EMPLOYMENT TRIBUNALS

Claimant: Miss S Vaz

Respondent: Portobello House Ltd

Heard at: London Central **On:** 17 January 2023

Before: Employment Judge H Grewal
Mr G Bishop and Mr D Clay

Representation

Claimant: In person

Respondent: Mr R G Binns, Director

JUDGMENT

The unanimous judgment of the Tribunal is that it does not have jurisdiction to hear any of the Claimant's complaints. The claims are dismissed.

REASONS

1 The Claimant commenced Early Conciliation ("EC") on 17 April 2020 and the EC certificate was granted on 2 May 2020.

2 The Claimant presented her claim form on 16 July 2021. In the claim form she said that her employment began on 19 August 2019 and ended on 31 March 2020. She ticked the boxes to say that she was complaining of unfair dismissal and race discrimination and that she was owed other payments. In response to the question whether she had a disability she ticked "No". She attached to that six typed pages of the particulars of her claim.

3 As an introduction to the particulars of claim, the Claimant wrote,

> "*I am writing to raise a claim in regards to both the unlawful deduction of wages and an automatic unfair dismissal when asserting my statutory rights, motivated by racial discrimination."*

Under the headings of discrimination, unfair dismissal and unlawful deduction of wages she set out the particulars of each of those claims. Under the heading of discrimination, she wrote,

> "*I believe I was indirectly discriminated by Portobello house ltd under the protected characteristic of race. Throughout the duration of my employment. I had experienced different forms of passive/in-direct racial discrimination towards myself, my colleagues and customers whom were People of Colour."* [sic].

She then proceeded to set out the particulars of the race discrimination. She complained about how a new Italian manager had treated her in October and November 2019 (when his employment was terminated), the treatment of, and comments about, black customers and Muslim employees by the new manager Ana and others, black employees being made to feel untrusted and the failure to put the Claimant on furlough and the termination of her employment on 31 March 2020. Nowhere in that section, or anywhere else in the particulars, did the Claimant say anything about having being treated unfairly or badly because of any disability that she might have had. The only reference that she made to disability said exactly the opposite. When talking of the race discrimination, she said,

> "*As Portobello House were generally accepting of my chronic health condition (hypermobility syndrome) and agreed upon the reasonable adjustments I feared to then address the racial issues."*

As the Claimant had not made any complaints of disability discrimination, the Respondent did not respond to them in its response.

4 In a case management agenda prepared for a preliminary hearing on 26 March 2021 the Claimant said that she wanted to apply to amend her claim to add that she was disabled, that that caused her to be late, in November 2019 Ana implemented a policy of fining people who "arrived later than 5 minutes early to work" £5. She had been fined six times in January 2020. She also wanted to complain about what the Respondent had said about her not being able to carry trays in the correct manner because that was an adjustment that the Respondent had made for her. She wanted to add claims of indirect discrimination in relation to disability.

5 In the record of the preliminary hearing of 26 March 2021 it was said (at paragraph 7) that in her claim form presented on 16 July 2020 the Claimant had brought complaints of unfair dismissal for asserting a statutory right, unlawful deduction from wages, direct race discrimination, harassment related to race, indirect discrimination and failure to make reasonable adjustments on account of disability. The record then set out the issues to be determined in respect of each claim. Two PCPs were identified for the indirect disability discrimination and failure to make reasonable adjustment claims– (i) all staff were required to attend on time and failure to do so put them at risk of being fined and (ii) waiting staff were required to carry heavy trays.

There was no reference in the record of the preliminary hearing to an application to amend by the Claimant being considered, what the Respondent's view on it had been, an order being made to give the Claimant leave to amend her claim or to the Respondent to file an amended response to deal with it. All the evidence indicates that an application to amend was not considered at that hearing and the Employment Judge proceeded on the basis that those complaints had been made in the original claim form. The complaint of unauthorised deductions from wages was dismissed on withdrawal.

