Case Number: 3331962/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms L Northover	v	London Borough of Islington
Heard at:	Watford	**On**: 2 December 2019
Before:	Employment Judge Loy	

Appearances:

For the claimant: Not present or represented
For the respondent: Miss Tara O'Halloran of counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The claimant's application for a postponement of this preliminary hearing is refused; and

2. The claimant's claims are dismissed.

REASONS

The claim

1. The claimant, who during her employment was known as Anita Hall, was employed by the respondent, a local authority, from 11 November 2016 as a newly qualified child social worker until her dismissal on 14 July 2017. By a claim form presented on 12 August 2018, following a period of early conciliation from 4 September 2017 until 2 October 2017, the claimant brought claims of disability discrimination and automatically unfair "whistleblowing" dismissal. Initially, the claimant brought claims against her trade union, BASW, and against Ofsted but withdrew those claims at the preliminary hearing on 8 February 2019 on the grounds that the tribunal had no jurisdiction to hear them.

2. The respondent submits that the deadline for submitting claims against it expired on 11 November 2017 (allowing for the extension occasioned by the early conciliation period) with the effect that the claim is 9 months out of time. The

respondent points out that the claimant accepts in her claim form that her trade union representative was informed by Acas within the limitation period that the claim form needed to be presented in a timely fashion. The claimant was aware of this contemporaneously. The claimant also accepts in her claim form that her trade union told her (wrongly it would appear) in September 2017 that her claim was already out of time. However, it was not until 12 August 2018 that her claim form was received by the tribunal.

3. Setting aside the time limit problems, the respondent submits that (1) the claimant was procedurally and substantively fairly dismissed by reason of her gross misconduct; (2) any disclosure to Ofsted post-dated both her suspension from duties and a service user complaint relied upon in the disciplinary proceedings and that such matters played no part whatsoever in her dismissal; and (3) the claimant does not have the required 2 years' service to claim "ordinary" unfair dismissal. The respondent's positive case on the merit of the claimant's dismissal is that she was summarily dismissed on the grounds of serious concerns about her professional boundaries, inappropriate professional conduct and a failure to follow managerial advice.

Rule 47 - Non-attendance of a party

4. The claimant did not appear and nor was she represented at the hearing. The claimant had confirmed her attendance during a routine enquiry on 29 November 2019 (the working day before the hearing) when contacted by the administration. A telephone attendance note to this effect is on the file. When the claimant failed to appear on the morning of the hearing, I asked for enquiries to be made of the claimant. Such enquiries are required by rule 47 should I wish to consider either dismissing the claim or proceeding with the hearing in the absence of a party.

5. Upon making such enquiries on the morning of 2 December 2019 the claimant confirmed to the administration that she would not be attending this preliminary hearing on either 2 or 3 December 2019. The claimant's explanation for her absence was that her mother has "boils on her feet and was on the way to hospital". She also confirmed that she had received over the weekend the 211-page bundle of documents that the respondent had prepared for this preliminary hearing.

6. Rule 47 is as follows:

> "If a party fails to attend or be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reason for the party's absence."

7. I decided to proceed with the hearing in the claimant's absence. I did so after taking into account the claimant's confirmation that she would not be attending on either of the scheduled days for the hearing. That course of action appeared to me to be in the interests of justice and in furtherance of the overriding

objective. I could see no point in adjourning for 24 hours since the claimant's position was that she would not be attending on either day.

8. No oral evidence was heard. The respondent's counsel made submissions on the matters to be determined. I read the bundle of documents that was provided to me.

The matters for determination

9. This is an open preliminary hearing which was listed on 8 February 2019 and directions were given at the same time. The following matters were identified for determination at this hearing:

    8.1 Whether the claimant was a disabled person for the purposes of the Equality Act 2010 ("the EqA") at the time of the alleged discrimination.

    8.2 Whether the claimant's disability discrimination complaints have been presented within 3 months of the alleged acts of discrimination complained of.

    8.3 If not, was there an act and/or conduct extending over a period and/or a series of similar acts or failures, the last of which was presented within 3 months.

    8.4 If not, should time be extended on a just and equitable basis.

    8.5 Whether the claimant's complaint of automatic unfair dismissal, pursuant to section 103A ERA has been presented before the end of the period of 3 months beginning with the effective date of termination.

    8.6 If not, whether it was reasonably practicable to bring the claim in time.

    8.7 If not, was it brought within a reasonable time thereafter.

    8.8 Whether the complaints of automatic unfair dismissal and discrimination should be struck out under rule 37 for having no reasonable prospects of success.

    8.9 Whether any specific allegation or argument in the complaints of automatic unfair dismissal and discrimination have little reasonable prospect of success such that a deposit order should be made under rule 39.

10. On 8 November 2019, the claimant wrote to the tribunal saying she had not disclosed documents in support of her disability claim to the respondent in accordance with the directions of 8 February 2019. REJ Byrne responded to the effect that the Preliminary Hearing remains listed for 2/3 December 2019.

