THE EMPLOYMENT TRIBUNALS

Claimant
Ms A. Claxton-Mayer

Respondents
Gateshead Council ("the LA")
The Frontline Organisation ("Frontline")
University of Bedfordshire ("the University")

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

MADE AT NEWCASTLE (without a Hearing) ON 27 May 2021
EMPLOYMENT JUDGE GARNON

JUDGMENT ON A RECONSIDERATION APPLICATION

I refuse the claimant's application for a reconsideration of my judgment made on 24 March 2021 (sent to the parties on 13 April), under Rule 72 (1) of the Employment Tribunal Rules of Procedure 2013 (the Rules) because I consider there is no reasonable prospect of the original decision being varied or revoked.

REASONS (bold print is my emphasis and italics quotations)

1. The claimant has applied for a reconsideration of a judgment I made at a public preliminary hearing when she appeared in person and the respondents were all represented by Counsel: the LA by Ms B. Clayton, Frontline by Ms J. Connolly and the University by Mr S. Ahmed. The claim against the University was withdrawn, but not dismissed as the claimant reserved the right to proceed in a Civil Court. The claims against the first and second respondent were presented outside the time limit for doing so. I decided it was not just and equitable to hear them notwithstanding that, so they were dismissed. Dismissing any discrimination claim due purely to a claimant not meeting the time limit is an exceptional step I take very rarely, which is why I gave ten pages of written reasons for doing so, which I need not repeat.

2. Rule 72 includes:
(*1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked .., the application shall be refused and the Tribunal shall inform the parties of the refusal.*

3. The claimant's application is well formulated. It was emailed late on Sunday 25 April and, as required by the Rules, copied to the respondents. I was on leave in the week commencing 26 April and had an accident on 3 May causing me to be hospitalised. I have dealt the application as quickly as possible. The respondents say there is nothing in the reconsideration application which the claimant did not raise or should have raised at the hearing, and she is seeking "a second bite at the

cherry". As she is unrepresented, I do not think her application should be refused only for that reason without considering the more detailed points she has made. I now summarise them.

4. The claimant was diagnosed with epilepsy in 2018 and is a disabled person. Frontline trains people to become social workers. The LA was an employment service provider for her work placement within the meaning of sections 55 and 56 of the Equality Act 2010 (EqA), so the Employment Tribunal (ET) had jurisdiction to hear her claim. The LA has a practice within the meaning of s.20(3) of requiring Student Social Workers to undertake unaccompanied home visits to service users and that practice placed her at a substantial disadvantage because she would be in a vulnerable position were she to have a seizure in someone's home. On **29 August 2019** she attended a meeting to discuss the management of her epilepsy during her placement. Reasonable adjustments were agreed but, she says, not implemented. The respondents accept a plan was agreed but deny it was not implemented. At the meeting and in an Occupational Health Report of 26 June 2019, a risk assessment was recommended in regard to her making unaccompanied home visits. None was carried out during her placement which started on about **1 September 2019**.

5. On **9 October 2019,** at a supervision with Ms Archibald of the LA, the claimant discussed her anxiety about the impact of her epilepsy on her carrying out home visits. She says it was clear to Ms Archibald and Mr Brownrigg of Frontline **by 20 December 2019 at latest** arrangements for home visits were not effective. She had told Ms Archibald this repeatedly and asked for improvements. She was upset to be told by Mr Brownrigg that if he had been aware of the regularity of her seizures prior to the course starting she may not have been accepted. A" Cause for Concern" process was initiated following this meeting.

6. In **early January 2020** after working with Gateshead Access to Employment Service for her adult placement, she told Ms Archibald she believed there could be further adjustments made for home visits. Ms Archibald responded all reasonable adjustments had already been made. A Cause for Concern meeting took place on **15 January 2020** to explore the reasons for the claimant's high number of absences. She says her seizures, though uncontrollable and unpredictable, are generally quite minor and, with appropriate support, she recovers quickly. At times colleagues unnecessarily called ambulances so, rather than losing an hour or so of her placement, a whole day was spent attending hospital. She told the respondents she needed, for example, a support worker to accompany her. Mr Brownrigg said this would be difficult due to the nature of the social work role. When she suggested exploring Access to Work as an option, he said he would contact them.

