EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100323/2020 (A)

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Held via CVP video conferencing on 17 July 2020

Employment Judge R Gall

10 **Miss D Graham**	**Claimant** **Represented by:** **Mr A Cacace -** **Solicitor**
15 **Starfish 9 Limited t/a Starfish Construction**	**Respondent** **Represented by:** **Ms L Doyle -** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is as follows: –

(1) The claimant's employment with the respondent ended on 10 August 2019 when she received the letter of 9 August sent by her to the respondents, 25 which dismissed her with immediate effect. Dismissal was the last act of discrimination said by the claimant to have occurred.

(2) The claim of discrimination, the protected characteristic being disability, presented by the claimant to the Employment Tribunal on 17 January 2020 was presented out of time. It is just and equitable to extend time to enable the 30 claim to proceed. The claim will be set down for a case management preliminary hearing to determine further procedure.

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REASONS

Background

1. This Preliminary Hearing ("PH") was heard by CVP, remote video, on 17 July 2020. It had been set down to be so conducted at a case management PH. That PH had been held on 22 May 2020.

2. At this PH, the claimant was represented by Mr Cacace, solicitor. The claimant give evidence. The respondents were represented by Ms Doyle, solicitor. Mr Jessimer give evidence for the respondents. A joint file of documents or bundle was submitted.

3. At the case management PH, held before Employment Judge McPherson, detailed and specific orders had been made following exploration of the matters involved with respective solicitors. The claimant was represented at that PH by a colleague of Mr Cacace, Mr Cox.

4. Of specific note, Orders were made following the case management PH. Those were for production of witness statements and for production of a file of documents for this PH.

5. In relation to witness statements the following Orders and comments made in the PH note are of significance: –

   Order 8

   *"For the purposes of the Preliminary Hearing on time-bar, the Tribunal **ordered** that the claimant and the respondents' witness, Mr John Jessimer, shall each prepare and submit a written, in the terms set forth by the Tribunal below, restricted to the disputed **witness statement** preliminary issue of time-bar, and **not** the whole merits of the various complaints against the respondents, which witness statements shall be taken as read, as per **Rule 43** and constitute their evidence in chief at that Preliminary Hearing."*

<u>Order 9</u>

"After being sworn as a witness, the claimant and Mr Jessimer shall each be cross-examined by the solicitor for the other party, and questions of clarification may be asked of them by the presiding Judge."

<u>Paragraph 21 in the Note</u>

"Equally, both parties' solicitors agreed to the use of pre-prepared and sequentially exchanged witness statements, claimant first, then respondents, taken as read at the Preliminary Hearing, followed by cross-examination, in the usual way, and thereafter short closing submissions, after the close of evidence, but based on written skeleton arguments previously intimated 7 days in advance of the date to be fixed for the Kinly CVP Preliminary Hearing."

<u>Paragraph 23 in the Note</u>

"As regards witness statements, these have been ordered from the claimant and the respondents' witness, Mr Jessimer, as per Rule 43. The following specific directions are given for the assistance of parties:

*(1) The Tribunal **Orders** that the witness statement from the claimant shall contain all of the evidence in chief to be given by the claimant relating to why she submits that 31 August 2019 is the effective date of termination of her employment with the respondents; why her Tribunal claim against these respondents was only lodged on 17 January 2020, and not before, and why she submits, if the Tribunal finds her claim is time-barred, it should exercise its discretion to grant her an extension of time, in terms of **<u>Section 123 of the Equality Act 2010</u>**, and while narrating the factors she relies upon to seek any extension of time, should not relate to the factual basis of her complaints of alleged unlawful sex and disability discrimination against her by the respondents, nor the remedy sought by her from the Tribunal, in the event of success with her claim.*

(2) *Further, the Tribunal* ***orders*** *that the witness statement from the respondents' witness, Mr Jessimer, shall contain all of the evidence in chief to be given by him relating to why the respondents submit that 9 August 2019 is the effective date of termination of the claimant's employment with the respondents, and why the respondents submit that her claim to this Tribunal is time-barred, and comment upon the terms of the claimant's witness statement, and in particular on the factors relied upon by her in seeking any extension of time, in terms of* ***Section 123 of the Equality Act 2010****, and narrate any factors the respondents intend to rely upon in opposing any extension of time being granted to the claimant, detailing any hardship and/or prejudice to the respondents that it is anticipated will arise in that event.*

(3) *Both witness statements shall be typewritten, detailing events in chronological order, and with numbered pages and paragraphing, dated and signed by the witness at the end, certifying that the information provided is believed by the witness to be true and accurate, and cross-referring, where appropriate, to the page number in any Joint Bundle of Documents, comprising any documents relied upon or referred to by the witness in connection with the time-bar argument only.*

(4) *An additional, or supplementary witness statement will only be allowed for use at the Preliminary Hearing by joint agreement of both parties, or by order of the Tribunal, on good cause shown.*

(5) *For the avoidance of any doubt, the Tribunal orders that, in terms of, the claimant and Mr Jessimer shall not be called to give oral* ***Rule 43 of the Employment Tribunals Rules of Procedure 2013*** *evidence in chief, and any witness statement produced by them shall stand as their evidence in chief and be taken as read.*

(6) *The claimant and Mr Jessimer will not be expected to read their witness statement aloud to the Tribunal, but, after being sworn, and identifying their signed witness statement as their evidence in chief,*

they shall each proceed, in turn, to being cross-examined by the other party's solicitor, and questioned by the Tribunal, in the usual way."

