Case No: 2603318/2019 (V)

EMPLOYMENT TRIBUNALS

Claimant: Miss A Miklos
Respondent: VF Northern Europe Ltd

Heard: Remotely, via CVP
On: 28 January 2021

Before: Employment Judge Clark (Sitting alone)

Representation
Claimant: Miss Anett Miklos in Person
Respondent: Mr Wayne Smith, Solicitor

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT having been sent to the parties on 5 February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

1. The claim of race discrimination is **struck out**. It was presented out of time and it is not just and equipment to extend time.

2. The claim of religion or belief discrimination is **struck out**. It was presented out of time and it is not just and equitable to extend time.

3. The claim of unfair dismissal is **struck out**. The claimant did not have sufficient service to present such a claim and none of the exceptions applied.

REASONS

Introduction

1. This is a hearing to determine whether to extend time for the presentation of the Claimant's claims of discrimination on the protected characteristics of religion and race.

2. The claim is not fully particularised but it is possible to deduce its essence from the ET1 claim form and the statement attached to it (a statement which was actually produced for the purposes of a County Court application to set aside a default judgment). The claim relates to less favourable treatment during her short period of employment culminating with a decision to terminate her employment after about 6 months. Had it been a claim brought in time, it would have undoubtedly required further and better particulars but, for today's purposes, it is sufficient to at least isolate the time we are concerned with for the purpose of when the allegations of discrimination crystallise and to give a flavour of the nature of the claim being advanced.

The Issues

3. It was set down for this hearing by Judge Camp, who expressed the issues in a broad sense as: -

> ***whether part of the claim should be struck out/dismissed and/or one or more deposit orders made because of time limit issues. The claim appears to be out of time (see paragraphs 4 – 6 of the Respondent's Grounds of Response) case management may also follow.***

4. I was concerned to ensure whether the parties understood this to be an issue <u>determining</u> the just and equitable extension under section 123 of the Equality Act 2010, or whether it is an issue of <u>assessing</u> the prospects of that test being satisfied as a precursor to making orders or deposit or strike out under the Employment Tribunal Rules of Procedure 2013 rules 37 and 39. We proceeded on the basis the tribunal could determine the issue.

5. Section 123 requires that proceedings under the Equality Act 2010 are presented to the employment tribunal within 3 months starting with the date of the act complained about or such other period as the employment tribunal thinks just and equitable. In this case the claim is clearly well outside 3 months on any analysis. The "just and equitable test" is the focus.

6. Nevertheless, before then it is still necessary to pin down when time starts to run from. I did express a query whether the dismissal date

was ambiguous in the sense that when the dismissal decision was conveyed to the Claimant in a face to face meeting on 23 March 2018, she was told that she did not need to work her notice. The letter that followed confirmed dismissal was in fact on that day and the reference to 'notice' is more in the nature of payment in lieu of notice. However, my concern came to nothing as, frankly, whether the effective date of termination was 23 March 2018 or 31 March 2018, that week makes no material difference to the circumstances of this claim.

7. The deadline for bringing a claim under the 2010 Act was therefore 22 June 2018. The obligation to engage in early conciliation before presenting a claim was not commenced until 24 October 2019, approximately 16 months after the time limit expired and the claim itself was not presented for a further 2 or 3 weeks on 12 November 2019. So it is, as everybody accepts, considerably out of time.

The relevant test

8. The discretion then to extend time is a broad one. All that is required is that I give consideration to all those factors put before me which are relevant and I ignore those that are irrelevant. It is often said the checklist found within section 33 of the Limitation Act 1980 is relevant. That was the guidance provided in ***British Coal Corporation v Keeble [1997] IRLR 336, EAT*** some years ago. In most cases it is fair to say they probably will be relevant but I am not obliged to consider them unless I am satisfied they are relevant. I have also been taken to ***Robertson v Bexley Community Centre [2003] EWCA Civ 576*** which, whilst high authority being a Court of Appeal case, is often in my view cited in these cases by respondents with a particular interpretation that the case does not really bear out.