7. On **10 February** Ms Archibald stated she could now approach deputy consultant social workers to accompany her on home visits, but rarely were any available. At some point Ms Archibald said she would be referred to a "suitability panel" to whom she believed she could raise her concerns and they could assist with reasonable adjustments. On 14 February 2020 she was told she would not be referred to a suitability panel, so this was another "dead end". At a meeting on **14 February 2020** with Ms Archibald the claimant said she had heard nothing further to Mr Brownrigg stating he would contact Access to Work. On **21 February** she sent an email to Mr Brownrigg explaining the difficulties of having to arrange visits around other people's diaries, and wrote a formal internal complaint addressed to the University. Her application explains what happened well: "*I was informed by Frontline I should make an initial complaint to the University of Bedfordshire, however the information on their website on this is entirely unclear and it took me some time to discover how*

this process operated. I submitted a complaint on 21 February 2020. I was then informed I should submit a complaint to the Frontline Organisation and an appeal (called an academic appeal) *to the University of Bedfordshire.This resulted in me submitting my complaint to the Frontline Organisation on 2 March 2020. Once I had submitted a complaint, I was told it should take 21 days, in fact it took much longer. I was informed on 5 June the investigation .. had been completed, the process was then reopened with no attempt being made by Frontline to inform me that this had happened or to involve me in this part of the investigation.*

8. In late February/early March, Ms Archibald had recommended the claimant fail her training because of *'lack of depth*" and her being unable to demonstrate an ability to meet all of the required elements of the Professional Capabilities Framework. On **3 March 2020** she was advised of her fail through the University. The claimant was a member of Unison whom she asked for advice during her placement. They told her the case was complex and may have to be brought under the "Education" provisions of Part 6 EqA. She was told on **2 July** Frontline had re-opened the investigation but she did not hear the outcome until **17 July**. She was told the delay was in part due to the pandemic. She lodged an internal appeal on **23 July**. This was later rejected. **Her issues were not being resolved by Frontline or the LA, so continuing internally was pointless.**

9. Belatedly, she sought legal advice. **On 29 July** she was told to claim in the civil court and the ET. She started Early Conciliation (EC) with ACAS that day. ACAS issued an EC Certificate on **26 August**. She presented her claim on **24 September 2020.** Both Counsel said in March there was no reason to explain why, already out of time, the claimant waited four weeks from ACAS issuing an EC Certificate to present her claim. The claimant said she had four weeks, which is right, but she did not have to use it all.

10.She was granted legal aid in early August, her case was taken on by a solicitor on 11 August 2020 and on 13 August, court proceedings were issued but withdrawn before service. She informed the solicitor she was starting a new job on 7 September and legal aid ended from 8 September.

11. For her claim to continue I would have to find it just and equitable to extend time. A vital area of dispute would be whether, as Frontline and the LA argue, the claimant was insufficiently pro-active in seeking people to accompany her on home visits. This will involve examination of factual details she asserts and, in order for a trial to be fair to both sides, witnesses to be able to recall what happened, why and when. Everyone has the right to a fair hearing within a reasonable time under the European Convention on Human Rights. That applies to all parties.

12. At the time of the March hearing, Ms Lesley Holden, an important witness for the LA has been on long term sick for some months and it was not known when she may return. Mr Brownrigg had left Frontline on 25 September 2020. The claimant says her complaint is evidenced by written records of discussions on 20 December 2019, 15 January 2020 and 14 February 2020. This may well be so, but witnesses need to recall why steps were taken, or not taken, in context. I agree an internal investigation **should** include interviews with Mr Brownrigg, Ms Holden and Ms Archibald, but they may not have been detailed. I also accept the respondents may have anticipated a claim, as the claimant adds" *During the internal complaints process I contacted Frontline on a number of occasions expressing I was unhappy with the delays, for example,* ***on 2 July 2020*** *I sent an email to*

Frontline explaining that due to my dissatisfaction I was seeking legal advice. By then, she was already one month out of time, took 27 days to contact ACAS and another eight weeks to issue.