<u>Order 13</u>

*"Further, the Tribunal **<u>ordered</u>** that parties' representatives shall finalise preparation of a **Joint Bundle of Productions** incorporating, in chronological order, all documentary productions, related only to the preliminary issue of time-bar, on which either party intends to rely or refer at the Preliminary Hearing, for lodging by the claimant's representative with the Tribunal, by email, (in PDF format, duly indexed and paginated) **<u>no later than the 7 days before the start of the Preliminary Hearing</u>**, directing the claimant's representative to take the lead in doing so, in consultation with the respondents' representative."*

6. It is in my view helpful to have these Orders and comments in the Note issued following upon the PH set out at this stage. This is as it was made clear in the Note to parties that the evidence in chief from each witness would be as detailed in the witness statement produced for that witness. It was also made clear that the purpose of the PH on 17 July was to determine the issue of time-bar. There was specific reference in relation to the claimant to there being no detail in her statement at this stage as to the events on which she might rely to evidence discrimination.

7. The evidence upon which I had to rely therefore to make findings in fact is that set out in the statements provided by the claimant and Mr Jessimer as their evidence in chief, matters covered in cross examination and then in re-examination of these witnesses and documents spoken to in evidence. Mr Cacace did not seek to lead evidence in chief going beyond the claimant's witness statement. In re-examination however, and to a degree in submission, he sought to go into matters which were not dealt with in the evidence of the claimant or in her cross or re-examination.

8. It had fallen to the claimant's solicitor in terms of the Orders to submit a joint bundle or file of documents, duly indexed and paginated 7 days prior to this PH. As I commented to parties, it was frustrating and unhelpful that this had

not occurred. It impeded preparation by me for the PH. The file of documents in the form prescribed in the Orders only appeared with the Tribunal 10 minutes prior to start of this PH. An unpaginated file had appeared in the afternoon of the day preceding the PH.

9. One of the documents in the file produced 10 minutes prior to start of this PH had not been in any documents earlier submitted. Ms Doyle sought a brief delay in commencement of the PH to take instructions upon that document. This was granted to her without opposition from Mr Cacace. No objection was taken to the production of this document, the claimant's P45. As it transpired, however, no evidence was given about it.

10. The reason these practical matters are mentioned is that the purpose behind issuing Orders of the type made (which are admirably clear and full) was to ensure that there was appropriate time given for preparation for this CVP hearing. The extremely last-minute submission of the file of documents did not permit that to the extent which ought to have been possible. Equally witness statements, for both parties, were not dated or signed. They did not certify that the information provided in the statement was believed by the witness to be true and accurate. Where a document was mentioned by the witness in the witness statement there was no cross reference to the page in the bundle at which the document appeared. The Orders were therefore not adhered to by either party.

11. Apart from the lack of courtesy exercised by both representatives to each other, and in particular to the Tribunal, by not cooperating as is required in terms of the Rules, there is the fundamental point that Orders issued by the Tribunal ought to be complied with. What was also of concern was that there was no explanation or apology offered at the PH for the failure to comply with Orders. That was very disappointing. Representatives should note these remarks and strive to ensure that no future such failures occur, or that if default does occur an explanation and apology is tendered.

12. It is appropriate to say that despite these difficulties, which were unnecessary and which ought not to have arisen, the PH itself ran smoothly when evidence

was being taken. Insofar as the comments are critical of the failure to comply with Orders, I should stress that I have, in reaching the view set out in this Judgment as to the points before me at the PH, not had regard to or been influenced by the logistical difficulties and lack of preparation time caused by these failures. It is important however in the future that compliance with Orders issued by the Tribunal occurs.

Termination of Employment – The Date of the Act of Discrimination, the Relevant Date, the Effective Date of Termination ("EDT")

13. The first point for determination was that of the EDT. The latest act of discrimination said to have occurred was the dismissal of the claimant by the respondents. That is also the relevant date in connection with dismissal by reason of redundancy. The critical date is referred to in this Judgment as the EDT.

14. A letter of 9 August was sent by the respondents to the claimant. It was received and read by her on 10 August. It referred to the respondents giving notice of their intention to make her redundant with immediate effect. The claimant received payment of salary for the period to 31 August. Notification was given to ACAS seeking the Early Conciliation Certificate ("ECC") on 20 November 2019. The ECC was issued by ACAS on 20 December 2019.

15. It was accepted by the claimant that if the EDT was 10 August, her claim presented on 17 January 2020 was out of time. If, however, as she maintained, the appropriate EDT was 31 August 2019, her claim had been presented in time.

Just and Equitable Extension of Time

16. This was the second point for determination at this PH. It was however only a matter for determination if the conclusion reached in relation to EDT was that EDT was 10 August, or was on or prior to 21 August 2019. This was so given that the notification in relation to the ECC on 20 November 2019.

Findings in fact

17. The following are found to be the relevant and essential facts as admitted or proved.

18. The claimant was employed by the respondents on 15 September 2018. Her role was to be that of Business Development Manager. She did not receive a a contract of employment from the respondents.

19. Although it is a matter of dispute between the parties as to whether the claimant is disabled in terms of the definition in Section 6 of the Equality Act 2010 ("the 2010 Act"), it is not disputed that that the claimant had periods of absence during her employment with the respondents. Equally it is not a matter of dispute that the claimant did not have 2 years qualifying service with the respondents. The claim which she advances is one of discrimination.

