EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr F Dhladla	v	**Abellio London Limited**

OPEN PRELIMINARY HEARING

Heard at: London South by CVP **On: 29 April 2021**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: **No appearance or representation**
For the Respondent: **Ms T Patala solicitor**

JUDGMENT on PRELIMINARY HEARING

1. The claim of unfair dismissal was presented outside the primary time limit contained in section 111(2) of the Employment Rights Act 1996 and it was reasonably practicable for the claim to be presented within the primary time limit, accordingly the claim of unfair dismissal is dismissed.

2. The claim of race discrimination was presented outside the primary time limit contained in section 123(1)(a) of the Equality Act 2010 and it is not just and equitable to extend the period within which the claim falls to be lodged. The claim of race discrimination is dismissed.

3. The claims of breach of sections 10 and 11 of the Employment Relations Act 1999 were presented outside the primary time limit in section 11(2) of the Employment Relations Act and it was reasonably practicable for the claims to be presented within the primary time limit, accordingly the claims are dismissed.

4. The hearing fixed for 7-10 February2022 is discharged.

REASONS

Preliminary

1. This preliminary hearing was fixed in order to consider whether the time for lodging the claim should be extended to allow the claim to proceed. The issues were

determined at a hearing on 26 February 2021 and certain Orders were made in relation to the provision information to this hearing.

The issues to be considered at the OPH

2. Should all or some of the Claimant's claims be dismissed on the grounds they are out of time?

(i) Constructive Unfair dismissal claim:

a. Was the complaint of unfair dismissal presented within time (s111 ERA 1996)?

b. If not, was it not reasonably practicable for the Claimant to present the complaint within time?

c If it was not reasonably practicable for the Claimant to present the complaint within time, was the claim presented within such further period as the tribunal considers reasonable?

(ii) Discrimination claims:

a. In respect of the Claimant's claims that arose three months before the Claimant commenced Acas early conciliation, are these allegations out of time?

b. Do any or all of these matters form part of a course of conduct by the Respondent extending over a period of time such as to render them in time pursuant to s123(3)EqA?

c. If not, should time be extended on the basis the claim was presented within such further period as the tribunal thinks just and equitable? (s123(1)(a) EqA?

(iii) Breach of ss 10 and 11 ERelA 1999:

a. In respect of the Claimant's claims that arose three months before the Claimant commenced Acas early conciliation, are these allegations out of time?

b. If not, was it not reasonably practicable for the Claimant to present the complaint within time?

c. If it was not reasonably practicable for the Claimant to present the complaint within time, was the claim presented within such further period as the tribunal considers reasonable? (s11(2) ERelA

Alternatively, should all or part of the Claimant's claims be struck out as having, on time grounds, no reasonable prospects of success (Rule 37(1) Employment Tribunal Rules 2013)?

Alternatively, should the Claimant be ordered to pay a deposit not exceeding £1000 as a condition of continuing to advance any specific allegation or argument on the basis the tribunal considers that, on time grounds, it has little reasonable prospect of success **(**Rule 39(1) Employment Tribunal Rules 2013)?

If the Claimant's claims proceed to a final hearing, the Employment Judge will review the issues with the parties and make any necessary case management orders to ensure the parties are ready for the FMH.

Chronology

3. The Claimant's employment ended on 20 October 2018. On 20 February 2020, the Claimant contacted ACAS and an Early Conciliation certificate was issued on 1 March 2020. On 30 April 2020 the Claimant presented this claim.

Submissions

8. The Tribunal received oral submissions from the Respondent.

Law

9. Section 111(2) of the Employment Rights Act 1996 (ERA 1996) provides:
> "an Employment Tribunal shall not consider a complaint…unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination."

10. A Tribunal may only extend time for presenting a claim where it is satisfied of the following:
> "It was "not reasonably practicable" for the complaint to be presented in time
> The claim was nevertheless presented "within such further period as the Tribunal considers reasonable" (Section 111(2)(b), ERA 1996.)

11. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present the claim in time. The burden of proving this rests on the Claimant (**Porter v. Bandridge Ltd** [1978] ICR 943 CA). Second, if she succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

12. In **Dedman v. British Building Engineering Appliances Ltd.** [1974] ICR 53 Lord Denning held that ignorance of legal rights, or ignorance of the time limit, is not just cause or excuse unless it appears that the employee or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences. Scarman LJ indicated that practicability is not necessarily to be equated with knowledge, nor impracticability with lack of knowledge. If the applicant is saying that he did not know of his rights, relevant questions would be:
> 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing in ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse".

The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'

13. This approach was endorsed in **Walls Meat Co. Ltd. v. Khan** [1979] ICR 52. Brandon LJ dealt with the matter as follows:
> 'The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself

reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him'.

14. **Palmer & Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA followed this line and talked in terms of reasonable possibility at page 384-385.

15. The issue was considered more recently in **Marks & Spencer plc v. Williams-Ryan** [2005] ICR 1293 CA, where Lord Phillips MR, having reviewed the authorities, upheld the **Dedman** principle as a proposition of law (at para 31):

> *'[In Dedman] the* employee had retained a solicitor to act for him and failed to meet the time limit because of the solicitor's negligence. In such circumstances it is clear that the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an employment tribunal.'

16. The question in **Williams-Ryan** was whether a claimant could rely on the escape clause where she had received advice from a CAB. Holding that there was no binding authority equating advice from a CAB with advice from a solicitor, Lord Phillips MR stated (at para 32):

> 'I would hesitate to say that an employee can never pray in aid the fact that he was misled by advice from someone at a CAB. It seems to me that this may well depend on who it was who gave the advice and in what circumstances. Certainly, the mere fact of seeking advice from a CAB cannot, as a matter of law, rule out the possibility of demonstrating that it was not reasonably practicable to make a timely application to an employment tribunal.'

17. Similar considerations apply to the provisions of the Employment Relations Act 1999.

17. The Equality Act 2010 provides:

> 123 Time limits
>
> (1) [Subject to section 140A and 140B] proceedings on a complaint within section 120 may not be brought after the end of—
>
> (*a*) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (*b*) such other period as the employment tribunal thinks just and equitable.

18. Harvey provides a non-exhaustive list of factors which may prove helpful in assessing individual cases:

- — the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings);
- — the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;

- the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application;
- the conduct of the claimant over the same period;
- the length of time by which the application is out of time;
- the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim;
- the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

Discussion and decision

19. The only information available to this Tribunal was what was said at the previous preliminary hearing on behalf of the Claimant that he suffered from depression. None of the Orders made at the previous hearing had been complied with.

20. The Respondent had applied for strike out of the claim on 11 August 2020 and again on 4 September 2020.

21. In the absence of any evidence of the reason for the claim not being lodged in time, there was no basis upon which the Tribunal could exercise any discretion. The Tribunal decided that the claim should have been lodged it time and that it was reasonably practicable to do so and it would not be just and equitable to extend the time.

22. The Tribunal did not address strike out or deposit order as again there was no information upon which to base a decision.

23. The full merits hearing listed for 7- 10 February 2022 is discharged.

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Employment Judge Truscott QC

Date 29 April 2021