EMPLOYMENT TRIBUNALS

Claimant. **Michelle Feehally-Fisher**

Respondent. Nationwide Building Society

Heard at: **Bristol BY CVP PLUS** **On: 28 October 2020.**

Before: **Employment Judge Hargrove .**

Appearances
For the Claimant: **Mr D Stephenson of Counsel**
For the Respondent: **Mr Liberadski of Counsel.**

RESERVED JUDGMENT AND REASONS

1. The claimant's claim of unfair dismissal was not presented within the period of three months from the effective date of termination, and the tribunal is not satisfied that it was not reasonably practicable for her to have presented the claim within that period.
2. The claimant's claims of disability discrimination before and arising from her dismissal were not presented within the period of three months of the dismissal and the tribunal refuses to extend time under the just and equitable principle in Section 123(1)(b) of Equality Act 2010.

REASONS

1. The claimant was employed by the respondent from 10 August 1998,latterly as a board support officer. Her line manager was Victoria Hames (VH). From 27 November 2018 she was signed off sick with work-related stress and continued to be signed off by her GP with that condition until May 2019. It was envisaged at that stage that she would return to work on a phased basis on 9 May 2019. However, a meeting was arranged by the respondent with the claimant and her trade union representative and on 22nd May she was given written notice of consultation for redundancy. This was the second episode of redundancy affecting her employment, an earlier round having taken place in 2018 as described in correspondence dated 26 September 2019 at page 50. On 30 July

she was given notice of termination on grounds of redundancy expiring on 22nd October 2019. On 31 July the claimant appealed. The claimant was accompanied at the appeal meeting on the 27th of August 2019 by her trade union representative. On 26 September 2019 the claimant was notified that her appeal was unsuccessful. The restructure affecting her job is described at page 51. However, the respondent notified in writing that her notice period would be extended to 22 November 2019 to allow for a search for alternative posts. This later date of termination was confirmed again in an amended letter of 27 September 2019. The claimant was notified that she was on garden leave. She never returned to work after the expiry of her last sicknote in April.

2. The claimant was interviewed for two alternative PA posts in August 2019 but was unsuccessful .The claimant enquired about a third post but it was allocated to another employee absent on maternity leave who was also threatened with redundancy and was offered the post under the provisions in regulation 10 of MPLA.
3. On 6 October 2019 the claimant raised for the first time a grievance alleging bullying and harassment by her line manager VH in 2018, as a result of which she claimed her mental health had declined. She did not at that stage claim that she was disabled. A grievance hearing took place on 29 October where the claimant was again attended by her trade union representative. On 7 November 2019 the claimant was notified in writing by the grievance officer that the investigation would not be completed by the date she was due to leave, 22 November 2019. She was offered continuing private health care beyond that date. On 30th of October 2019 the claimant returned the leavers form, herself identifying the termination date of 22 November (see page 65). On 8 November 2019 the respondent again wrote to the claimant confirming the leaving date of 22 November 2019 and offering an enhanced redundancy package of £84,000.
4. On 15 November 2019 the claimant emailed the grievance officer asking for an update. She ended: “How soon will the investigation take to conclude as I am aware that I need to raise within three months of leaving the organisation”. A response indicated that some interviews could not be undertaken until December.
5. The claimant’s employment terminated on 22 November 2019.
6. The grievance outcome was notified to her by Sara Bennison on 4 February 2020 (pages 68 to 70). On 14 February 2020 (pages 71 to 73) the claimant appealed the grievance outcome.
7. On 25 February the claimant wrote stating that her trade union representative had asked her what she was looking for in terms of outcome. She suggested a figure of £50,000. She also indicated she had also “completed her ACAS appeal.” Also on 25th of February the claimant had applied for early conciliation and received a certificate on the same date. On 27 February the claimant emailed “thanks for the update – much appreciated I at least now know that I can proceed with the tribunal paperwork.“
8. Also on 25 February a document at page 81 from the tribunal indicates an attempt was made to file ET1. At 16.51 the claimant emailed her husband under the heading “Employment Tribunal complete your claim“, adding “We have to do this tonight“.
9. The ET1 form was finally received by the employment tribunal on 5 March 2020. The claimant describes difficulties she had in successfully submitting her claim online. The claim form identifies heads of claim of unfair dismissal and discrimination in the form of harassment by V H from 2018, and discrimination

in relation to her dismissal, but lacks detail . Surprisingly however it identifies the date of termination as being 25 November 2019. In its response, the respondent identified time points and applied for the conversion of a case management hearing listed on 28 October 2022 to a public preliminary hearing to decide them. This was granted by an employment judge who made the case management orders for this hearing including for the provision of a disability impact statement.