11. At 18:03 on 29 November 2019 (the last working day before this preliminary hearing) the claimant emailed the tribunal and the respondent seeking a postponement of the hearing.

My decision on the Claimant's application for a postponement

12. I decided to refuse the claimant's postponement application. The reason given by the claimant for her application was that she "*was struggling to collect evidence …to defend my disability claim at the preliminary hearing set for the 02/03 December 2019".* The deadline for simultaneous disclosure in the Orders made on 8 February 2019 was 25 October 2019.The respondent complied with that Order whereas the claimant did not. No application for further disclosure was made to the tribunal Furthermore, the claimant's reason for not attending the hearing was difficult to reconcile with the fact that this preliminary hearing is scheduled to last two full days of tribunal time. I therefore decided to refuse the claimant's application for a postponement as it would not be in the interests of justice or furthering the overriding objective for it to be granted.

Issue 1: was the claimant a disabled person?

13. I decided that the claimant was not a disabled person within the meaning of section 6 of the Equality Act 2010 ("the EqA"). Section 6 provides:

> 6 Disability
>
> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

14. "Long term" is defined in paragraph 2 of schedule 1 of the EqA in the following terms:

> (1) The effect of an impairment is long-term if—
>
> (a) it has lasted for at least 12 months,
> (b) it is likely to last for at least 12 months, or
> (c) it is likely to last for the rest of the life of the person affected.

15. The tribunal has also had regard to the Guidance on the definition of disability (2011) ("the Guidance").

16. The claimant provided a Disability Impact Statement dated 20 March 2019 as ordered by the tribunal (bundle pages 125 to 127). That statement does not contain any evidence of the impact of the claimant's alleged impairments on her

day-to-day activities. Nor is there any evidence, for the purposes of associative discrimination, of the impact on the day-to-day activities of the claimant's mother, despite the order requiring that information to be provided. In the absence of such evidence I concluded that neither the claimant nor her mother met the requirements of section 6 EqA and accordingly neither the claimant nor her mother were disabled at the material time of the alleged discrimination.

Issue 2: whether claimant's disability complaints have been presented within 3 months of the alleged acts of discrimination complained of?

17. I considered this issue in the alternative to my decision on the first issue.

18. The claimant was dismissed on 14 July 2017. On the basis that the claimant's dismissal was the last act of alleged discrimination, the primary time limit of 3 months from the date of the act to which the complaint relates expired on 13 October 2017. The extended limitation period, early conciliation having taken place between 4 September 2017 and 2 October 2017, expired on 11 November 2017. It was therefore common ground that the complaint was, having been presented on 12 August 2018, was 9 months and a day out of time.

Issue 3: If not, was there an act and/or conduct extending over a period and/or a series of similar acts or failures, the last of which was presented within 3 months.

19. Having found that the claim about the final act of alleged discrimination was not presented within the primary time limit, it follows that even if there has been a series of similar acts starting with the claimant's suspension from duty on 18 January 2017 and ending with her dismissal, the requirements of section 123(3) EqA have not been met.

Issue 4: If not, should time be extended on a just and equitable basis.

20. Section 123(1)(b) EqA provides the tribunal with a discretion to extend the primary time limit for "such other period that the employment tribunal considers just and equitable." The factors to be taken into account in determining what is "just and equitable" for that purpose are the subject of much case law. Chief Constable of Lincolnshire Police v Caston [2010] IRLR contains (in paragraph 31) the following helpful comment of Sedley Lord J:

> "There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing employment tribunal proceedings, and Auld LJ is not to be read as having said in *Robertson* [i.e. Robertson v Bexley Community Centre [2003] IRLR 434] that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded

> in doing so in any one case is not a question of either policy or law: it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it."

21. British Coal Corporation v Keeble [1997] IRLR 336 makes it clear that the factors relevant when applying section 33 of the Limitation Act 1980 are to be applied in determining whether it is just and equitable to permit a claim to be made outside the primary time limit of three months (extended, if it is commenced before that period of three months ends, by any period of "early conciliation", i.e. by reason of section 140B of the EqA 2010). In considering whether I should consider the merits of the claim, I referred myself to the following passage in paragraph 8-94.1 of volume 2 of the *White Book*:

> "The discretion conferred on the court by s.33 requires that the court must have regard to all the circumstances of the case (s.33(3)). This entitles the judge to take account of the ultimate prospects of success, and it has been emphasised in Davis v Jacobs [1999] Lloyd's Rep. Med. 72, CA that it is incumbent on the judge to take great care when deciding to do so; the judge must specifically take care that all matters which might be taken into account are in fact considered."