6 Prior to 9 August 2022 the Respondent applied to strike out the Claimant's claims on the grounds that they had not been presented in time and were vexatious and/or had no reasonable prospects of success. The Respondent was asked to provide written grounds in support of that application and did so on 29 August 2022. It set out in detail why each of the Claimant's complains of discrimination had not been presented in time and why it would not be just and equitable to extend time. That application was not dealt with by the Tribunal at the time. Later, the parties were told that it would be dealt with at the start of the full merits hearing which was dur to start on 17 January 2023.

7 In both her claim form and witness statement the Claimant said that she had consulted Citizen's Advice and ACAS around 31 March 2020.

8 We explained to the parties at the outset that it appeared to us that the complaint of unfair dismissal had been presented one day late and that all the discrimination claims had been presented after the expiry of the time limits for presenting them. We explained how we had calculated the time limits. We also said that there was an issue about whether the Claimant had ever complained of disability discrimination in her claim form. We asked the parties to address us first on those issues and we heard evidence on oath from the Claimant about why she had not presented her complaints earlier.

The Law

9 Section 111(2) of the Employment Rights Act 1996 ("ER1996") provides,

> "*Subject to the following provisions of this section an employment tribunal shall not consider a complaint* [of unfair dismissal] *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 satisfies that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."*

Section 111(2A) ERA 1996 provides that section 207B applies for the purposes of subsection (2)(a).

10 Section 97 ERA 1996 provides,

> "*(1) Subject to the following provisions of this section, in this Part "the effective date of termination" –*
>
> *…*

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
…

(2) Where –
(a) the contract is terminated by the employer, and
(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1),
For the purposes of section 108(1), 119(1) and 227(3) the later date is the effective date of termination."

11 Section 207B ERA 1996 provides,

"*(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").*

(2) In this section –
(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period."

12 Section 123 of the Equality Act 2010 ("EA 2010") provides,

"*(1) Subject to section140B 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
…

(3) For the purposes of this section –
(a) conduct extending over a period is to be treated as done at the end of that period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) 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."

13 Employment Tribunals have a very wide discretion in determining whether or not it is just and equitable to extend time. That having been said, as Auld J said in **Robertson v Bexley Community Centre [2003] IRLR 434**,

"*Where tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a compliant unless the applicant convinces it that that it is just and equitable to extend time. So, the exercise of the discretion is the exception rather than the rule."*

The burden is on the claimant to persuade the tribunal that it would be just and equitable to extend time.

14 In **Adedeji v University Birmingham Hospitals NHS Foundation Trust [2021] ICR** Underhill LJ in the Court of Appeal made it clear that in **British Coal Board v Keeble** the EAT had done no more than to suggest that a comparison with the requirements of section 33 of the Limitation Act 1980 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors, It certainly had not suggested that the list be used as a framework for any decision. Underhill LJ went on to say,

"*the best approach for a tribunal in considering the exercise of the discretion under section 123(1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular … "the length of, and reasons for, the delay"*

Underhill LJ also pointed out that,

"*As part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago."*

15 In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR1194** Leggatt LJ said,

"… *factors which are almost always relevant to consider when exercising any discretion to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent."*

In **Miller v Minister of Justice UKEAT/003.2015** Laing J pointed out,

"*There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents and losing touch with witnesses."*

16 In determining what claims have been made by a claimant in the claim form Tribunals look at the substance of the complaint and do not approach the wording used in a technical, narrow or legalistic manner. That having been said, a tribunal "*only has jurisdiction to consider and rule upon the act or acts of which complaint is made to it"* – per Mummery J in **Qureshi v Victorial University of Manchester [2001] ICR863**. The same point was made by Sedley LJ in **Anya v University of Oxford and another [2001] IRLR 377**. Having repeated Mummery J's statement, Sedley LJ stated,

> "*The industrial tribunal has no jurisdiction to consider and rule upon other acts of racial discrimination not included in the complaints in the originating application."*

The Claimant's evidence

17 The Claimant said that her claim had been presented in time because the Respondent was contractually bound to give her one week's notice and her employment had, therefore, terminated on 7 April 2021. She later said that that was based on legal advice that she received about time limits after she had presented her claim. Her complaints of race and disability discrimination were about a continuing act. She said that she had suffered from Alopecia (hair loss) in January 2020 as a result of stress at work and had had counselling. She had raised concerns about discrimination at work and they had been dismissive. It had made her feel worried. In February she had gone on holiday.

