Case No: 3332515/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms K Hanson-Quaye	**v**	Marks & Spencer

Heard at: Watford **On:** 3 April 2019

Before: Employment Judge Bloch QC

Appearances:

For the Claimant: Unrepresented and di not appear herself
For the Respondent: Mr C Kelly, Counsel

JUDGMENT having been sent to the parties on 3 April 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant was employed by the respondent until 15 June 2013. The respondent believes she was employed since 7 September 2008 and at the time of her employment was employed in the role of customer assistant. The respondent maintains that the claimant was dismissed for capability. The claimant notified ACAS of her complaint on 29 June 2018 and on 24 August 2018, ACAS issued the early conciliation certificate.

2. The claimant then issued a claim against the respondent which was received by the tribunal on 8 September 2018. The claimant was, at all material times, legally represented.

3. The trust of the claimant's complaint was not entirely clear but she contended in her claim form that she had been unfairly dismissed on the grounds of long-term ill-health, allegedly relating to health and safety issues at work.

4. She also said that the reason for ill-health was in fact related to asbestos which was present in the respondent's property in Wood Green where the claimant was working at the time. She went on to say that the claimant was unable to bring a claim until now as she had been suffering from a number of medical conditions related to the asbestos in the respondent's property and that this was the earliest opportunity for her to submit the claim.

5. She went on to say that there were a number of investigatory meetings

relating to the claimant's health and at no time was the claimant given adequate time for her condition to ease, nor were any reasonable adjustments made during her employment. She went on to say that in light of the above, and the claimant's improved health, she felt she had no choice but to bring a claim for unfair dismissal under the grounds of health and safety pursuant to the provisions of ERA 1996, section 100 (1). She therefore claimed unfair dismissal due to the respondent's breach of the implied duty of mutual trust and confidence.

6. This case had originally been listed for a full merits hearing on 3 April 2019 but by order dated 20 January 2019, Employment Judge Manley corrected that the hearing listed on 3 April 2019 was to be converted to a three hour open preliminary hearing to determine whether the Employment Tribunal had jurisdiction to hear the claimant's claim which had been presented out of time. Employment Judge Manley made the following case management orders:

    6.1 Disclosure – simultaneously two weeks from the date of this order;

    6.2 Agreed Bundle – four weeks from the date of this letter;

    6.3 Witness statements – six weeks from the date of this letter; and

    6.4 Respondent to send online legal argument to claimant and the tribunal seven days before the date of the hearing.

7. The tribunal file shows no further developments until the receipt of a letter by the claimant's advisors, (GMS Legal Services) of 1 April 2019, asking for a postponement of the hearing. This was on the basis that the claimant had been unable to attend to the matter lately, due to an urgent family matter which she has had to be dealing with. That application was resisted by the respondent and by order dated 2 April 2019, the application was rejected by Acting Regional Employment Judge Foxwell.

8. A further letter was sent to the tribunal on 2 April 2019 renewing the request for a postponement. This letter said:

> "our client has unfortunately been unable to attend to the matter, lately, due to alleged personal, health related and family issues ….."

9. The claimant had instructed GMSL for an adjournment and therefore with that in mind they said that they had not instructed counsel in time for the hearing, due to costs', mitigation and logistics reasons. Frantic reasons were to instruct counsel to attend the hearing after notification that the request was not granted but to no avail due to last minute cancellation and understandably the short time-frame it was also not possible in-house arrangements to be made for someone to attend to other prior engagements or personal issues that needed urgent attention. That application to postpone the hearing was also rejected, the reasons set out by the tribunal and GMSL requested the claimant that the tribunal also take into account other parts of the letter of 2 April relevant to the strike-out application. In particular, the letter of 2 April, GMSL said that the

> "… the claimant's case is that the rationale for suggesting this is seriously contended; on the basis that she has alleged unfair dismissal by the respondent on the grounds of long-term ill-health. She claimed she had been exposed to asbestos while working for the respondent. She alleged that her claim relates to health and safety issues at work and that she had been suffering ill-health for a long time now, only recently able to make proper consultations in respect of her claim, once her health had fairly improved"

10. That was how matters stood and that the application to strike-out was presented this afternoon. Mr Kelly on behalf of the respondent submitted written submissions and in broad terms I accepted these.

11. Ordinary time limits for the presentation of claims is three months from the effective date of termination, in case of unfair dismissal (section 111(2)(a) ERA) and from the date of the act to which the complaint relates in section 23(1)(a) EQA, in the case under that act.

12. For both claims, this three month period is extended by reference to the period of time for which a claimant and respondent are ….. in conciliation with ACAS. Either the extension aspect is not when given that the claim was presented to ACAS over five years after the claimant's dismissal.