9. In particular, there are two matters referred to at paragraph 25 of that judgment by Lord Justice Auld that need contextualising. One is that the burden is on the Claimant, to establish just and equitable and secondly that the exercise of discretion is the exception rather than the rule. In respect of that, it is really saying no more than the fact that unless a claimant brings an application to a tribunal, then time will not be extended. It is doing no more than recognising that the Claimant has that burden. Secondly, the fact that extensions may be the "exception rather than the rule" is not imposing any greater threshold on the test of just and equitable; it is not requiring the Claimant to go any further than they otherwise would under the Act, it is simply a statement that this is a discretion and, as with any discretion, it has got to be exercised in a manner that has at its heart justice, fairness and relevance and reason.

10. That is the approach and the test I am going to take. I need then to apply it to the circumstances of this case.

The Background Circumstances

11. Miss Miklos is Hungarian. For the last 13 years or so she has practiced Krishna Consciousness and in 2017 received initiation. Also in 2017, she posted her CV on some sort of online jobs website, as a result of which she was contacted by the Respondent who had a need for a Dutch speaking credit controller. She was interviewed online and appointed. It is a particular feature of this case that her employment was subject to a substantial relocation grant to assist her in moving from Hungary to the UK. That grant, however, was subject to a contractual term making it refundable upon the employment terminating at any point within 2 years.

12. She did relocate; she commenced her employment on 25 September subject to a probation period. There are other Dutch speaking individuals employed at this workplace and one such credit controller was appointed soon after her appointment who was Dutch by nationality.

13. Four months into the probation period, it seems that she was told her probation would be extended, the reason was the Respondent said it was not satisfied that she was demonstrating the necessary skills and progress expected.

14. Whilst she no doubt was displeased with that decision - and she certainly has sought to put before me evidence of her considerable skills and competencies and how that she is well regarded, both in the jobs she has had before and the jobs she has had since in credit control - it is all but common ground that there was no grievance or even complaint raising discrimination, not explicitly at least. I accept Miss Miklos does refer to visiting HR on two or three times during which she did make reference to the unfairness of the process and as such says she was indirectly making such a complaint.

15. That may be so, but one significant factor in the test I have is the circumstances with which the evidence might be affected by delay, usually it is not and usually if it is, it affects both sides equally. But there is something to say in this case that, whether those performance concerns are genuine or contrived, the documentation would focus on that and not on the circumstances of the complaint now before the tribunal. It seems such documentation as there will be is unlikely to explicitly deal with the issues in these claims which will depend on the recollection of witnesses in their oral testimony and in a way where they will not be assisted by contemporaneous documentation. The passage of time therefore weighs heavy in the effect it has on prejudice.

16. Returning to the chronology, the Claimant complains that in the weeks that followed the extension of the probation period she was kept under close scrutiny from her supervisors. That state of affairs appear to be

consistent with the case advanced by the Respondent, although of course I bear in mind that in discrimination cases, it is very much the nuances of what is happening not the explicit labels or status of what is happening that can establish a claim.

17. On 23 March 2018, the Claimant was asked to attend a meeting. That meeting turned out to be for her summary dismissal. She was told that her employment was to terminate forthwith. Again, as Mr Smith points out, there was no immediate response to that in any way consistent with a sense of discrimination but I do not hold that against the Claimant at all. This was no doubt a shock to be in this meeting and the responses given by any individual in such a situation are not necessarily determinative one way or the other.

18. One significant thing about the circumstances leading up to the dismissal is the relevance of this recruitment relocation grant. I have not been told the exact figures involved, it is somewhere between £1,700 or £2,000 but by the time we get to the final indebtedness, it is over £3,000. It is a substantial sum.

19. There are issues which arise here which have caused me to reflect on the situation, particularly how this employer goes about placing the risk of the success of its own recruitment on the candidates that it selects. It seems to me in the balance of relationships between people looking for work and employers wanting the labour of those individuals, this situation and the risk that what happened to Miss Miklos could lead to the individual being substantially out of pocket is potentially something that engages the concept of an unfair bargain. It would, on a case that was validly before me, cause me to look very carefully at the employer's practices in this regard.