Conclusions

18 We considered first whether any of the claims had been presented in time. The last act of which the Claimant complaint was her dismissal. It was not in dispute that the Respondent dismissed her without notice on 31 March 2020. It is clear from section 97(1) ERA 1996 that the effective date of termination in those circumstances is the date on which termination takes effect, unless section 97(2) ERA 1996 applies. Section 97(2) does not apply to section 111(2) ERA 1996. Hence, the effective date of termination, for the purpose of calculating the time limits for presenting the complaint of unfair dismissal in this case is 31 March 2020. In respect of the discrimination complaints about the dismissal, it is the date on which the Claimant was dismissed. That is the same date.

19 Under both ERA 1996 and EA 2010 for a claim to have been presented in time, it should have been presented before the end of period of three months beginning with/starting on 31 March 2020, plus any extension of time allowed for the purpose of facilitating Early Conciliation. At the hearing, we said that on that basis, subject to the EC extension, the claims for the dismissal should have been presented by 30 June 2020. On reflection, however, we considered that, as there are only 30 days in June, the last day for presenting the claims was 29 June 2020. Whichever of those two dates it is, the end result remains the same. The effect of the extension of time provisions in both statutes, is that the period starting with 18 April 2020 (the day after Day A) and 2 May 2020 (Day B) is to be disregarded. That adds 15 days to the original time limit. Therefore, the claims should have been presented on 14 July 2020 (we initially thought that was 15 July). The claim was presented on 16 July 2020. Hence all claims were not presented within the time limits.

Unfair Dismissal

20 We considered whether the Claimant had satisfied us that it was not reasonably practicable for her to have presented the complaint of unfair dismissal by 14 July 2020. The Claimant has not given any explanation of why she could not have presented her claim on or before 14 July 2020. Any advice that she may have had about termination taking effect when the notice period expired was, according to her, received after she had presented her claim. In her claim form she had said that her employment ended on 31 March 2020. She did not claim that she had been ignorant of time limits. It would have been difficult for her to claim that in circumstances where she had sought advice from Citizens' Advice and ACAS around 31 March 2020. She had started Early Conciliation on 17 April 2020 because she was aware that she needed to do that in order to bring a claim to the Tribunal. She had had that further involvement with ACAS for two weeks and at the end of that should have been aware of the time limits after that. There was no explanation of why the Claimant had not presented the claim at any time between 3 May and 14 July 2022. She had not claimed that she had been unable to do so for any medical reasons. We concluded that the Claimant had failed to satisfy us that it had not been reasonably practicable for her to have presented the complaint of unfair dismissal by 14 July 2020.

Disability Discrimination

21 There were two issues in respect of the disability discrimination complaints – these were (a) whether the Claimant had made the complaints in her claim form or been given leave to amend her claim to include them and (b) if she had, whether it was just and equitable to consider them as they had not been presented in time.

22 It is clear from reading the Claimant's particulars of claim that she has not in that document made any complaint about being treated badly or unfairly for any reason related to her disability. The only reference to disability is to explain why she did not complain about race discrimination while employed, and that was because the Respondent had been accepting of, and had made reasonable adjustments for, her disability. Therefore, the Tribunal would only have jurisdiction to consider any complaints of disability discrimination if the Claimant was given leave to amend to her claim to include those complaints. Although, the Claimant had indicated in her case management agenda that she wished to make a complaint of disability discrimination, it is clear from the record of the preliminary hearing that no such application was made or considered. The Employment Judge appears to have proceeded, erroneously, on the basis that such a complaint had been made in the claim form. As the complaints of disability discrimination have not been made and the Claimant has not been given leave to amend her claim to include that, we concluded that the Tribunal does not have jurisdiction to consider those complaints.