13. I said at a preliminary hearing on 7 January 2021 and again at the start of the March hearing, my **preliminary** view was the respondent's time limit point would not succeed, because several factors explained **some** delay. It appeared to me then the delay was less in duration and more excusable. For example, I did not know about her being a union member or the missed opportunities she had to claim. The claimant must have known her placement and success on the course was in jeopardy if she did not do enough home visits. She attributed the problem to failure to make reasonable adjustments and knew, or should have known, she could have brought such a claim well before her placement was terminated. She says adjustments agreed in September 2019 did not come about, she raised concerns and nothing was done. On her own case, by 20 December 2019, she was getting nowhere and must have known that. She has an arguable case she was also subjected to harassment on that day by Mr Brownrigg. She could have brought that claim then.

14. She says although she was a member of UNISON and contacted them regarding discrimination on the placement, they advised it was not an employment issue so they were unable to represent or advise her further. She later discovered, with substantial effort, the discrimination should be treated as an employment matter but by that time she was no longer on placement and had no access to UNISON advice and representation. I would be very surprised if they did not alert her to time limits.

15. There are some points of the reconsideration application, I need to deal with specifically:
(a) The claimant passed her academic studies and received positive feedback from managers on her adult placement. The alleged failure to make adjustments was a continuous failure on the part of the LA and Frontline and led to the decision to fail her on 3 March 2020. **On her s 15 claim, that is when time started to run.** Various earlier acts of discrimination could have been claimed and, had I felt able to allow the s 15 claim to proceed, I would have allowed them too.

(b) If the claim proceeded, the claimant would probably show the ending of her placement was at least in part due to something arising in consequence of her disability, so prima facie discrimination contrary to s15. Whether the respondents could show it was a proportionate means of achieving its legitimate aim to allow only suitable people to qualify as social workers would largely depend upon whether reasonable adjustments had been made. It has to have a fair opportunity to show all steps it knew were needed, and were reasonable, were in fact taken. When the respondents asked for details of **missed** home visits, as to when they happened, why and who was involved, the claimant could not provide them as too much time has passed for her to recollect.

(c) The decision to fail her resulted in a crisis of confidence and the onset of serious depression. She did not tell me at the hearing in March she had been prescribed Citalopram since 28 February 2020 or had an assessment on 19 March saying she required talking therapies. Ill health can be a good reason for delay. Her increasing level of anxiety affected her ability to sleep, eat and concentrate. I accept this may have **undermined** her ability to progress a complaint, but not prevented her doing so . Once she had failed the course, **urgent** action was needed and by May at latest she must have known internal complaints were getting her nowhere. A claim, even if legally imperfect, could have been presented then, saying simply she had been failed due to not making enough home visits.

(d) At the March hearing she mentioned, but without the following detail, she had caring responsibilities for her grandmother who lived in Cornwall and had been unwell **since February 2020**. From **23 June 2020** it became her responsibility to speak to carers, GP, and health professionals regarding her grandmother's care and update her family. No-one could visit her and on 5 July she died alone. The claimant arranged a cremation, liaised with a solicitor regarding her estate. I accept all this was stressful, time consuming and impacted her mental health. I do not underestimate its significance, but it does not explain her failure to do anything before her termination or to contact ACAS to start EC before 2 June when the primary time limit expired.

(e) Once the complaints process was completed, she found the investigating officer had not viewed all the evidence she provided eg. had not read the Occupational Health report. Finding this out made her depression worse, was demoralising and frustrating. She spent days crying and upset and trying to find the mental energy to work out what to do next. The dates above show a process which should have taken 3 weeks dragged on for over 3 months but still she did not present a claim. What she discovered on about **17 July, cannot explain her earlier inaction**.