20. Having said that, whatever I might think about this sort of practice, there was a clear contractual obligation to repay the relocation costs. I am also satisfied this was something well known to the Claimant and, to be fair, she accepts that she signed up to this and it was a risk that she took. It was explicitly dealt with during the termination meeting and indeed the Claimant herself made reference to it being restated to her numerous times during the six months she worked for the respondent to the extent that she regarded it as a continual theme. In fact, she described it as a financial threat.

21. That may be so and, unpleasant as this part of the case is, that history points against any reasonable basis for a u-turn on dismissal whereby the employer represented it would not pursue the debt it nonetheless leaves me satisfied that the Claimant was well aware that at the termination of her employment the Respondent was not only entitled to but was likely to seek to recover that cost. The Claimant does say that she asked the Respondent not to do so but there is nothing before me to show that the Respondent agreed to that. I do not have a great deal

before me, other than the Claimant's assertion, to form the basis on which she would later assume it was being waived or the right to recover this money was being waived.

22. There is something equally unsatisfactory about the 4½ days holiday pay she says she was due but which was not paid to her, but that do not give rise to any reasonable understanding on the part of the Claimant that this money would not be pursued and it certainly does not give rise to any representation to that effect. Had there been a positive representation that the debt would not be recovered, it is highly likely that I would have viewed the circumstances that took place in September 2019 in a different light. As it is, at the time the employment ended, I have to conclude everyone's understanding was that the Respondent certainly was entitled to recover the relocation grant and it was going to do so.

23. I then turn to events after the employment ended. In the weeks that followed, the Claimant took a pre-planned two-week vacation to the Netherlands to visit her son. Either before that, or soon after that, she took measures to raise her concerns about this spell of employment and did so through the veil of not fully understanding what rights she may have in the UK. I put it in those terms because one of the agencies she contacted was in fact the police, thinking that the conduct of the Respondent amounted to a crime. She also went to the Job Centre and also spoke to the Citizens Advice Bureau. Significantly, their advice was that she would need to take this matter to an employment tribunal.

24. She agreed that she did not follow this advice and that is said to be due to financial barriers and emotional trauma. Any financial barriers that existed were indirect and partly based on assumptions about what was involved in taking a case to court in Hungary. I am not saying there were not financial barriers in that indirect sense. The Claimant was earning a modest wage in any event and suddenly found herself without income and indeed without accommodation. So, there may well have been other financial barriers of an indirect nature such as being able to have access to computers or internet or such like. But the access to the free advice that the Claimant had located swiftly is such that I can be certain would have engaged her with the necessary process and requirements for bringing a claim, had it been taken further. As a result, it does not make the assumptions about direct financial barriers a reasonable one to hold.

25. I do accept there is emotional trauma, firstly to the extent that anyone would have their confidence totally shattered by an employer telling them they were not up to the job in a sector and role that they had performed apparently successfully in past. What I do not have before me is anything to put that emotional trauma into any wider context or to put a measure on it. I can only assess that through the aspects of the

Claimant's life that followed, which included the ability to obtain new employment relatively quickly, albeit through a series of short-term contracts, to find new accommodation and to deal with other life events in respect of her children. Those were no doubt affected by the consequences of this dismissal and I do not want Miss Miklos to think that anything I am saying seeks to diminish the response to that situation. However, what I do find is that she made a positive choice to focus on rebuilding her life and that is to her credit and shows a very real strength of character.

26. I am told that by taking new employment she did not have time to pursue the tribunal claim. That is not a strong point in explaining the passage of time but, to add to that, there was a positive choice to put the events of her employment with this Respondent behind her.

27. At some unknown point during 2018 into 2019, the Respondent did indeed take steps to recover the relocation grant. The Claimant had moved-house and I have no doubt there was a period of time when she was unaware of the steps being taken by the Respondent to recover that sum. It seems the Respondent obtained judgment against her in the Sheffield County Court, which could be odd if its understanding of her address was still in the Nottingham area but it seems to me there must have been a time when there was some understanding of her living in the Sheffield area.

28. Nevertheless, the Claimant says that she became aware of the existence of the judgment on 5 September when she was visited by High Court enforcement officers and she could not obviously pay the sum demanded but did agree to under a condition of a control order paying instalments of around £15 per week, which I understand she is still doing.

