



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE C HYDE (sitting alone)

BETWEEN:

Claimant

MISS J ZHU

AND

Respondent

TOWN AND COUNTRY CLEANERS LIMITED

ON: 13 January 2020

OPEN PRELIMINARY HEARING

APPEARANCES:

For the Claimant:	In Person
Interpreter:	Mr Yang Sun, Mandarin (China)
For the Respondent:	Mr D Morgan, Solicitor

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that: -

1. The claim was rejected under Rule 12(1)(c) of the Employment Tribunals Rules of Procedure 2013.

REASONS

1. Reasons are provided for the Judgment above as it was reserved.
2. The reasons are set out only to the extent that the Tribunal considers it necessary to do so in order for the parties to understand why it reached its decisions. Further, the reasons are set out only to the extent that it is proportionate to do so.
3. Any findings of fact were made on the balance of probabilities.
4. By a claim form which was presented on 24 March 2019, the Claimant complained that she had been unfairly dismissed and discriminated against on grounds of race. She further contended that she was making another type of claim which she described as 'mental injury/mental damage compensation'. She set out under section 8.2 of the form details of the complaint in general terms in three short paragraphs.
5. In addition, under section 15 'additional information', she cut and pasted the contents of what appeared to be emails exchanged between herself and the Respondent discussing settlement terms via ACAS.
6. The Tribunal explained the normal rule in relation to disclosing settlement discussions. Mr Morgan, on behalf of the Respondent, indicated that the Respondent had no objection to the Claimant having mentioned the 'without prejudice' communication in her claim form.
7. By a response which was sent to the Tribunal on 17 June 2019, the Respondent indicated that they intended to resist the claim. They set out the grounds on which they proposed to do so in an attached response to claim.
8. The case was listed for a closed preliminary hearing before Employment Judge Freer on 6 August 2019. The Tribunal refers to that order for its contents. It was at that hearing that the current preliminary hearing was fixed in order to consider the following matters: -
 - 8.1 To finalise the issues in the case (principally to determine what types of discrimination the Claimant was arguing, e.g., direct discrimination, harassment, victimisation, etc).
 - 8.2 Second, following immediately on, consideration of two issues: -
 - 8.2.1 To consider the Respondent's application that the claim must be rejected because the incorrect ACAS certificate number was entered into the ET1 claim form (as explained in the Respondent's letter dated 15 August 2019).

8.2.2. Whether the Tribunal has jurisdiction to consider the Claimant's claims having regard to the statutory time limit.

The Claimant's employment ended on 18 July, therefore unless there was any post-termination discrimination, the time limit for presenting a claim to the Employment Tribunal expired three months less one day after the date of termination which was 17 October 2018. The Claimant entered into ACAS early conciliation on 10 October 2018 and the certificate was provided on 24 November 2018. When all the correct calculations were then made, Employment Judge Freer recorded that the Claimant had until 24 December 2018 to submit her claim to the Employment Tribunal but that the claim was submitted on 24 March 2019.

9. He therefore continued that the claim appeared to have been presented out of time. However, he then set out that a claim could still be considered by the Tribunal even though it had been presented out of time if: -
 - 9.1 With regard to the unfair dismissal claim, it was not reasonably practicable for the claim to have been presented in time and it was then presented within a reasonable time thereafter.
 - 9.2 With regard to the discrimination claim, it was just and equitable to consider it.
10. Employment Judge Freer then made various directions for the preparation of the case for the preliminary hearing including the preparation of witness statements and a written outline argument to be provided by the Respondent to the Claimant by 6 December 2019.
11. Employment Judge Freer had directed that the Claimant also have the benefit of an interpreter at the open preliminary hearing as she had attended on 6 August without one although she was assisted by a friend.
12. At the hearing on 13 January 2020, the Claimant relied on a witness statement which was included in the bundle prepared by the Respondent at pages 58-59. The bundle prepared by the Respondent consisted of some 160 pages and was marked [R1]. In addition, the Respondent relied on a statement by Mr James Coster which the Tribunal marked [R2].
13. Finally, the Respondent relied on the outline which Employment Judge Freer had directed that they should provide to the Claimant and the Tribunal marked that document [R3].
14. The Claimant's witness statement was effectively a letter which she had sent as an email to the Tribunal with a copy to Mr Morgan dated 22 November 2019 at 2.11pm. The subject was 'why my claim form was out

of time’.

