

**IN THE CENTRAL LONDON EMPLOYMENT TRIBUNAL****BETWEEN**

**Claimant
MRS M EKERUCHE
Respondent
NATIONAL GRID**

Employment Judge Russell Sitting Alone

HELD AT: London Central (CVP video hearing) ON: 29 SEPTEMBER 2021

REPRESENTATION:

**Claimant: In person
Respondent: Mr M Salter Counsel**

Open Preliminary Hearing

This was an open preliminary hearing, and it was agreed there were 3 issues to determine.

- (a) whether the Tribunal has jurisdiction to hear the Claimant's second complaint relating to her dismissal.
- (b) whether the full merits hearing should proceed as listed for a 10-day Final Hearing commencing on Wednesday 6th October 2021;
- (c) whether the Claimant has complied with the order of Employment Judge Baty to provide a witness statement by noon on 29th September 2021.

Judgement

1. The hearing listed for 6 October shall be vacated. **The full merits hearing is re listed for a 13 day hearing from 20 June 2021 before a full ET panel held at Victory House , 30-34 Kingsway London WC2BEX. Starting at 10 am (parties to be present by 9.30 am) before a full ET panel.** At present this hearing shall be in person unless the parties are advised accordingly .
2. The Claimant's claim for unfair dismissal was presented out of time but time should be extended under s111(2) (b) (2) ERA 1996 and s123 Equality Act 2010 (1) (b) and the unfair dismissal claim shall continue and be considered by the tribunal at a full hearing .
3. The Claimant had not complied with the order to provide a witness statement but would be given a further chance to do so .

Reasons

Issue A Jurisdiction. Whether the Tribunal has jurisdiction to hear the Claimant's second complaint relating to her dismissal.

1. The Claimant's first claim was presented on 18 September 2020 and she was subsequently dismissed on 20th October 2020. The limitation period for making her claim of unfair dismissal therefore expired on 19th January 2021 but she only presented her claim on 20th January 2021. So, she was one day out of time. These are the statutory provisions .

Complaints to employment tribunal. Time limits

s111 ERA 1996

- (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
- (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
 - (a) before the end of the period of three months beginning with the effective date of termination, or
 - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

s123 Equality Act 2010

- (3) [Subject to section 140A] 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
 - (c) such other period as the employment tribunal thinks just and equitable.
 - i. ...
 - (4) For the purposes of this section—
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
 - (5) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.
2. The burden of proof in showing the tribunal should extend time is placed squarely on to the Claimant: Robertson v Bexley Community College [2003] IRLR 434 but I accept the Claimant's evidence that, acting in person and without the opportunity of independent advice, she only realised that she should make a claim within 3 months of the dismissal when told this by EJ Spencer at the PH on 20 January 2021. She then did so immediately. She presented her ET1 the same day in fact. She had previously thought that the time limit was from the outcome the appeal (against dismissal) which is an understandable belief even if incorrect.
 3. She makes it clear in her ET1 that she regards her dismissal as part of a continuing act of discrimination against her. And in respect of her discriminatory dismissal claim the Tribunal has a wide discretion under s 123(1)(b)Eq Act 2010 to do what it thinks is just and equitable in the circumstances. The Respondent's counsel helpfully referred me to the case of Southwark London Borough Council v Afolabi [2003] IRLR 220, CA. Making it clear the tribunal is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action. Given the delay was only 1 day and the reasons for it and the lack of prejudice to the Respondent, in allowing the claim as to a discriminatory dismissal to proceed, it is clear to me that an extension should be allowed. In so far as it related to a complaint under the Equality Act.
 4. The position in respect of the unfair dismissal case itself, under the Employment Rights act, is less clear cut. Reasonable practicability means, reasonably feasible. Palmer and Saunders v

Southend-on-Sea Borough Council [1984] IRLR 119. The Claimant was aware she had the right to present a claim to the Employment Tribunal, having already done so. And she knew there was a 3 month period to do so but was confused as to when the time limit started to run. But she had no advisor at any time and had not been able to get any advice to clarify the position and even though it was her obligation to seek such advice (Trevelyan (Birmingham) Ltd v Norton [1991] ICR 488 she did try and acted in good faith in such efforts. I find that she did not know of the urgency and this is not a Porter v Bandbridge [1978] ICR 943 situation where she ought to have known. She had not been dismissed when filing her first claim and post dismissal was pursuing an appeal and when she did find out on January 20 of the applicable time limit she then acted immediately. The appeal had still not taken place as of 20 January.

5. Whilst the “ reasonably practicability “ test must be construed strictly it is within my discretion to find , as I do , that it does not preclude the Claimant from continuing in respect of her normal unfair dismissal claim , on this occasion. On balance I find it was not reasonably feasible for her to file the claim in time . And for the reasons given . I also observe that she filed the claim immediately on finding out the jurisdiction concern and only 1 day late and there is no prejudice to the Respondent in allowing the unfair dismissal element of this claim to proceed and I finally observe that the issues to be aired in the full hearing will principally be the same ones.

Issue B . Whether the full merits hearing should proceed as listed for a 10-day Final Hearing commencing on Wednesday 6th October 2021

6. It is clear to me that there is a real danger that the hearing, listed for 10 days, will go part heard. Which would be undesirable for obvious reasons. Two of the Respondent witnesses are currently on maternity leave. Disclosure is not complete. The Claimant has not yet provided a witness statement. She remains unrepresented. The issues are complex and still remain slightly unclear given (in particular) the lack of a Claimant witness statement.
7. There is a Scott Schedule of allegations running to some 46 pages including some 83 separate allegations and some 140 pages of Respondent’s witness evidence (9 witnesses, one of whose statements is 72 pages) and a bundle consisting of (now) some 2500 pages.
8. The Respondent has previously raised concerns over the adequacy of the time allocation for this matter. And for all these reasons a postponement is allowed and was also agreed to by the Claimant. As were the new dates for the full hearing now over 13 days (timetabled) and to start on 20 June 2022.

Issue C. Whether the Claimant has complied with the order of Employment Judge Baty to provide a witness statement by noon on 29th September 2021.

9. EJ Baty ordered that the Claimant was to provide a statement by 12 noon on 29th September 2021. She did provide a last-minute draft statement but in a confused and inadequate form and incorporating large parts of the Scott Schedule. She had not complied with the ET order and further orders to ensure that she did were made. As set out separately.

Russell

EMPLOYMENT JUDGE -

09 October 2021

Order sent to the parties
on: 12/10/2021

For Office of the Tribunals