(f) The pandemic had an impact. The claimant was unable to visit family, her partner was working long hours taking extra shifts due to him working in a residential care home. She worried about his health and his access to PPE. She is more vulnerable to Covid due to asthma. I accept all this too, but it does not explain why she did not pursue her case externally from early March onwards.

16. Her application also says: "*.. my belief I must complete the internal complaints procedure before beginning the process of a legal claim was made significantly worse by the lack of clear information and delays in handling my complaint by Frontline and Gateshead.…The complaints procedures did not outline I could submit a complaint to the employment tribunal, nor did it advise of any legal time limits. As a result, I was unaware this was a process I could have been following".* **No employer is under a duty to advice an employee how to go about suing it. This shows the real main cause of the failure to issue in time- a mistaken belief as to the law.**

17. She spoke to the Disability Law Service, Citizens Advice, North East Law Centre, Disability Rights UK Helpline, the Equality Advisory and Support Service, the Disabled Students Helpline and 'No win No Fee' solicitors who allegedly told her either her claim was regarding education and should be heard in the civil courts or they could not assist. She adds" *I had contacted many organisations and done my best to seek legal advice and clarity on the issues. However, due to the complexity of my case I was advised incorrectly at times. I was also not provided the information by the respondents that I needed to submit a claim earlier in the process and I was struggling with bereavement and mental health that caused further difficulty in gaining the support I needed to make a claim within the time limits*." All the organisations she names would, or should, know if there is doubt as to whether an ET has jurisdiction in a claim related in some way to work, the obvious and safe course is to issue a claim in the ET, which need not be perfectly formulated, and address the jurisdiction issue later, **not let the claim go out of time.** She did not need to understand the complex legal issues **to start** a claim saying simply her attempt to qualify as a social worker had been thwarted by a failure to take steps needed to enable her to make home visits safely. **There is no need to start, let alone complete, internal processes first.** On 29 July, the solicitor's advice was to ***protectively*** issue in the civil courts **and to start EC with ACAS**. She should have discovered much earlier that was the proper course.

18. In my reasons, I set out section 123 EqA and cited Hendricks-v-Commissioner of Police for the Metropolis, Matuszowicz-v-Kingston-Upon-Hull City Council, British Coal Corporation-v-Keeble, Robinson-v-The Post Office and Adedeji-v-University Hospitals Birmingham NHS Foundation Trust. ET's have a broad discretion in deciding what it is just and equitable to hear out of time but must assess all the factors in the particular case. Although the discretion to extend is broad, I cannot exercise it simply out of sympathy.

19. Under the Employment Rights Act 1996 (ERA) the test for "extending" time limits is much stricter. It must have been "*not reasonably practicable*" (which means feasible or "do-able") to issue in time, a question of fact taking all the circumstances into account including (i) **the substantial cause** of the failure to comply with the time limit (ii) whether the claimant was being advised at any material time and, if so, by whom, and (iii) whether there was any substantial fault on the part of the claimant or advisor which led to failure to comply with the time limit. Time **limits** are **not** just loose targets even under the EqA where I have more discretion to extend them. However,some ERA cases set out useful principles. Dedman-v-British Building 1973 IRLR 379, Wall's Meat-v-Khan 1978 IRLR 499 and Riley -v-Tesco Stores1980 IRLR 103 held where a claimant or her advisers allow the time limit to pass due to mistaken beliefs of law, the mistaken belief must in itself be reasonable before time can be extended. Porter-v-Bandridge Ltd held the correct test is not whether the claimant knew her rights, but whether **she ought to have**. This extends to knowledge of time-limits. Trevelyans (Birmingham)Ltd-v-Norton 1991 ICR 488 held a claimant must **seek** information about **how and when** to enforce her rights. In Sodexo Health Care Services Ltd-v-Harmer EATS 0079/08 the claimant submitted 23 days late because she wrongly assumed the time limit would not start running until the end of the appeal process. The Employment Appeal Tribunal (EAT) said the crucial question was whether, in the circumstances, she was **reasonably** ignorant of the time limit. Given she knew of **a** time limit but had failed to make proper inquiries, the only answer was "no".