20. Since around mid-June 2020 the claimant was absent from employment with the respondents due to ill health.

21. On 9 August the respondents wrote to the claimant regarding her employment. A copy of that letter appeared at page 33 of the documents file. The letter read: –

"RE: NOTICE OF REDUNDANCY

May I take this opportunity of formally informing you on our intention of making you redundant with immediate effect.

Given the poor financial performance of the Motherwell Business Development unit, especially your own performance, we have no other option than to restructure depot operations.

The company will continue to pay you until the end of August 2019 including your entitlement to holiday pay. This additional 2 week period exceeds both your statutory and contractual terms of redundancy notice.

Should you require any further information please do not hesitate to contact me.

Finally, may we take this opportunity of wishing you every success in your future endeavors (sic)*.”*

22. The respondents did not meet with the claimant prior to sending this letter to her. They did seek to contact her by telephone and left voicemail messages for her. They did not receive return calls. They therefore sent the letter without any prior discussion with the claimant.

23. The letter was sent by recorded delivery mail. It was received by the claimant at around 11:30 AM on 10 August 2019. The claimant signed for the letter. The claimant took a photograph of the letter immediately and sent it to her mother. She made contact with Citizens Advice Bureau (“CAB”) seeking an appointment to obtain advice on her position in light of the letter.

24. Although the letter stated that the respondents intended to make the claimant “*redundant with immediate effect*” the claimant was of the view that the reference to her pay continuing until the end of August meant that she remained employed by the respondents until that time, being on garden leave for the period beyond 10 August. That was the advice she received from CAB.

25. The claimant works in a sales type role. It is often the situation in the sector in which she works that immediate notice is given. The respondents committed to paying the claimant for the period to the end of August as a gesture to give her 3 weeks’ pay to try to minimise the impact of her employment with them ending.

26. At page 42 of the bundle an email of 15 August 2019 from the claimant to the respondents appeared. The claimant wrote: –

“Please accept this as formal acknowledgment of your letter dated 09.08.2019.

After seeking legal advice regarding the notice of redundancy I have decided to contest this notice.

Furthermore, can you please forward my employment contract you mention in the said letter as requested by my legal advisor. Below I have forwarded

emails between yourself, Kevin and I where I requested this at the beginning of the year and did not receive the document. If possible, can you please forward before Friday 23.08.2019."

27. Around the time of receipt of the letter the claimant was affected by fatigue which meant that she slept for substantial periods of the day. This was around the middle to end August. Notwithstanding this, she arranged an appointment with CAB which took place on 23 August 2019. She met with Mr Locke.

28. On 26 August, in a document which appeared at page 38 of the bundle, Mr Locke wrote to the respondents. In relation to the letter of 9 August from the respondents to the claimant, Mr Locke said:- –

"My client does not believe her dismissal to be as a consequence of redundancy, as you have not complied with the required conditions as determined under Section 139, Employment Rights Act 1996. Your letter suggests it was my client's capability that led to your decision. My client has evidence to suggest you are currently advertising her or similar post at this time (sic)*."*

29. Mr Locke then referred to medical conditions by which she said the claimant was affected. He said that the claimant believed that these were the reasons which had led to the decision to dismiss. He went on to say: –

"My client is distressed by your actions and no longer has trust and confidence in you as an employer. She therefore does not seek reinstatement to her previous position with you. She will however suffer substantial loss of earnings as a consequence of your dismissal which she believes is unfair and unreasonable. My client therefore seeks financial compensation from you."

30. The respondents replied in a letter of 16 September to Mr Locke, a copy of which appeared at pages 34 to 36 of the bundle. That reply took issue with the respondents' alleged knowledge of disability on the part of the claimant. It set out what the respondents said were the reasons why dismissal by reason of redundancy was appropriate. It detailed what the respondents said were the supportive steps taken by them during the illness and absence of the

claimant. It intimated what should be done if an appeal was to be made by the claimant.

31. A further letter was written by Mr Locke to the respondents. That appeared at page 39 of the bundle. The letter was dated 26 September. That letter said that the claimant appealed against the *"dismissal decision as a consequence of redundancy"*. It was stated that the redundancy was unfair as there had been a failure to follow a fair and reasonable process with there being no sufficiently detailed business reason given for the redundancy. Mr Locke said that there was no evidence of a selection process or individual consultation nor of any consideration of redeployment options prior to dismissal. He said on behalf of the claimant that she believed she was subject to disability discrimination during her employment and by reason of dismissal.

32. On 4 October 2019 the claimant met with a solicitor, Mr Cacace. She instructed him to represent her in connection with an appeal *"in the likelihood the matter goes to an Employment Tribunal".* She sent an email that day to the respondents informing them of the appointment of Mr Cacace. A copy of that email appeared at page 44 of the bundle.

33. In that email, in addition to intimating the appointment of Mr Cacace as her solicitor and the fact that she had met with him, the claimant referred to a request which the respondents had made to obtain her medical records. They had made that request on the basis that there had been reference by the claimant to her health and they wished to have medical information available to assess in terms of the appeal process. The claimant said that the respondents had no legal basis to seek her medical records, saying that the appeal *"is not based on my health, it is in fact due to the redundancy process followed, or lack of."* She also went on to say in relation to the proposed time of an appeal hearing:-

"Regarding the meeting next week can you please advise on the reason for this meeting. However, should you still require to hold this meeting for fundamental reasoning to this appeal I will need to reschedule to a more convenient time as Mr Andy Locke my CAB adviser is now an annual leave

for a fortnight. My health has further declined meaning my mobility just now is poor so it would be beneficial for all that I am fit enough to be able to fully engage in the meeting."