15. There was no dispute that the Claimant was dismissed on 17 July 2018 and was informed of this by a dismissal letter which was sent to her by email dated 18 July 2018 and received by her on that date (p130). The letter confirmed the outcome of the meeting on the previous day. The dismissal was summary.
16. By the date of the hearing, it was apparent that the Claimant had actually entered into two periods of early conciliation. The first was from 10 October 2018 to 24 November 2018 when the first certificate was issued; and the second was from 4 March 2019 to 8 March 2019 when a second certificate was issued.
17. The Tribunal accepted the Respondent’s submission that the second period of early conciliation had no effect having regard to the decisions in the case of **Commissioners for HM Revenue and Customs v Serra Garau** [UKEAT/0348/16].
18. In the claim form presented by the Claimant, she had entered the number of the second certificate in the relevant panel. The Tribunal considered the authority relied on by the Respondent [para 6 of R3] namely **E.on Control Solutions Limited v Caspall** [UKEAT/003/19] in which the Employment Appeal Tribunal considered the issue of the effect of stating wrong early conciliation number in the claim form. Rule 12 of the ET Rules sets out the relevant law with regard to rejection. The Respondent submitted and the Tribunal accepted that under Rule 12(1)(c) the claim had been presented on a claim form that did not contain a valid early conciliation number. In fact, the claim had been accepted although according to this authority it should have been rejected. Fortunately, this situation was also considered by the Employment Appeal Tribunal in the **Caspall** case. It was held that where a claim form was submitted with an incorrect early conciliation number, the Tribunal must reject that claim under Rule 12 and that the Tribunal may not allow the claim form to be amended to include the correct number. Her Honour Judge Eady held that it was not a matter about which the Tribunal had discretion and that the claim form containing the wrong EC certificate number must be rejected.
19. Mr Morgan very helpfully set out at paragraph 8 of his submissions an excerpt of the judgment of Her Honour Judge Eady at paragraph 54 of the Caspall judgment in which she discussed the practical consequences of this decision. In summary, she stated that if the claim form had been rejected, it would have been returned to the Claimant. The Claimant could then have resubmitted a rectified claim form including the correct EC number from the first certificate. If this had been done, the Employment Judge would have been required to treat the claim as validly presented on the date that the defect was rectified. The rectified claim would, of course,

have been lodged out of time but it would have then been for the Tribunal to determine whether it had not been reasonably practicable for the Claimant to have presented the claim in time. She opined that in this context, the Tribunal might well consider it relevant that the Claimant had not been given a notice of rejection and advised of the means by which s/he might apply for a reconsideration at an earlier stage and thus might exercise its discretion in favour of allowing the Claimant to present her claim out of time.

20. It appeared to the Tribunal that as the law stood, it was required to reject the Claimant's claim under Rule 12.
21. The Tribunal then considered the issue in relation to time limits, lest it was wrong on the first point. Thus the reasons on the following issues are phrased on the assumption that the Tribunal is in error on the first issue above.
22. The law governing the time limits in relation to unfair dismissal is set out in Section 111(2) of the Employment Rights Act 1996 ('the 1996 Act'). The Tribunal refers to the text of Employment Judge Freer's directions paraphrased above in relation to the relevant dates. There was no dispute that the relevant date in relation to the unfair dismissal time limit was 24 December 2018 taking into account the effect of the first early conciliation period. This claim was therefore presented out of time. The Tribunal therefore had to decide whether it was not reasonably practicable for the Claimant to have presented the claim within three months (taking into account the extension of time provided by the first early conciliation period, i.e., to 24 December 2018. If the Tribunal were satisfied that it was not reasonably practicable for the Claimant to have presented her claim by 24 December 2018, the next question was whether the complaint had been presented by such further date that was reasonable.
23. Once again, the Tribunal acknowledges and expresses its gratitude to the Respondent for setting out the relevant authorities in the outline which, in the event, was quite detailed as to the relevant applicable law. The Tribunal saw no reason not to adopt it. The Claimant did not suggest that it was inaccurate.
24. In addition, Mr Morgan relied in this context on a further case of **J v K** [UKEAT] PA/0661/16/MM in the context of paragraphs 14-16 of his outline on the issue of reasonable practicability.
25. In summary, the Claimant relied on the email referred to above sent on 22 November 2019. She indicated that she was upset about her dismissal after she received the dismissal email on 18 July 2018 but that she felt traumatised and that although she was eager to tell the truth and that the dismissal was unfair, she did not know how to do it. She stated that her physical and mental health suffered as a consequence of feeling helpless

in the face of the unfair dismissal and her treatment by the Respondent. She referred to having been approached by someone in relation to a trade union which could offer her assistance and that she then paid what appears to have been a subscription of just under £300 to become a member of the union on 3 August 2018. She then indicated that a Mr Purcell acted on her behalf to 'defend her case'.