29. Around that time, she visited the Citizens Advice Bureau once again, this time the advice was focussed on making the application to have judgment set aside. She made the application. Her application was heard by District Judge Heppell at Sheffield County Court on 12 November 2019 at a hearing which the Claimant did not attend. Unsurprisingly, the application was dismissed and, regrettably from her point of view, further costs were added to her indebtedness.

30. It is the fact of the Respondent pursuing its relocation grant that causes the claimant to reflect on her 6 months employment with it, by then some 20 months earlier. As I said, her position is that she had assumed they had waived the relocation debt. Discovering that they had not meant that she now has found herself needing to "look herself in the mirror", to use her phrase, and that she felt she could not remain silent. She was also on maternity leave at the time and that fact was a factor in her mind that she now had the time to bring her claim and to focus on it because she did not have the pressure of work or getting up

for work. I take this as a reference back to her explanation of why she had not brought a claim soon after her employment ended due to the pressure of her new job. She also says she could also deal with the emotional pressure of conducting the litigation.

31. Early conciliation with ACAS was commenced on 24 October and concluded on 25 October. There is then a further delay of 2 or 3 weeks to 12 November when the ET1 Claim Form is presented.

Discussion.

32. I have to draw out of that history the relevant factors that are engaged to be weighed in the balance, many of which are the factors that are raised by the ***Keeble*** guidance. The first is that the Claimant herself is unfamiliar with the legal system in the UK. This is a factor which points in her favour; it points towards extending time that she has to go the extra step to understand and digest the system of remedying disputes in the workplace and as she can now say, reflecting on what she did do almost with amusement on her part, that it felt so bad that she went to the police in the first instance. She said she had sought out bodies similar to those that she knew of in Hungary such as "the Equal Opportunities Bureau". It seems to me that there are, indeed, similar bodies in the UK such as the Equality and Human Rights Commission but she did not become aware of it. The disadvantage she suffers in that respect, however, only goes so far because within a very short space of time, but certainly within the period within which a claim could have been brought, she did find various bodies most significant of which is the Citizens Advice Bureau where it seems to me proper advice was given as to the employment tribunal's role and it was a matter open to the Claimant to decide whether to take that further or not. She chose not to.

33. The next factor I consider is the apparent merits of the case. This will not typically weigh heavily in my consideration of just and equitable time limits because one only has the apparent assessment of the case on the pleadings. It will only be in cases where there are clear cut problems for one side or the other where it can particularly have any real effect on the discretion. The factor tends to work on discretion in this way. An apparently meritorious claim is obviously going to carry more weight to proceed than a claim that does not have merit and, to that extent, it is a factor which is generally either neutral, or works against a claimant. In other words, where a claim clearly has no reasonable prospects or very little reasonable prospects, it is likely to be a factor against extending time. To put it simply, why should a defendant have to go through the cost and trouble of defending a claim which is highly likely to fail in any event.

34. The question is whether this is a case which would fall into that and I have to say on first reading the matter, I wondered if that would be a

factor. It is certainly a case which requires particularisation and it is certainly a case where the race element on the face of it has more traction than the religion or belief element of it. But I have decided this is not a case where the merits is a factor which carries any great weight in the overall assessment. It is reasonably arguable. I am not saying that this is a claim that would succeed or that it has strong prospects but, I think it is fair for the Claimant to hear me say the reason I am denying her the ability to pursue this claim is not because I think she has not got an argument to raise. That is as much as I will say about it in the context of how I weigh the balance between allowing the claim and refusing it.

35. We then come on to the factors which are typically reflected in what we call the ***Keeble*** factors, so far as they are relevant to this case. The first is the length and reason for the delay. This is a substantial delay and the reasons, whilst some of them are mixed, are generally not persuasive. The main issue is the access to immediate advice within time. That is closely followed by the fact that there was a positive choice not to take that advice. It is compounded by the fact I concluded that any mistake about the costs of bringing such a claim to the employment tribunal is not a reasonable one to have held in view of the access to that free and competent advice.

