EMPLOYMENT TRIBUNALS

Claimant: **Ms Jennifer Isaac**

Respondent: **B & Q Limited**

Heard at: **Watford London Hearing Centre (by video hearing)**

On: **3 February 2022**

Before: **Employment Judge Tobin (sitting alone)**

Appearances
For the claimant: in person
For the respondent: Mr D Piddington (counsel)

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. **The claimant's claims that she was unfair dismissed, owed notice pay, owed holiday pay and owed arrears of pay were presented outside the time limits contained in s111 Employment Rights Act 1996, Employment Tribunals Extension of Jurisdiction Order 1994, Regulation 30 Working Time Regulations 1998 and s23 Employment Rights Act 1996 respectively. It was reasonably practicable for these claims to be presented within the appropriate time limits.**

2. **The claimant's claims of discrimination on the grounds of her race have been presented outside of the time limit contained in s123 Equality Act 2010. Having considered the circumstances, it is not just and equitable to extend time for bringing these complaints.**

3. **The Employment Tribunal does not have jurisdiction to hear the complaints brought by the claimant on 13 August 2019.**

4. The claimant's application to amend her claim is refused.

5. Proceedings are now dismissed.

REASONS

The hearing

1. This has been a remote hearing which has been consented to by the claimant and the respondent. The form of remote hearing was a video hearing through the HMCTS cloud video platform and all the participants, save as to the Judghe, were not physically at the hearing centre. A face-to-face hearing was not held because it was considered not to be practicable in the light of the coronavirus pandemic and the Government's ensuing restrictions. The hearing was listed as a Preliminary Hearing (Open) to determine the matters below.

2. Employment Judge Anstis struck out the claims on 6 August 2020 on the basis that proceedings were presented outside of the time limits prescribed in the Employment Rights Act 1996 ("ERA") and the Equality Act 2010 ("EqA)". Judge Anstis provided Written Reasons for his decision which was sent to the parties on 1 October 2020. This Judgment was made in the claimant's absence and Judge Anstis set it aside on the basis that the hearing ought not to have proceeded in the claimant's absence. The case came before me today to re-consider the decision in respect of time limits, to consider the claimant's application to amend her claim, and to make any further case management orders depending on the outcome of the above.

3. Judge Anstis provided a summary of proceedings at paragraph 2 and 3 of his Written Reasons. Judge Antsis determined that the claimant, having submitted the claim form on 13 August 2019, was 1- day out of time.

4. In respect of the claimant's reconsideration application, EJ Anstis noted on 9 June 2021:

> … the claimant's original claim form contained no description of her claim other than ticking various boxes at 8.1 and a partial schedule of loss at box 9.2. In response to an invitation dated 29 August 2019 to provide further particulars, the claimant replied on 1 October 2019. The claimant's email of 1 October 2019 amounts to the only particulars the tribunal has of the claimant's complaint, and suggests that the only claims of discrimination are a claim of racial harassment dated from July 2018 (over a year before her claim was presented to the Tribunal) and a claim of victimisation in respect of which no particulars are given of either the protected act or resulting detriment(s).

5. Judge Anstis recommended that the claimant apply to amend her application to pursue the legal claims she described in her reconsideration application, which the claimant did on 1 July 2020 [see Hearing Bundle pages 44-52].

6. At the outset of the hearing, I confirmed that all participants had access to, and had had time to go through, the latest Hearing Bundle, which now consisted of 110 pages and Mr Piddington's written representations ("Preliminary Document on behalf of the Respondent). The hearing bundle included the claimant's written submission for this hearing [HB41-43] and a character witness statement from Mrs G Brown dated 17 January 2022 [HB86-87]. The claimant's said that she did not intend to call Mrs Brown and I advised her that I would give this statement less weight because Mrs Brown was not there to confirm her evidence and answer questions. Mrs Brown's evidence was not relevant, save as to one extent (see later). The claimant had provided a statement plus exhibits [HB102-110] but this was only relevant to the reconsideration application as it did not address the substantive out of time issues.