34. By email of 17 October the respondents wrote to the claimant informing her that all information regarding the case had been handed over to a third party for review. The claimant thanked the respondents for that information. That email exchange appeared at page 43 of the bundle.

35. A more substantive reply to earlier correspondence was issued by the respondents by email of 21 October 2019. A copy of that response appeared at page 45 of the bundle. The respondents reiterated their view that medical information was of relevance to them. They had so concluded as in the correspondence from CAB it had been stated that the claimant was suffering from a long-term disability and had been discriminated against. They sought to obtain medical information to enable them to *review "the critical information held within your medical records"*. They also sought any additional relevant information which the claimant said supported her appeal. They proposed alternative dates for the appeal hearing in light of what the claimant had said to them as to the unavailability of her representative.

36. The claimant did not ever reply to the email of 21 October from the respondents. She was of the view that she did not wish to discuss her medical position with the respondents. In her view the respondents were likely to use any medical information obtained at this point to justify her dismissal. Her view was that she would be vulnerable if she divulged the medical records to the respondents. As the respondents said the claimant was redundant, the claimant did not see the relevance of her medical records.

37. The claimant received a diagnosis of her medical condition towards the end of October 2019. There were some days around this time when she was very tired and obtained assistance from her mother with domestic responsibilities. There were some days she did not get dressed. There was no evidence, however, that she was prevented or impeded from seeking an ECC, presenting her claim or instructing solicitors in any form due to any such

medical issue. There is no evidence that she intended so to proceed but that her health prevented that or made it difficult.

38. The claimant notified ACAS in terms of the relevant provisions, seeking an ECC, on 20 November 2019. It is unclear as to why notification was given on that date as opposed to an earlier or later date. There was no evidence of any health or other issue preventing or impeding the claimant from notifying her intention to claim to ACAS in the ECC process or from presenting her claim once that process had been completed.

39. The claimant was looking to move residence from Scotland to England around October and November 2019. She also required to pick up documents from Mr Locke to pass them to Mr Cacace. The precise dates of the claimant passing those documents to Mr Cacace or of being occupied in the house search/move are unknown. There was no evidence of any negative impact of those factors upon the ability of the claimant to notify ACAS seeking an ECC or to present her claim.

40. The advice the claimant received from Mr Locke and from Mr Cacace was that payment being made by the respondents to her for the period to 31 August meant that that date was date of termination of her employment.

The issues

41. The issues for the Tribunal were: –

    (1) what was the EDT of the claimant?

    (2) if the EDT was such that the claimant been presented out of time, was it just and equitable to extend time for presentation to enable the claim to proceed?

Applicable law

42. The case of *Gisda Cyf v Barratt* 2010 UKSC 41 *("Gisda Cyf")* confirms that where dismissal is communicated to an employee by letter, the date of termination is the date when the employee actually reads the letter or has had a reasonable opportunity to read it.

43. *Cosmeceuticals Ltd v Parkin* UKEAT/0049/17 *("Parkin")* was a case in which the claimant had been told on 1 September that she could not return to her then role of managing director. She was put on garden leave. On 29 September the respondents had written to her telling her that she was now being given notice of termination of employment which would come to an end on 23 October.

44. In *Parkin* the Employment Appeal Tribunal ("EAT") highlighted that EDT is a statutory concept. The claimant had been told her contract of employment was at an end on 1 September. That brought about her effective dismissal. The Employment Tribunal had erred in finding that dismissal was not effective until 23 October. The EAT confirmed that where an employer made it clear that it was withdrawing the contract of employment, that was communication of the dismissal. It had been communicated to the employee that her employment had come to an end, not that the decision of the respondents was that the employment would end in the future. Dismissal had occurred at the meeting when the claimant was informed that she was no longer managing director.

45. *Sandle v Adecco UK Limited* UKEAT/0028/16 *("Sandle")* was a case in which a worker employed on an agency basis by the respondent was working on assignment with a different entity. That assignment came to an end. The respondents did not take any steps to find work for the claimant and made little effort to contact her as they assumed she was not interested in further agency work. The claimant made no attempt to contact the respondents. The EAT upheld the Employment Tribunal which had decided that the claimant had not met the burden of proof to show that she was dismissed in terms of Section 95 of the Employment Rights Act 1996 and could not pursue a claim of unfair dismissal. It was commented that for dismissal, the employer's unequivocal intention to dismiss had to be communicated to the employee. The Employment Tribunal held that the claimant had not established that the respondents had communicated such an unequivocal intention to treat her employment is at an end and accordingly the employment relationship was still continuing when the claim was lodged.

46. In a discrimination case, where the act said to be discriminatory is that of dismissal, the time limit runs not on the date when notice is given but on the date when dismissal takes effect. That is confirmed in the case of *Lupetti v Wrens old House Ltd* 1984 ICR 348.