26. The Claimant disclosed documents which showed her communications with Mr Purcell between 16 October and 9 December 2018 during which there were negotiations with the Respondent to try to settle the complaint. She further contended in her statement of 22 November 2019 that she was not informed by Mr Purcell of the limitation dates or how to lodge a claim.
27. The Respondent submitted that the union the Claimant joined and Mr Purcell were to be treated as skilled advisors and that they had been engaged and paid to act on the Claimant's behalf, and defend her case and that where there was no misrepresentation by the Respondent then the question of whether it was not reasonably practicable for her to have presented her claim in time must be judged in the light of such advice as the Claimant should have been given by her skilled advisors; **Dedman v British Building Appliances Limited** [1974] All ER 520. The Tribunal accepted this submission about the effect of the law.
28. In relation to the issue of the Claimant's mental or physical health, the Tribunal found that the Claimant had failed to submit a medical report or evidence that her illness was sufficiently severe to merit referral to a doctor other than her GP or to prevent her from submitting her claim in time. The Tribunal took into account that she was represented during the relevant time frame.
29. Further, the Tribunal found that the Claimant's illness was not so severe as to prevent her from: -
 - 30.1 Engaging the services of a skilled advisor during the period 3 August to 9 December 2018; or
 - 30.2 Commencing early conciliation proceedings at the proper time; or
 - 30.3 Discussing her claim with her advisors; or
 - 30.4 Providing instructions to her advisor regarding the settlement of her claim; or
 - 30.5 Visiting China during the relevant period; or
 - 30.6 Making up her mind to expose the Respondent through legal means.

30. All these matters took place before the end of the relevant limitation period.
31. The Tribunal also found on the evidence of the Claimant that she was on the same medication at the same dose at the time that she should have submitted her claim as she was when she actually submitted her claim on 27 March 2019.
32. There was no evidence to lead the Tribunal properly to conclude that it was not reasonably practicable for her to have submitted her claim within the relevant time frame due to her mental health.
33. Further, although the Claimant provided various fit notes covering three periods between 8 August 2018 and 22 November 2019, she did not provide any fit notes for the period or leading up to the date on which her claim for unfair dismissal should have been submitted. There was, thus, a fit note for the period 8 August to 5 November 2018 but the next fit note was not until 27 March 2019.
34. Further, the Claimant's health was sufficiently good for her to have engaged in early conciliation and to have taken advice on the effect of the agreement from her advisor and to have decided that she did not wish to settle but wished to bring a claim.
35. Similarly, the Tribunal found that the Claimant was aware that she had the right to bring a claim within the relevant time frame as this emerged from the documents that the Claimant disclosed between herself and her skilled advisor: para 16(c) of [R3].
36. The Tribunal accepted the Respondent's submission that the Claimant knew of her right to bring a claim and had decided that she wished to do so before the expiry of the limitation period but that she failed in the event to pursue matters or to investigate matters further. The Tribunal found that the Claimant could reasonably be expected to have been aware of the time limits in these circumstances: **Wall's Meat Company Limited v Khan** [1979] ICR 52.
37. The Tribunal therefore did not consider that this was a case in which the Claimant had established that it was not reasonably practicable for her to have brought her unfair dismissal complaint in time.
38. In the event that the Tribunal was wrong on this and with due respect to the parties and the Respondent who addressed the further point, the Tribunal sets out its view on whether the claim had been presented within such further period as was reasonable.
39. The Tribunal adopted Mr Morgan's submissions on this issue at paragraph 17-21 of [R3]. The Tribunal did not consider that the Claimant had

presented any adequate grounds for the further considerable delay between 24 December 2018 and the date on which the claim was presented namely 24 March 2019. The Tribunal would not therefore, in any event, have extended time to 24 March 2019.