10. Mr Stephenson identifies the claims in relation to the dismissal as being of direct discrimination, and discrimination arising from disability. In addition he identifies a claim for failure to make reasonable adjustments in failing to follow and occupational health report recommending a phased return to work. Instead she was placed on garden leave, with the result that the claimant could not settle into work prior to her interviews for the two alternative posts.
11. Prior to this hearing the claimant provided to the respondent a DIS in which she describes a long-term history of depression, which she alleges was further precipitated by her line management manager's treatment of her in 2018 leading to her being off sick from November 2018 to May 2019. Within the bundle are the claimant's GP notes for the period from November 2018 to May 2020. There are entries relating to mental health appointments with her GP up to the 16 May 2019, but not thereafter. However, she has been on antidepressant medication continuously since. Prior to this hearing the respondent conceded that the claimant was disabled in respect of depression at the material time up to her dismissal, but denies knowledge thereof.
12. The tribunal received very competent written and oral submissions from Counsel on both sides, referring the Tribunal to a series of authorities. It is common ground that there are two different and contrasting time limit provisions applying to the claimant's unfair dismissal claim – section 111 (2) of ERA, and disability claims (section123 of EQA). In each case the three months time limit from the effective date of termination, the dismissal being the principal ground of complaint, runs from 22 November 2019 and ends 3 months less one day, on 2 February 2020. It is also common ground that the claimant did not enter into early conciliation until 25 February, and did not present her claim until 5 March 2020. The essential issues for the Tribunal include considering why the claims were submitted out of time; whether the claimant could prove that it was not reasonably practicable for her to present it in time (in relation) to her unfair dismissal claim and that it was presented within such further period as was reasonable; and whether the claimant could satisfy the Tribunal that it would be just and equitable to extend time (in relation to her discrimination claims).
13. It is appropriate to start by identifying the circumstances and reasons why the claimant was presented late on the 5th of March 2020. I am satisfied that the claimant was aware of the right to bring a claim to a tribunal and as to the time limit of three months. She is unclear as to where that information came from but she agrees that it must have been either her trade union representative or her sister. I find on the balance of probabilities that it was her trade union representative, with whom she was in regular contact from the start of the redundancy consultation. This is not a case where she can possibly argue that she was reasonably ignorant of her rights to bring a claim to the tribunal, or of the nature of those rights. The claimant's email enquiries of the 15th of November indicates she knew that the time limit was "within" three months of the date of her leaving. She argues that she was not aware that the time limit was three months less one day, but that is not consistent with the content of

that email and in any event it does not explain why she did not bring her claim within time. That leaves only two issues, the first being a claim that she thought that she should go through a grievance process before presenting her claim; the second being that she made a mistake about the effective date of termination, believing it to have been the 25th of November and not the 22nd. Even so, she did not present her claim until 5 March, so it is necessary to consider separately the reasons for the delay between the 25th of February and the 5th of March.

14. Turning now to the application of the different legal tests and starting with the claim of unfair dismissal – the reasonable practicability test I have been referred by the claimant to a paragraph in the judgement of Brandon LJ in Walls Meat company Ltd v Khan 1979 ICR page 52: – "the performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which recently prevents, or interferes with, or inhibits such performance. The impediment may be physical… or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of or mistaken belief with regard to essential matters. Such states of mind can however only be regarded as Impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not to be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

15. I do not consider that the claimant has established that the reason for her mistaken belief as to the date of dismissal was attributable to her depression. At the time she made the mistake, the claimant had been back at work in another job for three months and had held it down. She did not consult her doctor complaining of any problems resulting from her continuing depression. The medical evidence available does not establish a link between her mental state and the mistake. The mistake must itself be reasonable. The claimant had been repeatedly reminded in writing what the date of termination of her employment was, and that correspondence must have been available to her to check. She could and should have checked it. As to the passage from Dedman cited at paragraph 19 of the claimant's closing submissions, I have found that the claimant was aware of her rights and as to the time limit. If she had any doubts about that she had the option to check it with her trade union representative. I do not accept that she was wrongly advised that she should complete the grievance process before making an application to the tribunal. That is not consistent with her communications in advance of the expiry of the time limit. In any event, her grievance had been rejected. She appealed on 14 February, but the fact that she started EC on 25 February demonstrates that she did not consider it to be an impediment to bringing her claim. In any event the case of Palmer v Southend-on-Sea Borough Council demonstrates that the fact that internal procedures are outstanding does not render it not reasonably practicable to present a claim. For these reasons I find that the claimant has not established that it was not reasonably practicable for her to have presented her claim of unfair dismissal in time.

16. Turning now to the just and equitable test, I was referred to the application of the list of factors to be considered under section 33 of the Limitation Act 1980,

as recommended in British Coal Corporation v Keeble 2003 IRLR page 220. These are: – (a) the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings); (b) the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed; (c) The conduct of the respondent subsequent to the act of which complaint is made up to the date of the application; (d) the conduct of the claimant over the same period; (e) the length of time by which the application is out of time; (f) the medical condition of the claimant taking into account in particular any reason why this should have prevented or inhabited the making of a claim; (f) the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given. Afolabi 2003 ICR page 800 provides that all significant factors should be considered. Mr Liberadski referred me to the passage in Auld LJ's judgement in Robertson v Bexley community centre 2003 IRLR page 434 referring to the extension on just and equitable grounds being the exception rather than the rule, and the requirement on the claimant to convince the Tribunal that a just and equitable extension was justified.Mr Stephenson referred me to the limitations on this passage contained in the Judgements of Wall LJ at paragraph 24, and Sedley LJ at paragraph 31 in the later case of Chief Constable of Lincolnshire police v Caston 2010 I RLR page 327. Mr Liberadski referred me to the principle recognised in Habinteg UKEAT 0274/14 and Edimobi UKEAT 0180/16 that where the claimant fails to supply an explanation for the delay, or the explanation is rejected, then the application for an extension should be dismissed. As to responsibility for a legal adviser's mistakes not being visited upon the claimant in a just and equitable extension case, Mr Stephenson referred me to Chohan v Derby Law Centre 2004 IRLR page 685, and Bahous v Pizza express restaurant Ltd UKEAT/0029/11. Applying these principles to the present case, I do not accept that the claimant's failure to present claims in time was caused by any wrongful advice from the claimant's trade union representative. It was unfortunately principlally the fault of the claimant in failing to check the date of her dismissal, of which she had had ample written notice from the respondent. I do not accept that failure was due to her depression. Accordingly I reject the explanation as not being a good reason for not presenting the claim in time. I accept however that the respondent has not shown any specific prejudice in having to defend a claim presented only 12 days out of time; and that the claimant will not have a remedy if not allowed to proceed with the claims. Mr Liberadski does not rely upon the fact that the claimant's claims had little or no reasonable prospect of success but I do regard it as a weak claim because the claimant does not dispute that her post was made redundant and the claimant did not raise any ostensible basis for a discrimination claim within the grievance process. I do not accept that the respondent unreasonably delayed the investigation of a grievance raised less than six weeks before the claimant's dismissal. The respondent gave notice that the grievance process would not be completed before the dismissal took on the effect in its email of the 7th of November, two weeks before; and the result was communicated to the claimant well within the three months period after the dismissal, on 4 February 2020.7

29th October 2020.

Employment Judge Hargrove
Sent to the parties on:
20th November 2020
By Mr J McCormick

For the Tribunal

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and written reasons since February 2017 are now available online and therefore accessible to the public at: https://www.gov.uk/employment-tribunal-decisions
The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.