5 47. In relation to whether it is just and equitable to extend time for presentation of a claim, that is a matter very much within the discretion of the Employment Tribunal which hears any evidence said to be relevant in that regard. The Tribunal must have regard to relevant factors and weigh up the position. It is appropriate to consider the prejudice to the claimant if the case is not 10 permitted to proceed by extension of time, together with any information as to possible prejudice to the respondents which is said to occur, other than simply having to face a claim. That might be, for example, that evidence is no longer available or that a witness has died. The extent of lateness in presenting a claim is of relevance as is any conduct by the respondents which is viewed 15 as having misled the claimant into any belief that time was still running for presentation of her claim. The reasons for delay are also of relevance. Any health issue on the part of the claimant may also be considered, if that is either clearly something which caused a difficulty in presenting a claim or in instructing that a claim be presented, or is said in fact to have caused a 20 difficulty in those steps being taken. Whether a claimant had advice during the period in which a claim could have been presented within time is also a factor which the tribunal might relevantly take into account.

48. The case of *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434 *("Robertson")* confirms that the onus is on the claimant to satisfy 25 the Employment Tribunal that an extension of time should be permitted on the basis that it is just and equitable for that to occur. The case also sees the Supreme Court state that an Employment Tribunal has a wide discretion in relation to extension of time on a just and equitable basis. It is noted that time limits are exercised strictly in employment and industrial cases. There is no 30 presumption that time should be extended on the basis of that being just and equitable. It is for the claimant to convince the Employment Tribunal that it is

just and equitable to extend time. The judgment states in paragraph 25 "*So, the exercise of discretion is the exception rather than the rule*."

49. *Abertawe Bro Morgannwg University v Morgan* 2018 EWCA Civ 640 *("Abertawe")* is a decision of the Court of Appeal. It confirms that the discretion of Employment Tribunal is "*clearly intended to be broad and unfettered*". The Tribunal does not require to be satisfied that there was good reason for the delay. Whether there is any explanation or apparent reason for the delay and the nature of any such reason are however relevant matters to which the Tribunal ought to have regard. Accordingly, if there is no direct evidence about why a claimant did not bring the claims sooner than he or she did, an Employment Tribunal may still be persuaded that it is just and equitable to extend time to permit the claim to be presented. It does not follow that in those circumstances an Employment Tribunal must conclude that there was no acceptable reason for the delay. Similarly, it does not follow that in that scenario time should not be extended as an automatic response to such a situation.

50. There is what has been described as a "*valuable reminder*" of what can be taken into account by the Employment Tribunal in its assessment of whether it is just and equitable to extend time set out in the case of *British Coal Corporation v Keeble* [1997] IRLR 336 *("Keeble")*.

Submissions

Submissions for the claimant

51. Mr Cacace had lodged a skeleton argument as the Orders required. He spoke to that. The following is a summary of his submission both in the written skeleton argument and also as advanced at conclusion of the PH.

52. The terms of the letter of 9 August from the respondents to the claimant were referred to by Mr Cacace. He said that the claimant's evidence was clear. She understood that her employment was coming to an end. The date which she regarded as being the termination date was 31 August. She had received the letter of 9 August the following day. Her email of 15 August did not

acknowledge awareness of immediate termination. Mr Cacace said that an employee in receipt of a letter terminating her employment not only had to read the letter but had to understand it. I queried with him whether he was saying that the date of termination of employment was therefore tested by the subjective interpretation of the claimant. His response to this was that it would have been appropriate for the claimant to have been told in clear terms about the date of termination of her employment. She could for example have been told face to face. He did not specifically address whether he was arguing that the claimant had to come to a view herself that the letter meant her employment had ended before termination took effect. He urged that I find that the date of termination was 31 August.

53. Mr Cacace referred to *Parkin* and *Sandle*. In *Parkin* there is been a face-to-face meeting. *Sandle* was referred to as it commented that sending a P45 to an employee could constitute dismissal. There was however, as mentioned above, no evidence whatsoever before me as to the P45 which was sent to the claimant, when it was sent and what it said. It became a production in the case only on the morning of the hearing. The claimant had not dealt with it in her written statement. There was no application made to extend her evidence in chief to include evidence about the P45. She was not asked about it in cross examination. There was no cross examination of Mr Jessimer in relation to the P45.

54. Mr Cacace also referred to *Sandle*, commenting that there could have been a verbal statement made to the claimant in this case which would have made things clear to her.

55. *Sandle* was also said by Mr Cacace to support the claimant as that case contained the comment that constructive dismissal of an employee could take place if the employer removed the employee from the payroll. In this case the claimant had been told that she would be paid until 31 August. She was not removed from the payroll until that time. This therefore was a similar situation and termination had taken place on 31 August.

56. The factors which Mr Cacace said I should have regard to were essentially set out in *Abertawe*. He said that the claimant received the letter on 11 August (although in fact her evidence in her statement and in the timeline to which she referred, confirmed that she received the letter on 10 August). The claimant had been ill for a period of time. The respondents were aware of that. The claimant was absent from work when the letter of 9 August was sent to her. Mr Cacace referred to an element of communication between the parties in mid-July 2019. That was mentioned in the claimant's timeline attached to her statement. It was prior to 10 August. I did not therefore see its relevance in circumstances where the claimant did not point to it as being connected with a failure on her part to meet the deadline for presentation of her claim. The claimant's health was a factor in the delay, said Mr Cacace. Mr Cacace referred to the evidence from the claimant as to tiredness.

57. The respondents had then requested information as to the claimant's health. They appeared therefore to be investigating her disability notwithstanding her dismissal.