20. In John Lewis Partnership-v-Charman EAT 0079/11, the EAT upheld a decision to permit an out of time claim by a young inexperienced claimant, who knew nothing about the right to claim prior to his termination, saying the relevant question was whether that ignorance was reasonable. **He had no union or legal advice**. He relied heavily on his father **who had been given inaccurate advice by ACAS**. The case is one of the rare examples of a reasonable ignorance of the law. In Marks and Spencer plc-v-Williams-Ryan 2005 ICR 1293 the claimant believed she had to exhaust the internal appeal procedure before she could bring a claim and **had this confirmed by the Citizens Advice Bureau**. The tribunal allowed her claim to proceed out of time. Lord Phillips said: '*Were these conclusions on the part of the tribunal **perverse**? I have concluded they were not. I think the findings were **generous** .., but not outside the ambit of conclusions a tribunal could properly reach on all the facts before them.*' "Perverse" means no reasonable Tribunal could have reached the conclusion. In that case misleading advice, from a voluntary organisation to which many people turn and rely upon, saved the claimant. Where the employer itself has **mislead** the employee, it has been found not reasonably practicable. Unlike in Charman and Williams-Ryan, this claimant is an intelligent person, well able to do research and had some union advice .All the information she needed to present a claim in time was readily available from ACAS or online. She did not need to understand the complex legal issues **to start** a claim saying simply her attempt to qualify as a social worker had been thwarted by a failure to take steps needed to enable her to make home visits safely. Under the EqA, fault of an advisor is not fatal (Chohan-v-Derby Law Centre). Using internal process is not in itself an excuse for not issuing, Robinson-v-The Post Office but is a relevant factor

21. Her application acknowledges my decision recognised her lack of legal knowledge and some of the difficulties she had in obtaining competent advice on how to proceed. She says it "***gives insufficient weight to the difficulties and delays caused by incorrect and generally unclear information on how to make a complaint provided by Frontline, delays in carrying out investigations into my internal complaint and refusal to fully disclose related documents.*** I disagree. As with all such decisions, I have to **balance** points for and against extending time.

22. Discrimination cases are fact sensitive so witnesses need to remember what was said, done or not done, why **and** the context. Internal processes may result in prompt records being made, but not always. The claimant was not given clear information about how to go about internal procedures which were delayed, **but she knew that was happening**. Also, for many months when, on her own account, she was being "fobbed off", she took no steps to enforce her rights to have something more done to help her make the home visits she needed to do to show she should qualify as a social worker. In March I wrote:
30. All in all, she is a very pleasant lady who tolerated a bad situation for far too long. My sympathies are with her but each week that passed without her making a note of key events, such as home visits she could not arrange, brings us to the point not even she can now give specifics. The respondents' witnesses will not be able to answer questions about what happened, when and why. All too often I see spurious time limit arguments from respondents, indeed I dealt with one on the day of writing these reasons. However, in this case the prejudice the respondents would suffer would be facing a case in which the cogency of the evidence it needs to bring to defend itself is likely to be greatly affected by the delay and irreparably so. The Tribunal will be faced with diametrically opposed views of the parties and no reliable basis to decide which is the more likely. With regret, and narrowly, I have concluded extending time would not be just and equitable.

23. I re-affirm that view. As my statements to the parties in January and March 2021 show, if I could have found a way of extending time to enable a lady who, if what she says is accurate, has been treated badly could pursue a claim in the ET, I would have. I balanced the opposing arguments and could not. I do not believe any judge, taking all the factors into account and properly directing himself as to the law, would think otherwise, so there is no reasonable prospect of the decision being varied or revoked.

Employment Judge T.M. Garnon
Orders authorised by the Employment Judge on 27 May 2021.