EMPLOYMENT TRIBUNALS

Claimant
Ms S Shah

Respondent
v **The Commissioner of the Police of the Metropolis**

OPEN PRELIMINARY HEARING

Heard at: London South by CVP **On: 6 January 2023**

Before: Employment Judge Truscott KC

Appearances:

For the Claimant: **In person**
For the Respondent: **Mrs E Smith solicitor**

JUDGMENT on PRELIMINARY HEARING

1. The claims for unpaid wages and holiday pay were presented outside the primary time limit contained in section 23(2) of the Employment Rights Act 1996 and it was reasonably practicable for the claim to be presented within the primary time limit, the claims for unpaid wages and holiday pay are struck out.

2. 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. The claim of unfair dismissal is struck out.

3. The claims of disability and pregnancy/maternity discrimination were 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 claims fall to be lodged. The claims of discrimination are struck out.

4. The hearing listed for 18-23 March 2024 is discharged.

REASONS

Preliminary

1. This preliminary hearing was fixed to address the issue of time limits for the claims which had been lodged.

2. The claimant gave evidence on her own behalf. She did not provide any additional documents to the Tribunal.

3. The respondent provided a skeleton argument.

Findings

1. The claimant was employed by the respondent as a Communications Officer from 2 April 2012 until 21 September 2021.

2. She was absent from work due to sickness from 24 July 2016 to 21 September 2021, except that she attended work from 15 July 2021 to 28 July 2021 and was then off sick again from 29 July to 6 August 2020, before returning to work on 9 August. The claimant then took accrued annual leave from 17 August 2021 until the date of her dismissal on 21 September 2021.

3. The termination hearing was postponed at the claimant's request on a number of occasions and was eventually held on 13 September 2021.The claimant attended the hearing on 13 September 2021 which was part heard and reconvened and concluded on 21 September 2021. She was accompanied by her union representative John Holmes-Yarde.

4. The claimant appealed against the decision to dismiss her by way of letter dated 14 October 2021.

5. On 22 December 2021, she commenced new employment.

6. An initial appeal hearing was conducted on 15 February 2022, the claimant was again accompanied by a union representative.

7. The claimant previously instigated a Tribunal claim against the respondent under case number 2300650/2018 which was determined at a full hearing on 30 November, 1 – 3 December 2020. The claimant's claims were not upheld.

8. Date A on the claimant's ACAS Certificate is 18 December 2021 and date B is 21 January 2022. The claimant's claim therefore should have been lodged no later than 21 February 2022 but was not lodged until 22 February 2022.

Law

Reasonably practicable

9. Section 23(2) of the Employment Rights Act 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 23(4) ERA 1996.)

11. 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."

12. 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.)

13. 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.

14. 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'

15. 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'.

16. **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.

17. 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.'

18. 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.'

Just and equitable extension

19. Section 123(1)(b) of the 2010 Equality Act permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable. Section 140B of the Equality Act 2010 serves to extend the time limit under section 123 to facilitate conciliation before institution of proceedings.

20. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR 279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

21. The Tribunal also notes the guidance offered by the Court of Appeal in the case of **Apelogun-Gabriels v. London Borough of Lambeth & Anr** [2002] ICR 713 at 719 D that the pursuit by a claimant of an internal grievance or appeal procedure will not normally constitute sufficient ground for delaying the presentation of a claim: and

observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

22. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment … cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what LJ Auld said "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised."

23. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

the length and reasons for the delay;
the extent to which the cogency of the evidence is likely to be affected by the delay;
the extent to which the party sued had co-operated with any requests for information;
the promptness with which the claimant acted once he knew of the possibility of taking action; and
the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

24. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

25. Incorrect legal advice may be a valid reason for delay in bringing a claim but will depend on the facts of the case: **Hawkins v Ball & Barclays** [1996] IRLR 258 and **Chohan v Derby Law Centre** [2004] IRLR 685. In answering the question as to whether to extend time, the Tribunal needs to decide why the time limit was not met and why, after the expiry of the primary time limit, the claim was not brought sooner than it was; see **Abertawe Bro Morgannwg University Local Health Board v Morgan [**2014] UKEAT/0305/13 unreported per Langstaff J. However, in determining whether or not to grant an extension of time, all the factors in the case should be considered; see **Rathakrishnan v Pizza Express (Restaurants) Ltd** (2016) IRLR 278.

26. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as "the just and

equitable power" has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

27. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the "just and equitable" discretion should be exercised in the particular case.

DISCUSSION and DECISION

28. The claimant claims unfair dismissal and discrimination on the grounds of disability and pregnancy/maternity and also brings a claim in respect of various sums allegedly owed.

29. She has suffered ill health for a sustained period. She identified PTSD and personality disorder in her evidence. In her ET1, she refers to Occupational Health doctors and OH reports of April 2021 and Aug 2021 which indicate that she would reach full duty of 12 hours per shift after 3 months of recouperation. In evidence, the claimant said that in addition to ill health, she had also suffered serious domestic abuse and had been involved in divorce proceedings in June/July 2021. The Tribunal sought to clarify her state of health in the period since her dismissal but the claimant tended to refer back to the period before dismissal.

30. At the time she lodged her ET1, she was aware of the time limit of 3 months minus one day because of her previous involvement with the Tribunal. This resulted in her contact with ACAS a few days before the time limit lapsed. She had delayed because she was concerned about the impact of proceedings on her health and the potential cost.

31. The claimant's evidence about assistance from the union was confused but the Tribunal noted that she had a representative at both the termination and appeal meeting. She had material prepared for her appeal hearing and used this to draft her ET1 which is lengthy and well written if somewhat unclear as to the legal basis of some of the claims.

32. The Tribunal sought to identify why the claimant had delayed until beyond the last day for lodging her claim. The Tribunal considered that she was in sufficiently good health to lodge the claim in the period and her matrimonial issues were not prevalent at that time. She was able to gain new employment and participate in the dismissal and appeal hearings. The claimant said she was tired after the appeal hearing and although understandable this does not explain the delay. The Tribunal focussed on the remaining few days of the time limit and concluded that the claimant was well enough to make the claim. The claimant said that she became confused but the Tribunal does not accept this evidence. She said she started completing the claim on 21 February 2022 and could have submitted it that day but left completion to the next day. Her evidence was that it was in the early hours of the next day that the claim was completed. The Tribunal is not in a position to know if this timing was correct.

33. The respondent's ET3 was filed on 30 March 2022 and copied to the claimant at that time. An application was made in the covering email, which again was copied

to the claimant, for a preliminary hearing to be listed to hear the respondent's application for strike out of the claimant's claims on the basis that they have been filed out of time. As at the date of the hearing, the Tribunal neither received, nor been copied on, any correspondence from the claimant in response to the respondent's position.

34. The Tribunal concluded that it was "reasonably practicable" to bring the claims of unfair dismissal and monies owed in time pursuant to section 111(2)(b) of the Employment Rights Act 1996 accordingly, these claims are struck out.

35. The allegations in the ET1 do not amount to conduct extending over a period within the meaning of section 123(3)(a) of the Equality Act 2010. The claim should have been presented before the end of the period of three months beginning when those alleged acts were done as extended by the relevant ACAS Early Conciliation period accordingly the claimant's discrimination claims which predate 19 September 2021, being three months before the claimant instigated the ACAS Early Conciliation process, are out of time.

36. The Tribunal deliberated long and hard on the question whether it would be "just and equitable" to allow the claimant to bring the claims of discrimination outside of the time pursuant to section 111(2)(b) of the Employment Rights Act 1996.

37. The Tribunal had considerable sympathy for the claimant but justice and equity applies to both parties. The respondent will have the prejudice of having to defend a claim which in certain respects is not specified sufficiently and which is just out of time in relation to dismissal and substantially out of time in relation to prior discrimination. The claimant was acutely aware of the time limit and was able to make the claim in time.

38. On the basis of the guidance set out earlier and weighing all the relevant factors, the Tribunal considers that it is not proportionate to resolve those issues when they are out of time, accordingly it is not just and equitable to extend the time for lodging the claims and the claims of discrimination are struck out.

Employment Judge Truscott KC

Date 11 January 2023