58. In a part of the written submission which I did not fully follow and upon which Mr Cacace did not expand, he referred to the fact that no reasonable adjustments had been carried out by the respondents before dismissal and that no formal welfare check was ever conducted by the respondents. There was no evidence as to reasonable adjustments being requested and what those might have been. It is not of course accepted by the respondents that the claimant was disabled at the relevant time. There was no oral evidence before me from the claimant on that matter nor were the respondents asked about it. I might have queried the relevance of the evidence had those points arisen. It did not ever reach that stage however. There was no evidence about any alleged relevance of those matters to the failure to present the claim within the time permitted for that.

59. Mr Cacace referred to entries in the medical information included within the file of documents. No evidence was led however about entries in that medical information.

60. There was no prejudice to the respondents, said Mr Cacace, in extending the time limit. The delay or lateness involved was not lengthy. It was 10 days in round terms.

61. The claimant had taken advice. The respondents had not engaged in the ACAS process. It is perhaps worth mentioning that the evidence from Mr Jessimer was that the respondents had not been contacted by ACAS. That evidence was unchallenged. I did not however see the relevance of this evidence in that if the relevant date either described as the EDT or the last act of discrimination, both involving the same event, dismissal, was 10 August the claim was out of time by the time the claimant contacted ACAS as part of the ECC procedure. The clock stopped of course when the ECC procedure was being undertaken.

Submissions for the respondents

62. Ms Doyle had also tendered a written skeleton argument. She referred me to that and spoke in relation to some elements to expand upon or to clarify points.

63. The written submission dealt with matters in relation to the question of EDT, it was said.

64. In those written submissions, Ms Doyle commenced by drawing my attention to the acceptance by the claimant that the letter of 9 August from the respondents was received by her on 10 August mid-morning. I was referred to *Gisda Cyf.* The EDT was when an employee read the letter informing him or her of dismissal. In this case that was 10 August 2019.

65. The claimant was aware of that date being date of dismissal. Ms Doyle referred to the email from the claimant dated 15 August which, she said, contained an admission that the claimant was aware of dismissal. I raised with Ms Doyle the fact that this email from the claimant, at page 42 of the bundle, referred to having sought legal advice *"regarding the notice of redundancy"* and to having *"decided to contest this notice"*. It did not therefore seem to me

to accept in terms that dismissal had occurred on 10 August. Ms Doyle accepted that the email was in the terms I mentioned.

66. Although payment had been referred to as being made at the end of August, the letter was clear that dismissal was with immediate effect, said Ms Doyle.

5 67. The relevant date for calculation of time-bar was 10 August. Contact with ACAS was 20 November in relation to the ECC. The claim was therefore out of time by that point.

68. Although the submission in written form referred to the "*not reasonably practicable*" test as well as the "*just and equitable*" test, Ms Doyle agreed that

10 the only relevant test was the "*just and equitable*" one.

69. In relation to whether it was or was not just and equitable to extend time, Ms Doyle referred to *Keeble*. Reasons for delay were said by the claimant to be absence of Mr Locke on leave, alleged failure by the respondents to negotiate during the ECC process and a reference by the respondents to looking to call

15 a termination of employment meeting, a proposed meeting accepted by the claimant in evidence as being the potential meeting to hear her appeal against dismissal. The claimant had advice during the time. Against the background of all the circumstances it was not just and equitable to extend time, said Ms Doyle.

20 70. When I raised this matter with her, Ms Doyle accepted that there was nothing to which she could point as clearly prejudicial to the respondents if time was extended.

Comment

71. Neither party had specifically referred to the case of *Robertson*. I therefore

25 raised it with both of them to give them an opportunity to comment upon it. Neither Mr Cacace or Ms Doyle wished to say anything beyond what they had earlier said.

Discussion and decision

EDT

72. I concluded that the EDT, relevant date for redundancy purposes and the last act on which discrimination was said to have occurred was 10 August 2019. That was therefore the appropriate date from which to calculate the time permitted for presentation of a claim. It was accepted by the claimant that if 10 August was determined by me as being the date of termination then the claim had been presented out of time

73. I came to the view that 10 August was the EDT by having regard to the terms of the letter sent to the claimant on 9 August. That letter could perhaps have been clearer in its terms in that it referred to the intention of making the claimant redundant. It does however state that this is with "*immediate effect*". Whilst the letter also goes on to say that the claimant will receive pay until the end of August, in my view the letter is sufficiently clear in its intimation that the claimant's employment has come to an end.

74. EDT is the date on which the claimant received and read the letter. I did not accept the argument of Mr Cacace that the claimant required to understand the letter. To put the EDT into the claimant's hands by tying it to the date on which she said she understood the letter, does not reflect the law as I see it. After all, even now the claimant does not accept that she was dismssied on 10 August, believing the date of dismissal to have been 31 August. In my view *Gisda Cyf* leads to the critical date being that on which the claimant received and read the letter intimating dismissal.

75. I did not follow the logic of the criticism of Mr Cacace that there had been no meeting with the claimant. The letter said what the letter said. The respondents had chosen to issue the letter. The evidence from Mr Jessimer was that the respondents had tried to contact the claimant to speak with her. That was not challenged nor was it contradicted by any evidence from the claimant. The critical matter was the issue of the letter and the terms in which it was written.

76. Just as it might be said that the letter could have been 100% clear in its terms and was not perhaps quite of that character, that was also a risk if a face-to-face meeting had occurred. Face-to-face meetings are always open to interpretation and to differences in recollection as to what was or was not said and what precise terms were or were not used. To that extent a meeting of itself is not therefore fool proof in guaranteeing that there is no doubt as to the position following upon a meeting. The claimant was also absent from work. There might have been difficulty in arranging such a meeting. She was absent through ill-health. Trying to arrange a meeting or calling her to a meeting might have been open to criticism in those circumstances. In any event what I had before me was what actually happened, namely the sending to the claimant of a letter which she received on 10 August, the letter referring to the claimant been made redundant "*with immediate effect*".