13. The issues which the tribunal was required to determine are:

    13.1 In respect of the unfair dismissal;

    13.2 whether or it was not reasonably practicable for the claimant to bring her claim within the three month ordinary time limit (section 111)(2)(b) ERA and

    13.3 If so, whether the claimant was brought within such a period as the tribunal considers reasonable (section 111(2)(B) ERA); and

    13.4 In respect of the discrimination claim, whether the claim was brought within such a period as the tribunal thinks was just and equitable, section 123(1)(b) EQA).

    13.5 The burden of proof of course lies on the claimant in respect of all those issues.

14. As regards unfair dismissal, the correct approach, summarised by the Court of Appeal in Palmer and Another v Southend on Sea Borough Council 1984, 1WLR 1129 at page 1114e.

> "however we think that one can say that to construe the words "reasonably practicable," is the equivalent of "reasonable" is to take a view too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done…… perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in Singh's case [1973] ICR 437 and to ask colloquially and untrammelled by too much legal logic – "was it reasonably feasible to present the complaint to the industrial tribunal within the relevant three months?" is the best approach to the best application of the relevant sub-section."

Discrimination

15. The direct approach with regard this is to determine whether it is just and equitable to extend time was addressed by the Employment Tribunal in Abertwe Bro Morgannwg University Local Health Board v Morgan UK EAT 0305/13/LA, at [52]:

> "though there is no principle of law which dictates how sparingly or generously the power to enlarge time is to be exercised (see *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298 at para 25, [2010] IRLR 327, per Seldey LJ) a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to do so, and the exercise of discretion is therefore the exception rather than the rule (per Auld LJ in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, [2003] IRLR 434 (CA)). A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second reason is why after the expiry of the primary time limit he claim was not brought sooner than it was. The tribunal here simply did not address these questions directly. The reasons could not be assumed."
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> "In determining whether the circumstances demonstrate that a particular case is sufficiently exceptional such that it is just an equitable to extend time, the following factors, noted by the Employment Appeal Tribunal in *British Coal Corporation v Keeble & Ors* [1997] IRLR 336, at [8], are relevant:
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> a) The length 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 cooperated 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 professional advice once he or she knew of the possibility of taking action."

16. The outstanding feature of the current case is the length of the delay, namely in excess of five years. In those circumstances it would be incumbent upon the claimant to explain in detail why over such a long period it was not reasonably practicable to present a claim to the Employment Tribunal, in relation to the Equality Act why it was just and equitable to allow the claim to proceed despite the expiry of such a long period of delay. However, the reasons for the delay put forward by the claimant in this case are extremely vague and it is not clear what symptoms the claimant suffered as a result of exposure to asbestos, in particular how they developed or changed over a period of five years so on the face of it, it seems inherently unlikely she would over the entirety of that period have been rendered incapable presenting a claim to the tribunal. It is noteworthy that the claim is stated in very broad terms and therefore is not a claim which the claimant seems to have regarded required particular effort to formulate.

17. One particular note in this case, was that the claimant was throughout legally represented and despite that did not comply with the directions by Employment Judge Manley on 20 January 2019, in particular he filed no

witness statement as she should have done six weeks after 20 January 2019.

18. The filing of such a witness statement would have been essentially if the claimant were to have any prospect of persuading the tribunal that over the five year period it was unable to present a claim to the tribunal. Furthermore, explanation is apparent from the tribunal file to why the claimant did not comply with directions by Employment Judge Manley.

19. To the cogency of the evidence, Mr Kelly told me on instruction that both key witnesses the respondents would have wished to call have left the employ of the respondent. Given the lack of witness statement from the claimant or her presence today is difficult to know. The facts giving rise to the cause of action and what steps were taken by her to obtain professional advice once she knew of the possibility of taking action, set out above, is clear that for some time, at least since the date of the filing of the claim form, she has been represented by GMSL Legal Services.

20. In all the circumstances, the claimant has discharged the burden showing that it was not reasonably practicable for her to bring her claim within the three month ordinary time limit required under section 111 (2)(b) ERA. Accordingly, the question of whether the claim was brought within such further period as the tribunal considers reasonable, does not arise.

21. If and insofar, and in my judgment, it is not entirely clear, the claim form also contains a claim of disability discrimination. In my judgment the claimant has not shown it is just and equitable for her to proceed after a delay of five years and the other matters to which I have referred.

22. For those circumstances, I have used my discretion to extend time and struck-out the claims on the basis of the tribunal having no jurisdiction to hear them.

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Employment Judge Bloch QC

Date: …11.03.2020…….

Judgment sent to the parties on

.....12.03.2020.....

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For the Tribunal office