23 In case, we are wrong in that conclusion and it can be argued that the Claimant was given leave to amend her claim to include them, we considered whether it would be just and equitable to consider them. If the Claimant was given leave to amend her claim to include complaints of disability discrimination, those claims will have been treated as having been presented on that date (26 March 2021) as they are completely new claims and unrelated to the existing claims in the claim form. As far as the PCP of being fined for arriving late is concerned, in her draft amendment set out in the case management agenda, the Claimant had said that the rule had been

imposed in November 2019 and she had been fined six times in January 2020. That claim would have been several months out of time if it had been made in the claim form on 16 July 2020. It is nearly a year out of time if it was first made on 26 March 2021. The second complaint is more difficult to understand. The Claimant appeared to be saying both in her claim form and in the case management agenda that an adjustment had been made and she was not required to carry heavy trays. In any event, if this started early in her employment and continued throughout her employment, the time limit would run from some point early on in her employment when the Respondent failed to make the adjustment. This claim, too, would have been several months out of time if presented on 16 July 2020 and would be over a year out of time if presented on 26 March 2021.

24 The delay is considerable, the Claimant has not provided any explanation as to why she could not have presented this claim earlier. A claimant who presents a claim late and has no explanation for not complying with the time limits has a difficult task in trying to persuade the Tribunal that it would be just and equitable to attend time. The Respondent is a small employer and is not legally represented. If the claim were allowed to go ahead it would suffer prejudice – it would have to defend a claim which would otherwise have been defeated by a limitation defence, its directors, who are not lawyers, would have to spend six days conducting the case which would be time costly and stressful, its witnesses would have to recall events that occurred months before. The Respondent had made the application a long time before the hearing and, because of the Tribunal's failure to deal with it timeously, it had had to prepare for the hearing the best that it could. In light of what the Claimant had said about the Respondent's attitude towards her disability in the claim form, she would have some difficulty in persuading the Tribunal that the reality was the exact opposite of that. Having taken into account all the above, we were not persuaded that it would be just and equitable to extend time to consider the complaints of disability discrimination.

Race Discrimination

25 The Claimant had argued that her complaint of race discrimination was a continuing act. If that argument were to be accepted, and the last alleged act of race discrimination (the failure to put on her furlough and her dismissal on 31 March 2020) was found to be an act of race discrimination, her claim would have been presented two days late. Even though that the delay might be short, the consequence of granting an extension would have been to open up issues which had occurred six months before then. In any event, in light of the different nature of the complaints made and the different perpetrators of those acts, there was a strong possibility that even if the Tribunal found some of them to be established it would conclude that they were not part of a continuing act. The complaints of race discrimination could be anything between 2 days and 6 months out of time.

26 What we have said about the Claimant's failure to provide any explanation for not presenting her other claims earlier applies equally to these claims.. While we might be able to understand the Claimant's reluctance to start proceedings while she was employed by the Respondent, there was no explanation of why she did not do so once her employment terminated and, more importantly, why she did not do so soon after 2 May 2020. By that stage she had had contact with Citizens' Advice and ACAS and had had the opportunity to seek advice from them about time limits. She was capable of presenting her claim herself – she did so on 16 July 2020. What we have said about prejudice to the Respondent (in paragraph 24 above) applies equally to

this claim. In addition, in the Claimant's witness statement she claims that the race discrimination started in August 2019 when she started her employment. Almost all the race discrimination claims are about comments made or the attitude of managers towards her. This is not a case where the complaints are about decisions or meetings that were recorded. It is very difficult for witnesses to recall months after a particular night in a bar whether something was said or not, or the context in which it might have been said or to identify witnesses who were present. For all the above reasons, we were not persuaded that it would be just and equitable to extend time to consider the complaints of race discrimination.

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Employment Judge - Grewal

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Date: 20/01/2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

23/01/2023

FOR THE TRIBUNAL OFFICE