77. I concluded that letter was sufficiently clear to constitute termination of employment on 10 August 2019.

78. The claim was therefore presented out of time.

Just and equitable extension of time

79. There was, being blunt, very little in the evidence in chief from the claimant which supported an argument that it was just and equitable to extend time. Despite the Orders issued following the case management PH, those being detailed above, the main evidence in chief from the claimant was contained within a timeline which dealt with allegations of discriminatory conduct. That was not relevant to the issue of whether it was just and equitable to extend time. I appreciated that Mr Cacace was not the solicitor who prepared the statement. The point remains, however, that the statement for the claimant included much material (the timeline) which related to the allegations of discrimination, something which the Orders stated should not be included in the statement.

80. The claimant's statement in paragraph 4 referred to delay whilst her representative was on leave, to the respondents failing to negotiate in the early conciliation process and to the respondents trying to call a termination

of employment meeting. The engagement or absence of contact in the early conciliation process was not relevant to extension of time as mentioned above. By the time the ECC process commenced the claim was already out of time.

5 81. The claimant's statement did not refer to any health issue as being a reason for failure to present the claim in time or for there being a delay in presentation of the claim. There was no reference in the witness statement to her health from August through to 17 January the following year, the claim being presented at the latter point. Her oral evidence on any health issue was brief 10 and did not see her maintain that any health issue had prevented or delayed presentation of her claim. It was for her to set out why the claim was not presented on time, as the Orders confirmed.

82. In cross examination, and subsequent re-examination, the claimant referred to fatigue and to having had to obtain assistance from her mother for an 15 element of time. That was said to have been in October. The evidence in this regard was very limited however. There was no evidence that the claimant was unable to meet with or to instruct her representatives. In fact, there was communication and personal contact with her solicitor around this time. The claimant instructed her solicitor on 4 October, meeting with him at that time. 20 She emailed the respondents on 17 October. She took a conscious decision not to participate in the appeal procedure, not responding to the email from the respondents of 21 October.

83. The claimant accepted in cross examination that the termination of employment meeting to which she referred was in fact the appeal process. 25 She was not, on the evidence, under any impression that she had not been dismissed at that point. I also did not see that there was any evidence which even hinted, never mind established, that the respondents had in some way sought to "*spin things out*" or to mislead the claimant such that time passed without her realising that there was any issue in that regard. There was, as an 30 example, no evidence as to any assurance having been given to her by the respondents that passage of time did not matter.

84. It also did not seem to me that the claimant's representative from CAB going on holiday, which I understood to be around late September and prior to construction of the solicitor who acted on behalf of the claimant from 4 October, was something which impacted on the ability of the claimant to seek an ECC from ACAS or indeed her ability to present a claim. There was plenty of time after instruction of the solicitor for a claim to be presented in time.

85. There was some passing evidence from the claimant as to a house move to England being something with which she was concerned around October. Again, there was no evidence in chief on this point. It was also not said, when it was mentioned, that this was a reason for delay in presentation of the claim or caused any issue with instruction of her solicitors.

86. The claimant was critical of the respondents for not sending to her a contract of employment. That undoubtedly is something which should have been done in that every employee should have a statement of main terms and conditions of employment. The fact that the claimant did not have that however from the respondents is not something which was said to have caused delay in presentation of the claim. The claimant said she wished it so she could look at any provisions within it as to garden leave. The terms of the letter were however sufficiently clear that she had been dismissed, as I have found.

87. It is certainly the case that there were some factors which might potentially form the basis of an argument for the claimant that time should be extended on a just and equitable basis. The claimant's health and her investigation of a possible move to England might potentially have been in that category. I had very little evidence however in relation to those matters as mentioned. Any evidence did not involve any suggestion that the claimant would have moved forward with her claim had she not had health issues or had she not been involved in a possible move of house. What evidence I had on those points did not amount to a persuasive basis on which it could be said that it was just and equitable to extend time.

88. This is where it is of relevance to have regard to the Orders made. They were very clear as to the written statements comprising evidence in chief. The

statement from the claimant, even referring as it did to the timeline (which narrated historical matters relevant to discriminatory behaviour alleged to have occurred and which ought not therefore to have been part of the statement, given the Orders and indeed the subject matter of this PH) did not provide much at all by way of support for a just and equitable extension of time.

89. I have taken account of her full range of evidence looking at the evidence which came from cross examination and re-examination, together with documents spoken to in evidence. Even that however does not offer much which would form a basis on which it was appropriate to extend time on a just and equitable test.

90. It is true that the balance of prejudice favours time being extended in that if time is not extended there is no claim. There is not said to be any significant prejudice to the respondents if time is extended, prejudice being limited to the fact that a claim would proceed against them. Equally the extent of delay involved, i.e. the time by which the claim was late in presentation, is not of particular significance, being some 10 or 11 days.

91. Looking at the complete picture, it seemed to me that the claimant had instructed advisers and would have been able to proceed to seek the ECC and subsequently to present her claim at any point, certainly shortly after instruction of her solicitors. She decided not to proceed with an appeal. That perhaps made the options clearer. The claimant might of course have decided to proceed to move forward with the ECC process and subsequently an application to the Employment Tribunal at an earlier date than October.