36. There were understandable reasons why the Claimant made the choice not to pursue the claim and instead to focus on the other aspects of her life and to put the matter behind her. Perhaps the most significant factor weighing against an extension of time in this factor is the reason given for she attempted to resurrect the claim when she did. This was only in respect of the Respondent bringing its claim for its contractual recovery of the relocation grant. As I have said already, this was likely to be judged entirely differently if there had been a positive representation by the respondent that it would not seek to recover it. However, in the absence of that representation and the fact that the claimant proceeding on an erroneous assumption of her own, the claimant's belief was not a reasonable one on which to have based any decision about pursing an employment tribunal claim.

37. I do not agree with Mr Smith's description of this as a "tit for tat" claim and I am not sure it is necessarily sufficient to amount to an abuse of process, but the essence of what Mr Smith has advanced in those submissions does have some force. It may be not abuse of process but in the circumstances of this case it is certainly not a persuasive reason to explain the delay and to weigh heavily in the just and equitable extension of time test.

38. The next factor is the extent to which evidence might be less cogent because of the delay. As I have said, this is very usually a factor which is neutral in the sense that each side suffers the consequences of it. There are cases sometimes where evidence has positively been lost or

individuals are no longer available for one reason or another, which is not the case here. But I do accept Mr Smith's submission that the documentary evidence of the performance improvement plan, the complaints to HR and the termination itself are not going to be particularly determinative of the issues of discrimination that the Claimant would seek in any particularised claim. For that reason, there is some force in saying that any case that was to proceed is going to rely more heavily on the recollection of witnesses and if we are asking witnesses to recall events which are now 3 years and in all likelihood would be closer to 4 years before a final hearing was made, I do have to weigh a cogency of the evidence in a way which tips it slightly against the extension of time.

39. The next factor is the conduct of the Respondent that is conduct in the sense of the way the Claimant learns of the right to bring the claim and there is nothing in this case which goes either way on that point.

40. The next ***Keeble*** point is not particularly relevant here, in the strict sense it refers to the disability of the Claimant. In the sense meant by section 33 of the Limitation Act 1980, that refers to the legal disability of the claimant being a child or lacking competence to litigate. That is not something that is advanced here so far as the Claimant is under any legal disability. I do think, however, as a factor generally before the employment tribunal in a case of a just and equitable extension of time, ill-health, whether that is physical or mental, is a relevant factor and there is clearly some evidence before me of the Claimant's physiological response to the circumstances of her dismissal which is a factor which tips in her favour towards extending time.

41. The next category is whether the Claimant has acted promptly and reasonably once learning of the delay and I am afraid this is one which does weigh particularly heavily against the extension of time. In part, there is some delay from 5 September to the claim being presented on 12 November but, everything else being equal, that may not weigh have weighed too heavily. The real delay arises in the time elapsed between a date well within the original time limit and continuing until 5 September as there was more than reasonably sufficient known to the Claimant for her to pursue her claim including sufficient access to free competent advice. The effect of that is compounded by the fact that she made a positive choice not to pursue the claim.

42. That overlaps with the final factor in the ***Keeble*** sense, which is the access to relevant advice as the case may be, this case clearly legal or other expert advice which was open to her.

Conclusions

43. There are aspects of this case where I am not particularly impressed with the employer based on what the Claimant has told me but those

matters engage only in respect of its actions during the employment and are not relevant to the extension of time.

44. There are some factors which tip in the Claimant's favour to extend time. Overall, however, when I look at the circumstances as a whole and seek to apply the just and equitable extension of time in the round, I am afraid the balance tips against the extension of time. The result is that the claim is out of time and the tribunal does not have jurisdiction to determine it.

45. That is the decision I come to. The only silver lining I can offer Miss Miklos is based on her own recognition of the emotional strain that a tribunal claim would place on her. That is not something I have considered as part of the reason whether to extend time or not but, having now deciding not to extend time, I hope the fact that that decision has been taken out of her hands will somehow enable her to put to rest the feelings and reflections on the experiences she had with the Respondent. I realise that is small comfort but I hope it is some comfort nonetheless.

Employment Judge R Clark
Date 26 March 2021

REASONS SENT TO THE PARTIES ON

29 March 2021

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FOR THE TRIBUNAL OFFICE