40. The Tribunal also noted the Respondent's submission that the Claimant had not actually made an application to extend time even after being warned that her claims were out of time in the response which was submitted on 17 June 2019.
41. The Tribunal then moved on to consider the issue of whether the race discrimination complaint was out of time and if so, whether it was just and equitable to extend time under Section 23(1)(b) of the Equality Act 2010. Here also the primary limitation period is the same namely three months subject to any extension by reason of the early conciliation process from the date of the act of discrimination which here is the same as the dismissal. The Tribunal then may extend time if it thinks it is just and equitable to do so. This is as set out by Mr Morgan in his written submission more generous test and the Tribunal was again grateful to him for comprehensively setting out the legal principles which applied.
42. The Tribunal relies on the findings set out above in relation to the unfair dismissal complaint having been presented out of time. The exercise of discretion was different, and there were additional considerations such as the balancing exercise under the principles taken from Section 33 of the Limitation Act 1980 and for example, weighing up the respective prejudice to the parties.
43. Here, the Claimant also relied on her absence from the country on holiday in China during the limitation period. The Tribunal did not consider that this was a persuasive argument given the correspondence which has already been referred to which she engaged in with her advisor within the jurisdiction during that limitation period. Further, it was a voluntary act of the Claimant in any event to leave the country for a holiday at that point.
44. The Tribunal took into account the submission that there were some four witnesses on whose evidence the Respondent would have wanted to rely who no longer worked for it or who were unavailable due to long-term illness. The Tribunal also had regard to the period of time which had now elapsed since the termination of the employment.
45. The Claimant clearly was able to seek professional advice but once she rejected the settlement which her advisor had secured for her, there was no evidence that she took any further steps to obtain further advice elsewhere.
46. The Respondent also argued that the correspondence which the Claimant had disclosed indicated that as of 9 December 2018, her desire to pursue

a claim against the Respondent was simply to inconvenience the Respondent. This, they argued, was not consistent with a just and equitable extension.

47. The Claimant alleged direct race discrimination in seven respects, as summarised below.
48. As of the date of the hearing in January 2020, she had still not indicated the basis for her contention that she was treated less favourably compared to other staff or that the alleged unfavourable treatment related to race. This point was relevant in relation to complaints 1-5.
49. The sixth complaint of race discrimination related to an incident that took place on or before 15 June 2018 and so there was strictly an earlier expiry date namely 14 September 2018. The Respondent argued that it followed therefore that the arguments about the limitation period expiring on 24 December 2018 could be made with even more force in relation to this claim.
50. In assessing the circumstances of this complaint, they relied on the fact that the incident was investigated by the Respondent at the time and that during that investigation the Claimant was uncooperative, and did not provide further details of any race discrimination that she had suffered herself but stated that she had overheard a remark made about an Eastern European colleague by another colleague. Having investigated this matter by interviewing witnesses, the Respondent concluded that there was insufficient evidence to conclude that a racist remark had been made and they concluded that the matter should be taken no further. The Claimant was informed of this outcome in a letter dated 9 July 2018 in which she was told that it had been found that there was no direct race discrimination and that the matter was considered closed. The Respondent relied on the Claimant's failure thereafter to take matters any further despite being told that she could contact the Respondent's head office if she wished to take the matter forward.
51. The Claimant also alleged race and sex discrimination arising out of the disciplinary hearing in allegation 7.
52. The Respondent contended that this went outside the claims set out in the claim form which were limited to race discrimination and that sex discrimination allegations were now out of time and would need an amendment. The Respondent argued that this should not be allowed.
53. They further argued that the sex discrimination allegations set out in the email under the attachments of 6 November 2018 were not credible and therefore had no reasonable prospect of success and were vexatious.
54. In relation to the race discrimination allegation element, Mr Morgan made

the point that the Claimant had failed to identify the racist remark made by Mr Cross during the disciplinary hearing and that there was no corroboration of this in the minutes of the hearing or any support in the record of anything said that might be considered race discrimination. Further, the Claimant did not raise this allegation in her appeal hearing.

55. The allegations referred to in the Respondent's submissions were those set out by the Claimant in an email sent on 6 November 2019 at 19:13 to the Employment Tribunal in which she set out the details of her allegations of unfair dismissal and discrimination. Both parties had that document but in summary, she listed them as follows: -

- 54.1 Projecting negative impression;
- 54.2 Management bullying against me;
- 54.3 The unfair work patterns;
- 54.4 Mistreated by the line-manager, Kris;
- 54.5 Unfair criticism of wearing uniform;
- 54.6 Belittling my dignity and worth as a person;
- 54.7 Making the racist remark.

In respect of each of these as directed by Employment Judge Freer, the Claimant had identified the relevant date or time frame of the allegation as quoted by the Respondent in their submissions.

56. In all the circumstances therefore, the Tribunal was satisfied that it did not have jurisdiction to determine the claims even if they had been validly presented on the basis that they had been presented out of time and that either it was reasonably practicable to have presented the claim in time or it was not just and equitable to extend time for the discrimination allegations under the Equality Act 2010.

Employment Judge Hyde

Date: 3 April 2020

Public access to Employment Tribunal Judgments

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.