92. I concluded on the evidence that the claimant left the matter in the hands of her advisers and was content so to do. She said in cross examination that both representatives proceeded on the understanding that the last day of her employment was 31 August 2019, on the basis that she was to receive pay until that time.

93. There was no suggestion that the claimant had been asked for instructions or had been asked to provide information to her advisers and that illness, a

possible house move or a misunderstanding on her part as to when the deadline was, had led to the claim being presented late. Rather, she had taken advice and the claim was late because she had relied upon the advice, given to her, which was that the point at which time started to run was 31 August. The relevant date was in fact 10 August.

Conclusion

94. I have considered the position very carefully.

95. As mentioned, the letter of 9 August could have been plainer to a degree in that it could simply have stated that the claimant was being made redundant with immediate effect rather than referring to an intention of making her redundant with immediate effect. It could also have referred to the payment which was to be made to her as being a goodwill payment, rather than saying that she would continue to be paid until the end of August. That as I see it is the only basis of possible confusion which can appropriately be weighed when I come to consider the possibility of a just and equitable extension of time. I do not regard it as being of relevance that the respondents did not meet with the claimant, that she had not received a contract of employment or whether (a disputed aspect in any event) the respondents did or did not engage with ACAS. I also did not see the correspondence around the appeal when the respondents sought medical information about the claimant as being something which was of relevance in relation to the just and equitable test.

96. Looking at the matters about which the claimant spoke, almost in passing, I did not see that there was much weight at all in the comment made, literally in one sentence, by the claimant as to a possible move house to England. Further, whilst the claimant was absent from work through ill health and had some health issues in October from her evidence, those were not referred to in her statement. They were not said by her, when she mentioned them in cross examination and re-examination, to be of any significance by way of preventing or restricting her presenting a claim or instructing presentation of a claim.

97. I was faced therefore with what amounted, in my view, to the proposition that it was just and equitable to extend time for presentation of the claim to enable it to proceed as the claimant had relied upon advice that time started to run from the end of August in circumstances where it in fact ran from 10 August.

98. I was conscious of *Robertson* with its statement that time limits are exercised strictly in employment cases, that the onus is on the claimant to satisfy the Tribunal that it is just and equitable to extend time and that extending time is the exception rather than the rule.

99. I was also conscious of *Abertawe* which states that Tribunal does not require to be convinced that there is a good reason for delay in presentation of a claim for it to be just and equitable to extend time to permit the claim to proceed.

100. The claimant had advice both from CAB and from a solicitor. If the test was whether it was not reasonably practicable for the claim to have been presented within 3 months, then the authorities are clear. The position is that with a representative, particularly a professional representative, instructed, if the deadline for presentation of a claim is missed by that representative, then it cannot be said that it was not reasonably practicable to present the claim in time. The test here however is whether it is just and equitable to extend time to permit the claim to proceed.

101. I have not found this an easy decision to reach. The claimant had professional advice. She relied on that. Through that reliance, the time limit for presentation of the claim was missed. To that extent the claimant was not at fault. The fault was that of her advisors who had given her unsound advice. If time was not extended permitting the claim to proceed, the claimant might well have a claim for negligence against her solicitors. Such a claim is never entirely straightforward. I noted, for example, that Mr Cacace did not adopt the position for the claimant that she should be permitted to proceed with the claim, as a just and equitable decision, as the error as to EDT was that of her solicitors.

102. It does seem to me that this is a clear case where the claimant relied on advice which unfortunately proved to be ill founded. I have sympathy for her. Had

there been more or fuller evidence as to the impact of illness upon her ability to instruct solicitors to proceed with a claim or to interact with them, or fuller evidence as to time spent dealing with a possible house move which again restricted her ability to provide instructions or to focus on this matter, that would have added to the balancing factors in favour of exercising discretion and permitting the claim to proceed.

103. I've taken account of the fact that the period of delay is relatively short and that there is no suggestion of prejudice to the respondents due to delay.

104. I am left therefore with the decision turning, in my view, on whether it is just and equitable to extend time looking to the reason for the time limit being missed, that reason being the error of the claimant's solicitors and CAB advisor. Putting that slightly differently, is it just and equitable to extend time when the claimant herself was not at fault in that she relied on the advice from her advisors?

105. With a degree of hesitation, I have concluded that it is just and equitable to extend time and to permit the claim to proceed, looking at the facts and circumstances in this case.

106. The critical elements in my decision are the reason for the time limit being missed and the prejudice which would be caused to the claimant by not extending time. Unsound advice led to the time limit being missed. The claimant would suffer prejudice as she would not be able to make her claim to the Employment Tribunal. She would face, if she decided to pursue a claim against her solicitors, a lengthy and potentially disputed claim, certainly as to the level of any award, it would be anticipated.

107. Looking at these factors I concluded that time for presentation of the claim should be extended as it is just and equitable so to do.

108. It is disputed by the respondents, on current information, that the claimant was at the relevant time disabled in terms of the 2010 Act. It is likely that a further PH will be required on that point. It would be appropriate for there to be a brief (it is anticipated) case management PH to determine whether and

when such a PH is to take place. The Clerk to the Tribunals is requested to arrange such a telephone PH, set down for one hour, as soon as is possible.

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Employment Judge: R Gall
Date of Judgement: 23 July 2020
Entered in register: 25 July 2020
10 and copied to parties