The law

7. The time limit for an unfair dismissal claim is set out in section 111 ERA. The complaint must normally be presented to the Employment Tribunal within 3 months starting with the *effective date of termination* ("EDT"), or within such further period as the Tribunal considers reasonable where it was not reasonably practical for the complaint to be presented within 3 months. The EDT for this purpose is as defined in s97 ERA. For summary dismissals (i.e. dismissals without notice), the EDT will normally be the date that the employee is first informed of their dismissal, either directly or upon notification by post: see *Gisda Cyf v Barratt [2010] UKSC 41* and *Robinson v Bowskill UKEAT/0313/12.* The 3 months start with (i.e. includes) the EDT (see *Trow v Ind Coope (West Midlands) Limited [1967] 2QB 899* and *Hammond v Hague Castle & Co Ltd [1973] ICR 148*) so effectively this means 3 months less a day (see *Pacitti Jones v O'Brien [2005] IRLR 889 (Court of Session)*). For dismissals on notice, unless the contract specifically provides otherwise, contractual notice, whether oral or written, runs from the day after the notice is given: *Wang v University of Keele UKEAT/0223/10*.

8. The claimant identified her employment ending on 7 March 2019 in her claim form. The time limit for presenting a complaint of unfair dismissal shall be regarded as strict. The Employment Tribunal's discretionary power to extend time limit is subject to a two-part test:

i. The Tribunal must be satisfied that it was not *reasonably practical* for the claim to be presented in time.

ii. The Tribunal must be satisfied that the claim was presented within such further period as the Tribunal considers reasonable.

9. Reasonably practical does not mean reasonably or physically possible, but rather something like "reasonably feasible": see *Palmer v Southend on Sea BC [1984] ICR 372 CA*. The determination of what is reasonably practical is a question of fact for the Tribunal (see *Miller v Community Links Trust Limited UKEAT/0486/07*. The burden of proof is on the claimant.

10. The remedy of unfair dismissal is considered to be sufficiently well known that ignorance of the remedy will not normally be accepted as an excuse (see *Read in*

Partnership Ltd v Fraine UKAEAT/0520/10, *John Lewis Partnership v Charmaine UKEAT/0079/11* and *Walls Meat Co Ltd v Khan [1979] ICR 52*.

11. The time limits for claims of notice pay (i.e. breach of contract), holiday pay and arrears of pay (i.e. a shortfall or non-payment of wages) are set out in the Employment Tribunals Extension of Jurisdiction Order 1994, Regulation 30 Working Time Regulations 1998 and s23 ERA respectively. These are the same as those that apply to unfair dismissal.

12. Claims of discrimination in the Employment Tribunal must be presented *within 3 months* (i.e. 3 months less a day) of the act complained of, pursuant to s123(1) EqA. Acts of discrimination often extend over a period of time, so s123(3)(a) EqA goes on to say that "conduct extending over a period is to be treated as done at the end of the period". In addition, Employment Tribunals have a discretion to extend the 3-month time limit period if they think it *just and equitable* to do so, under s123(1)(b) EqA.

13. For a discrimination complaint, *continuing acts* under s123(3)(a) EqA are distinguishable from one-off act that have continuing consequences; time will run from the date of the one-off act complaint of; see *Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, Aziz v FDA [2010] EWCA Civ 304* and *Okoro and another v Taylor Woodrow Construction Limited and others [2012] EWCA Civ 1590*. So far as I could ascertain, the acts that the claimant complainted of do not represent a continuous pattern or course of alleged discriminatory conduct by any specific individual; they are discreet acts with ongoing consequences.

14. The ACAS Early Conciliation period will extend time limits for the parties to attempt to resolve their differences without the need for Employment Tribunal proceedings: see s18A and s18B Employment Tribunals Act 1996 and the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014.

15. There is no presumption that Employment Tribunal's should extend time, the onus is on the claimant to persuade the Tribunal that it is just an equitable to do so: *Robertson v Bexley Community Centre CA [2003] IRLR 434*. In considering whether to exercise its discretion, the Employment Tribunal should consider the prejudice that each party would suffer as a result of granting or refusing an extension of time and should have regard to all of the other relevant circumstances.

16. In exercising any discretion, the Tribunal should consider the prejudice that each party would suffer as a result of granting or refusing the extension of time and should have regard to all of the other relevant circumstances. *British Coal Corporation v Keeble [1997] IRLR 336* said that the Tribunal should adopt the factors set out in s33 Limitation Act 1980 as useful checklist:

- The length of and reason for the delay
- The extent to which the cogency of evidence is likely to be affected by the delay
- The extent to which the party sued had cooperated with any requests for

information
- The promptness with which the claimant acted once he knew the possibility of taking action
- The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibilities of taking action.