22. The factors that were referred to in Keeble as being relevant (taken from section 33(3) of the Limitation Act 1980) are these:

> "(a) the length of 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 plaintiff acted once he or she knew of the facts giving rise to the cause of action;
> (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

23. The claimant says in her claim form that she was let down by her union. Putting the claimant's case at its highest, she identifies allegedly bad advice from her trade union; her mother's poor health; and accessing legal advice as explanations for her delay. These explanations can be seen from an email from the respondent to the claimant of 6 March 2019 (bundle page 138.1) written shortly after the first preliminary hearing on 8 February 2019. It is not reasonably possible to infer from the surrounding circumstances that the claimant's mother's unfortunate ill-health prevented her from filling in a claim form in a timely manner. She says that she was told by her union "in September 2017" that her claim "was out of time". She also says that she was challenging "right up to May 2018" a decision made by her union to withdraw its support for her. There is no explanation given by the claimant for the delay between May 2018 and August 2018. The reality is that while the claimant was both actively challenging a decision made by her trade union and making an allegation of a breach of data privacy by Ofsted throughout the period from the end of her employment until the spring of 2018, she made no attempt to file a claim form in this tribunal either

during that same period or within 3 months afterwards.

24. Furthermore, it is clear that during this period the claimant was able to challenge the decision of her union to withdraw its support for her case. It therefore appears that there was no impediment, medical or otherwise, which prevented or restricted her ability to challenge decisions impacting on her where she disagreed with them. I am also conscious the claim form is designed for use by lay people and is a relatively straightforward form to complete, as well as the fact that the claimant, having pursued an internal appeal against her dismissal, was in full possession of all of the documentary material that she needed to formulate a claim to the tribunal. I note also that the claimant is a qualified social worker. In that capacity she will have been familiar with the preparation of formal written documentation and the need to act in a timely manner.

25. Not all of the factors in Keeble were material. What were of most importance in my view were the lack of promptness with which the claimant acted once she knew about the facts giving rise to her claim (having already been told by her union that the time limit had expired); the length of the delay and the absence of cogent reasons for it. I concluded that in these circumstances that it would not be just and equitable to extend time to allow for the disability discrimination claim to proceed.

Issues 5, 6 and 7: (5) whether the claimant's complaint of automatic unfair dismissal, pursuant to section 103A ERA has been presented before the end of the period of 3 months beginning with the effective date of termination; (6) If not, whether it was reasonably practicable to bring the claim in time and (7) If not, was it brought within a reasonable time thereafter.

26. In the light of my findings on the date of presentation of the claim form, the complaint of automatically unfair "whistleblowing" dismissal was not presented within the primary time limit of 3 months as required by section 111 (2)(a) of the Employments Rights Act 1996 ("the ERA"). The primary time limit of 3 months from the effective date of termination also expired on 11 November 2018, with the claim form being presented very significantly out of time some 9 months later.

27. In order to extend time under section 111(2)(b) ERA the tribunal must find that: (1) it was not reasonably practicable for the claimant to have brought the claim with the primary 3 months' time limit (as extended by the period of early conciliation); and (2) the complaint must have been presented within such further period as the tribunal considers reasonable. Then onus of proving that the presentation of the claim was not reasonably practicable is on the claimant. In Porter v Bandridge Limited 1978 ICR 943 Court of Appeal, this was interpreted as imposing a duty on the claimant to show precisely why it was that that she did not present the claim in time. The claimant in this case has not done that. In Palmer and anor v Southend-on-Sea Brough Council 1984 the Court of Appeal considered that reasonably practicable did not mean "reasonable" (as that would be too favourable to an employee) and did not mean "physically possible" (as

that would be too favourable to an employer). It meant "reasonably feasible" and Lady Smith in Asda Stores Ltd v Kauser EAT 0165/07 explained the test as meaning*, "whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."*

28. I find that it was possible for the claimant to have presented her claim within the primary 3 months' time limit and that it was reasonable to expect her to have done so. The evidence that is available strongly suggests that the claimant was able to present her claim within the primary time limit not least because she says in her claim form that she pursued during that same period both a challenge to her union's decision not to support her and a challenge against Ofsted about an allegation of a breach of data privacy. As I have already said, it is clear that the claimant was well aware of her rights throughout the relevant time period and indeed the viability of her tribunal claim was at the heart of her disagreement with her trade union. I accordingly find that it was reasonably practicable for the claimant to have presented her claim within the primary time limit.

29. Had I determined the question of "reasonably practicability" in favour of the claimant, I would not have found that the second limb of the test, the obligation to present the claim within a reasonable time thereafter, had been satisfied. This is a case where there has been a delay of 9 months, a period equivalent to some three times the primary statutory time limit. As has been said already, putting the claimant's case at its highest, she identifies allegedly bad advice from her trade union; her mother's poor health; and accessing legal advice as explanations for her delay. I find that none of those explanations to be capable of explaining a delay of 9 months before filing a claim form, a delay which I accordingly find not to be reasonable.

30. In the light of my findings on issues 1-7 it is unnecessary to consider issues 8 and 9.

31. It follows that the claims for both disability discrimination and automatic unfair dismissal are dismissed.

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Employment Judge Loy
Date: 05 July 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE