



# EMPLOYMENT TRIBUNALS

**Claimant: Miss B Ogradowska**

**Respondent: Mizkan Euro Limited**

**Heard at: London Central**

**On: 15 December 2019**

**Before Judge: Mrs A Isaacson**

## Representation

**Claimant: Mr Temme, solicitor**

**Respondent: Mr A Mathur, counsel**

## Covid – 19 Statement

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face- to- face hearing was not held because of the Coronavirus pandemic.

# JUDGMENT

## The Judgment of the Tribunal is as follows:

The claimant's claims were presented out of time. It is not just and equitable to extend time. All the claims are struck out and the hearing listed for 7-11 June 2021 is vacated.

# REASONS

## The Claims and Issues

1. The claimant presented a claim form on 4 June 2020. At a case management preliminary hearing on 9 November 2020, before EJ Stewart, it was decided that there would be an open preliminary hearing to clarify the claims and to decide if the claims were in time.

2. The claimant was ordered to provide further and better particulars which were filed on 11 December 2020. The claimant applied for an application to amend her claim to include a breach of contract claim and to add as a further act of discrimination arising from her disability the dismissal of her grievance.
3. The Tribunal refused the application to amend to add breach of contract claims as they were misconceived but allowed the amendment to add the dismissal of the grievance. The claimant confirmed her claims were a) a failure to make reasonable adjustments and b) discrimination arising from the claimant's disability relating to her dismissal, IT issues, planned brain surgery and the dismissal of her grievance.
4. The issues to decide at this preliminary hearing were agreed at the beginning of the hearing:
5. What is the effective date of termination of employment (EDT)?
6. What is the date of the last discriminatory act?
7. What are the claims (by reference to the Claimant's further and better particulars provided on 11 December)?
8. Are the claims out of time bearing in mind extensions for ACAS early conciliation?
9. Are any claims in-time relating to conduct extending over a period?
10. Is it just and equitable to extend time to the date the claim was filed in respect of the discrimination claim?

### **General**

11. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way.
12. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net
13. The parties and members of the public were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties.
14. The participants were told that it was an offence to record the proceedings.
15. Evidence was heard from the claimant and Mr Temme, the claimant's legal advisor.
16. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were

unmarked. I was satisfied that none of the witnesses was being coached or assisted.

### **The law**

17. Section 123 of the Equality Act 2010 (“EqA”) provides that a claim may not be brought after the end of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. The acas early conciliation does extend the time for presenting a claim form, as set out in section 140(B) of EqA.
18. The tribunal has wide discretion in determining whether or not it is just and equitable to extend time and it is a wider discretion than for unfair dismissal. It should consider everything that it thinks is relevant. However, time limits should be strictly applied, and the exercise of the discretion is the exception rather than the rule. There is no presumption that the tribunal should exercise its discretion.
19. The tribunal is not legally required to but may consider the check list set out in section 33 of the Limitation Act 1980 in considering whether to exercise its discretion:
  - a) the length and reason 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 which the claimant acted once she knew the facts giving rise to the cause of action; and
  - e) the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action.
20. The tribunal will consider whether a fair trial is still possible and the prejudice to the respondent.
21. The tribunal will look at the whole picture when considering whether to exercise its discretion including the claimant’s knowledge of the facts giving rise to her claim and her knowledge of her rights to claim and the enforcement of those rights. Was her ignorance of the time limits and the calculation of her EDT reasonable? There is an obligation on a claimant to seek information or advice about enforcement of those rights.
22. Whether a solicitor or advisor is at fault and/or the claimant has been ill are also relevant factors to consider.

### **Findings of fact**

23. The claimant started her contract of employment with the respondent on 22 July 2019. Her contract provided for a six months probationary period and each party had the right to terminate, during the probationary period, by giving one week’s notice (p56).

24. The claimant suffers from epilepsy and the respondent accepts she is disabled as defined by the EqA.
25. The respondent terminated the claimant's contract on 31 December 2019. A letter confirming the termination is at p45. It states:
- "I am writing to confirm that your employment with the Company shall cease on 31 December 2019. We do not need you to work between the date of this letter and the end of the month.*
- We are mindful that it will be difficult for you to seek alternative employment over the Christmas period and with this in mind as a gesture of goodwill the Company will pay you salary until 22 January 2020.*
26. The tribunal finds this letter sets out clearly the EDT. It clearly states that the employment ceases on 31 December 2019. The second paragraph explains that as a gesture of goodwill the company will pay her until 22 January.
27. The claimant told the tribunal that she understood the letter to mean that she physically did not need to go into the office, but she remained an employee until 22 January 2020.
28. Although the tribunal accepts that the claimant was confused by the terms of the letter and sought clarification from the respondent, the tribunal finds that the letter is clear enough and it is reasonable for an employee to understand from the wording of the letter that her employment terminated on 31 December 2019.
29. After her dismissal the claimant felt very upset and depressed and was struggling to do normal day to day things.
30. The claimant told the tribunal she was aware of discrimination law and it was possible to bring a claim but didn't know about employment tribunals. At some point during a vocational health appointment in advance of an operation she was advised to contact the Disability Law Service (DLS). She contacted them on 17 January 2020 and in February 2020 but due to a breakdown in communication the claimant did not receive any advice at this time.
31. The DLS operate an advice line in the UK two days a week. DLS is very busy and they only answer the specific questions put to them and it is only when a case is referred that a representative would look at documents and give general advice. They would only answer what they were asked about. When asked whether it would be good practice to give advice about time limitation periods Mr Temme said the nature of the advice line was to give advice in specific circumstances to what has been asked and not to collect all the information like at the start of a retainer.
32. The claimant raised a grievance, and a grievance meeting was held on 25 February and a decision to uphold the dismissal was dated 12 March 2020 and sent to the claimant around the 19 March 2020.

33. Around this time the claimant was well enough to start to look for new employment and realised how difficult it would be during a corona virus pandemic.
34. The claimant contacted acas on 3 March and started early conciliation. This was completed on 17 April 2020. The claimant explained to the acas officer that due to her disability she has memory loss. She couldn't recall what he advised her about time limits but did recall asking the officer to contact her shortly before the time limit was due to expire.
35. During this time the claimant hoped that the matter would be resolved by settlement and didn't contemplate legal proceedings. Around the time the acas early conciliation finished the claimant contacted DLS again and asked how to calculate her claim. Mr Temme confirmed there was no discussion of time limits at the time. He answered the question he was asked by the claimant. Had the claimant asked him about time limits he would have advised her that the last date to present her claim was 4 June 2020 based on an EDT 22 January 2020.
36. The claimant continued to feel stressed and on 27 April 2020 had a severe seizure which was the first she had had since being on her medication. It was so severe she was admitted to hospital and had bruising and lost teeth. She was very upset and depressed. The case with the respondent caused her increased stress and affected her epilepsy so she tried to stay away from the case after the severe seizure.
37. She received a call from acas on 16 May 2020 and was told her deadline for presenting her claim was a few days away. The claimant contacted DLS and based on the claimant telling him that her EDT was 22 January 2020 Mr Temme advised the claimant that her claim needed to be presented by 4 June 2020.
38. The claimant presented her claim form on 4 June 2020.
39. In November Mr Temme represented the claimant at the case management hearing and further and better particulars were served, including an application to amend.

## **Conclusion**

40. The tribunal agrees with the respondent's counsel that an amendment which introduces a new cause of action takes effect for the purposes of limitation at the time permission is given to amend (*Galilee v Met Police* (2018) ICR 634. The claimant had not included the dismissal of the grievance as part of her original claim form. Therefore, the date of presentation is 15 December 2020.
41. As set out above, the claimant's EDT was 31 December 2019 as clearly stated in the dismissal letter.
42. The ACAS Early Conciliation certificate covers the period 3 March to 17 April 2020. The relevant period is that beginning *the day after* 3 March up to and including 17 April. Three months from 31 December 2019 is 30

March 2020. Adding 45 days from 30 March 2020 is 14 May 2020. 14 May 2020 is between 3 March and 17 May (i.e. between Day A and one month after Day B). Time therefore expires on 17 May 2020, at the end of the early conciliation period, as set out in section 140B(4) EqA.

43. Therefore, in relation to the claims up to and including the dismissal the claims are out of time as they should have been presented by 17 May 2020.
44. The claim relating to the dismissal of the grievance should have been presented by 11 June 2020 but was only presented today. Consequently, all claims are out of time. There is no evidence before the tribunal of a continuous act to make the claims in time.

Is it just and equitable to extend time?

45. The claimant's representative argued that the claimant misunderstood the termination date because she was told she would be paid until 22 January 2020 and it was reasonable for her to assume that was the EDT. Consequently, that was the date she advised acas and her solicitor. The claimant's seizure in April had a traumatic impact on her and it took a number of weeks for her to recover and then she acted promptly. It was a reasonable misunderstanding on the claimant's part due to the respondent not explaining it to her and there is little prejudice to the respondent if the claim is allowed to proceed.
46. Respondent's counsel argued the claimant ought to have understood the EDT and the misunderstanding was not as a result of any wilful act on the part of the respondent. It is not enough for the claimant to say that the matter would settle. The claimant was legally represented and it should have been clear to her legal advisors what was the EDT. The claimant's inability to understand the time limits is not a good enough reason or exceptional reason to extend time. Her seizure in April was not the reason why she missed the deadline.
47. The tribunal appreciates that the claimant had difficulty understanding the dismissal letter but on the face of the wording of the letter it is clearly stated that the contract ends on 31 December 2020.
48. The tribunal has sympathy for how busy Mr Temme must have been during the pandemic and notes their policy was to just answer questions actually asked. However, a lawyer advising on employment issues knows about the strict time limits for presenting claims and the importance of determining the EDT to calculate the correct time limitation period. It is not enough to assume the person seeking advice knows the correct date. Mr Temme only needed to ask to look at the termination letter and he could have established the EDT. I do recommend that in the future DLS has a policy that advice is always given on time limits in employment cases and the EDT is confirmed as a starting point.
49. The tribunal knows the discretion to extend time is wide but that it should be exercised strictly and as an exception rather than as the rule. In this case the short delay would not affect the possibility of a fair trial or cause

serious prejudice to the respondent. The tribunal has considered the effect of the claimant's health on her late claim but the claimant's evidence was that she was capable of presenting a claim in time. In all the circumstances, and particularly taking into account the claimant had legal advice from April 2020, the tribunal finds that it is not just and equitable to extend time. The claimant was able to present the claim in time and had legal advice before the expiry of the limitation period.

50. Therefore, all the claims are struck out as they are out of time and it is not just and equitable to extend time.

51. The hearing listed in June will be vacated.

EJ A Isaacson

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Employment Judge A Isaacson

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Date 16 December 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON  
17/12/2020.

FOR THE TRIBUNAL OFFICE