17. A key issue to be addressed, according to *ABM University Local Health Board v Morgan UK EAT/0305/2013* is as follows:

a. Why was it that the primary time limit had been missed?

b. Why, after expiry of the primary time limit, was claim not brought sooner than it was?

18. The Court of Appeal said in *London Borough of Southwark v Afolabi [2003] IRLR 220* that a Tribunal is not required to go through all of the above checklist in considering whether it is just and equitable to extend time, provided no significant factor had been left out in the exercise of the Tribunal's discretion.

Findings of fact

19. Notwithstanding, the claimant's written submissions to the contrary [HB41-43], at the outset of the hearing, we went through Judge Anstis' determination and Mr Piddington's written representations and the claimant accepted – as did I – that the claimant knew of the termination of employment on 7 March 2019, so, in accordance with Mr Piddington's calculation, proceedings ought to have been received by the Employment Tribunal on 12 August 2019 at the latest.

20. The claimant issued her Claim Form on 13 August 2019.

21. The various claimant's claims were presented therefore, at least, 1 day out of time. On the information provided up to an including the previous time limit hearing, it was not possible to be precise as to how much more (if any) the claimant's victimisation claim was out of time although the claimant's complaint of harassment on the grounds of her race, was 13 months out of time.

22. The claimant's written submissions contained legal arguments and proffered no explanation as to why her claims were out of time. The claimant's statement did not address this substantive issue. Mrs Brown's evidence suggested that she thought that the claimant suffered depression and she contemplated whether or not this was post-traumatic stress disorder. At page 99 to 100 of the Hearing Bundle the claimant's sometime barrister Mr Goodwin, identified 3 medical emergencies and 1 underlying condition. I asked her about these.

a. The claim said that she burned herself badly on 7 March 2019. She said that she required some treatment, but not the daily treatment as contended in her representative's submission. The claimant said that she did not require hospital treatment. This accident was on the day that the claimant said she was dismissed from her employment.

b. The claimant said that she was notified that she required hospitalisation the day that her limitation period ended - on 12 August 2019 (which Mr Goodwin accepted was the day of the deadline to some of her complaints). However, the claimant was still able to present her claim the following day, i.e. the day that she went to hospital.

c. The claimant said that she suffered from functional dysphoria since 2014, which she regarded as emotionally debilitating.

d. Finally the claimant's representative said that the claimant suffered from anxiety, insomnia and stress, such that she was not able to function properly and which lead to her not being able to present her claim in time.

23. The claimant did not produce any corroborative medical information or indeed medical records to confirm the various emergencies or conditions as outlined above. This is surprising and significant given that she was legally represented (or at least legally supported) to make these representations and the claimant obviously appreciated the need for some corroboration because she produced a letter from her friend, Mrs Brown. Mrs Brown is not a medical expert, so I do not place emphasis or rely upon her letter/statement.

24. In her oral account the claimant was reticent, and she appeared unwilling to provide detail about her medical conditions. She did not produce any medical report and there was no GP letter or GP notes to corroborate her representative's representation. There is no evidence of any previous medical consultation or intervention.

25. I accept that her dismissal may have come as a shock, particularly as the claimant was a long-standing employee. But I assess Mr Goodwin's account is exaggerated and was not fully supported by the claimant's evidence. I believe that if the claimant suffered a depressive illness, then this was overstated to excuse her missing the limitation date.

26. The claimant was able to make numerous and clear representation about the reconsideration of Judge Anstis' Preliminary Hearing and yet she was unable to explain why she could not explain in detail her medical conditions and provide appropriate corroboration.

27. I am suspicious that the medical emergencies at 22(a) and 22(b) above book-end the limitation period. The claimant said that she was sure of these dates but in the absence of any corroboration I do not accept these dates because of the paucity in the claimant account and the co-incidence which I regard as self-serving.

28. Furthermore, I draw a negative inference from the absence of documents that I expected to see and the claimant's inability to account for their absence. I believe that the claimant did not receive any treatment during the period mid-March 2019 to mid-August 2019 because of her unsatisfactory evidence and her failure to provide documents that could have easily been produced in the 2½ years since this claim was presented. So, I do not believe the claimant's account, as I determine she was not telling me the truth, and I reject her contention that she was told she would be admitted to hospital the next day on the last day of her limitation.

Determination

29. As the claimant did no more than tick boxes on her Claim Form and she did only provided scant details for her complaints of race discrimination [HB15] we applied the last day of employment as the starting point and gave the claimant the benefit of the latest conciliation certificate.

30. I reject the claimant's account of her incapacity. If she did burn herself on the day before the clock started to run then, I determine, that her injury was not so significant as to preclude her issuing proceeding within the following 4¾-months. The key question for me was why the claimant was unable to issue proceeding on the limitation day, but she was able to issue proceedings on the day she said that she went to hospital, and in that respect I do not believe her account for the reasons stated above. I also determine that, if the claimant was suffering from a depressive illness then this was exaggerated and I do not accept that she was so incapacitated that she could not issue proceeding within the limitation period as extended by the ACAS Early Consolidation period.

31. Following my findings of fact, I am determine that it was reasonably practical for the claimant to issue proceedings within the appropriate time limits so I strike out the claims for unfair dismissal, notice pay, holiday pay and arrears of pay.

32. It seems obvious to me that the claimant miscalculated the limitation dates. That is why she was 1-day out of time for the victimisation and other complaints and 13 months out of time for the harassment complaint. The calculation was made more difficult by 2 ACAS Early Compliance Certificates.

33. The discretion is wider for the discrimination claims. Lack of knowledge of Employment Tribunal time limitations or miscalculating these is not accepted as a sufficient explanation for non-compliance with s123 EqA. The case law is clear that only in unusual circumstances is a claimant entitled to rely upon this factor. The claimant is intelligent and articulate; she is a mature and experienced employee. She is capable of undertaking research and discovering the Employment Tribunal jurisdictional requirements.

34. The prejudice for the claimant would be significant if she was not allowed to pursue her claims; however, I note that the claimant raised 2 grievances and went through a disciplinary process, which included an appeal, so she did have the

opportunity to raise her complaints internally at least. The balance of prejudice to the respondent employees may be significant also. They may face career threatening allegation and reputational damaging complaints for proceedings that were not brought promptly and within the appropriate timescales. It is now almost 3 years or more since the discriminatory events have occurred so memories have no doubt faded and documents might not be available. I find the balance of prejudice favours not allowing these claims to proceed.

35. There is no evidence that the respondent has withheld information from the claimant such to justify late proceedings and I do not see that the claimant was impeded by delays in obtaining professional advice.

36. Discrimination complaints should, as a general rule, be decided only after hearing all of the evidence, see *Anyanwu v South Bank Students' Union [2001] IRLR 305 HL*. However, this case applied to circumstances where the claimant relied on an alleged continuous course of discriminatory treatment where some of the acts relied upon were brought in time. That is not the case here, no identified complaints were brought in time.

37. Finally, I am concerned about the merits of these claims as set out in the claimant's application to amend. The claimant attempts to make 6 new claims of direct discrimination, 7 new complaints of harassment and identifies 10 acts of victimisation that were not identified before. I went through the allegation with the claimant and I identified these allegations as being made against 6 individuals (TB, RC, PW, PS, MR and ZA). This application considerably expands the factual dispute, the individuals affected and puts back and brings forward the time limit disputes. Indeed, I cannot see any possible basis to allege so late in the day that in respect of the claimant's grievances, the grievance appeal officers were motivated (consciously or unconsciously) by discrimination as was also and separately the dismissal appeal officer. So far as I can see, the latter is imported only to try to extend the discriminatory clock. I am concerned that these claims appear to be cast unaccountably widely and following my preliminary discussion with the claimant they appear speculative.

38. In summary, I consider that it was reasonably practical for the claimant to issue her unfair dismissal, notice pay, holiday pay and arrears of pay complaints within the appropriate statutory time limit. Consequently, I strike these claim out pursuant to s111 ERA, the Employment Tribunals Extension of Jurisdiction Order 1994, Regulation 30 Working Time Regulations 1998 and s23 ERA. For the reasons stated above, it is not just and equitable to extend time in respect of the claimant's race discrimination complaint, pursuant to s123(3) EqA.

The proposed amendment to the claim by the claimant.

39. As I have dismissed the substantive claims, it is not possible for the claimant to amend these proceedings. However, I would not allow the proposed amendments in any event. The application to amend was made on 1 July 2020 which was almost

11 months after proceedings were issued. This is astonishing late and there is no justification for leaving this so long. The prejudice to the respondent is considerable and set out above. I am not at all persuaded that there is sufficient merit in the claimant's allegation to justify such a late amendment.

_____

Employment Judge Tobin

Date: 8 March 2022

Sent to the parties on:

10 March 2022

For the Tribunal: