer worked "*in the business*", as she put it. However, there was no evidence of prejudice (as opposed to the submission that this would occur) to the Respondent caused by this, such as a statement that these witnesses could not or would not attend the Tribunal hearing.

Conclusions

40. Applying the above law to the findings of fact made and the issues outlined at the outset of this judgment, I have reached the following conclusions.

Unfair dismissal, unlawful deduction from wages, breach of contract

41. These complaints were presented outside the primary limitation period of three months.

42. The EDT was 10 May 2019.

43. The date on which the wages allegedly due should have been paid was 31 May 2019.

44. Therefore, the factual issues are:

44.1. was it reasonably practicable for Claimant to present each of these complaints within the primary three month time limit?

44.2. if not, was each presented within a reasonable time thereafter?

45. The burden is on the Claimant to show that it was not reasonably practicable to present these complaints in time. Reasonably practicable does not mean "reasonable" nor "physically possible".

46. From all the findings of fact, I concluded that it was reasonably practicable for this Claimant to present these complaints in time for the following reasons:

46.1. Although I took into account that s.111(b) ERA is to be given a liberal construction in favour of the employee, the first statutory question is that of reasonable practicability.

46.2. In this case, although the Claimant did not instruct an adviser, which is a factor that I took into account in her favour, I found that she ought reasonably to have known from or about 1 August 2019 that there was a three month time limit during which she could submit her complaints. She learned the significance of the three month period from her conversation with ACAS on that date, and, given her access to the internet and her capability as a teacher, she could have looked up the relevant time limit on the internet.

46.3. The Claimant could have spoken with her trade union, either at the date of her dismissal, or the date of her appeal, or on 1 August 2019, in order to find out how she presented these complaints to the Employment Tribunal and what if any limitation period existed.

46.4. The Claimant was able to seek advice from a CAB.

46.5. The email at C1, received 4 September 2019, made it clear to the Claimant that there was a time limit within which she had to submit her Claim form.

46.6. Despite the absence of medical evidence, I accepted that the Claimant's abilities were to some extent affected due to the matters set out above in Paragraph 17. However, I concluded that those matters did not have such an effect as to make it not reasonably practicable for her to present her Claim within the three month period. I have referred above to the inherent inconsistency in the Claimant's evidence; she stated that she could have submitted her Claim had she known of the time limit. The Claimant did, after all, have access to the internet from her home, and she had been able to correspond with ACAS.

47. Accordingly, the Tribunal has no jurisdiction to hear the complaints of unfair dismissal, unlawful deduction from wages or breach of contract.

<u>Direct discrimination</u>

48. I reminded myself that the reasons for the delay (and if none, the absence of good reason) are an important factor for me to take into account. In addition, I took into account the relevant facts and matters set out above, including those identified at paragraph 46.2 to 46.6.

49. In this case, however, there was at least some good reason for the delay.

50. To begin with, the Claimant did wait for the outcome of her appeal, which she received on 12 July 2019, over two months after her dismissal.

51. On the facts in this case, the Claimant's emotional and mental states did suffer due to the facts and matters set out at paragraph 17.1 to 17.3 above. I accept that these contributed to her failure to present her Claim in time. Moreover, the Claimant explained in evidence was that these matters affected her ability to complete the Claim form. The absence of medical evidence is a factor to be weighed in the balance against her evidence being accepted; but there is no requirement in law for a Claimant to produce medical evidence to prove such a matter.

52. Also, I accepted that the Claimant did not know of the three month time limit when she contacted ACAS. The Claimant was shattered due to her emotional state at the time that the email of 4 September 2019 from ACAS was received. I concluded that she did not appreciate the significance of the warning in that email at that time.

53. In *Morgan*, the length of the delay is also identified as a relevant factor in most cases. In this case, the length of the delay is short enough (being about three weeks) that it was most unlikely that it had affected either the cogency of the oral evidence nor that it had jeopardised the existence of documentary evidence.

54. Moreover, the length of the delay must be seen in the context of what, if any, prejudice this delay may cause to the Respondent. In this case, I concluded that the delay would be unlikely to cause much if any prejudice.

55. Although I take into account that there is inherent prejudice to the Respondent in the cost of being required to defend claims that would otherwise be out of time, in this case, the Respondent's case is likely to rest largely on documentary evidence drawn from the redundancy exercise and selection process. Those documents are very likely to remain in existence; and it is very likely that one or more managers within the Respondent College can explain what they state and their significance.

56. Furthermore, experience shows that, in a case of this nature, where there has been a redundancy exercise, it is unlikely that many primary facts will be in dispute once all the documents have been examined.

57. In contrast, in terms of prejudice, if the extension of time required is not granted, the Claimant's claim will be struck out in its entirety.

58. In conclusion, having weighed all the relevant facts, I determined that, although the complaints of direct discrimination were presented outside the three month limitation period, it was just and equitable to extend time to permit those complaints to proceed. The Tribunal has jurisdiction to hear the complaints of direct race discrimination and direct age discrimination.

Employment Judge A. Ross
Date: 24 March 2020