EMPLOYMENT TRIBUNALS

Claimant		Respondent
Miss. Wendy McDermott	v	**GP Homecare Limited trading as Radis Community Care**

Heard at: **Birmingham** **On:** **1 June 2023**

Before: **Employment Judge Wedderspoon**

Representation:

Claimant: **In Person**

Respondents: **Ms. Patel, solicitor**

JUDGMENT

1. The Tribunal has no jurisdiction to deal with the claims of unfair dismissal, wrongful dismissal, breach of the working time regulations, discrimination and harassment.

2. All claims are dismissed.

REASONS

Purpose of the hearing

1. The purpose of the preliminary hearing is to determine in respect of the complaints of unfair dismissal, wrongful dismissal and or breach of the working time regulations whether
   (i) it was reasonably practicable for the claim to be made to the tribunal within the relevant time limits in section 111 of the employment rights act 1996, article 7 of the ETS extension of jurisdiction England and Wales order 1994 and regulation 30 of the working time regulations 1998;
   (ii) if it was not reasonably practicable for the claim to be made to the tribunal within the time limit was it made within a reasonable period?
2. Further the tribunal is to determine in respect to the complaints of sex discrimination or harassment assuming for the purpose of the preliminary hearing only that the claimant can establish conduct extending over a period whether
   (i) the complaints were made within such time of the end of that. As the tribunal considers just and equitable? The tribunal will consider

(a) why were the complaints not made to the tribunal in time?
(b) In any event is it just and equitable in all the circumstances to extend time.

The hearing

3. The Tribunal was provided with a two part bundle; a 57 page bundle in respect of the time/jurisdiction point and a 38 page bundle concerning case management. The claimant had only received the bundle the day before the hearing but accepted on reviewing the bundle that she was familiar with all the documentation contained in it save for notes of a grievance hearing held on 30 July 2021. The claimant was able to proceed. The claimant provided two witness statements (pages 13 to 15). The claimant stated that she had some text messages on her mobile telephone to her manager but these were concerned with the substantive claims and would not assist the Tribunal in determining the time point.

4. Reasonable adjustments of regular breaks were provided to the claimant throughout the hearing. At the end of submissions, the claimant requested that she be permitted to go home and she wanted the decision to be sent to her. There were no objections from the respondent.

Facts

5. The claimant was employed by the respondent as a care worker from 21 June 2019 until her resignation which took effect on 19 September 2021. Early conciliation started on 27 May 2022 and ended on 30 May 2022. The claim form was presented on 31 May 2022. The claimant brings complaints of unfair constructive dismissal, wrongful dismissal/breach of contract, direct sex discrimination, indirect sex discrimination, harassment related to sex and breach of the working time regulations in respect of weekly rest breaks.

6. At the preliminary hearing on 12 December 2022 the claimant accepted all of her complaints have been presented to the tribunal outside the relevant time limits. Her effective date of termination was 19 September 2021 so that her complaints of unfair and wrongful dismissal should have been presented to the tribunal by 18 December 2021 but were presented more than three months after the effective date of termination when presented on 31st May 2022 in respect of the claimants complained that the respondent failed to provide weekly rest breaks even if she has a complaint irrespective her last week of employment her claim in respect of that week should have been presented by 18 December 2021 and was presented more than three months after the date on which it is alleged she should have been permitted to exercise her rape right when presented on 31st May 2022. Her complaints of sex discrimination and/or harassment related to events which the claimant thinks took place in July and August 2020 should have been presented by November 2020 and were presented more than three months after the last alleged act of sex discrimination or harassment if they were part of course of conduct extending over a period.

7. Employment Judge Connolly explained to the claimant at the preliminary hearing on 12 December 2022 what documents should be disclosed, how a

witness statement should be structured and how it would be used at the preliminary hearing. The claimant was also referred to the Presidential Guidance and to the services of ELIPS.

8. The claimant was absent from work from the respondent from 28 July 2020 until her resignation in September 2021. During that time the reason for the claimant's absence varied; it commenced in July/August as stress related; for sick notes in September 2020 to mid-December 2020 (pages 17-19) it was related to migraine and headaches and from 14 December 2020 to early March 2021 the claimant was unfit for work by reason of migraines and work related stress. Sick notes in 2021 for a 6 month period from March 2021 were for headaches, stress related problem and menorrhagia. The last sick note prior to the ending of her employment dated 31 August 2021 to 14 September 2021 was menorrhagia. There is an evidential gap between mid September 2021 to March 2022 and a further sick note from 30 of March 2022 to 10 April 2022 when the claimant was unfit for work by reason of back and rib pain. Thereafter there are two further sick notes 11 April 2022 and 3 May 2022 concerning low back pain.

9. The last act of discriminatory treatment took place in August of 2020. The claimant's case is that she did not lodge a claim in 2020 because she was still working for the company she had been unwell and she simply wanted to return to work. In respect of her other claims, the claimant 's evidence is that she was not thinking straight at the time by reason of her mental health so could not lodge her complaint in time; she was unaware of the three month time limit in the Tribunal to make claims and she had received negative advice from ACAS as to making a claim in the three months post ending of her employment and was advised to go through the internal company process.

10. The claimant raised a grievance about her treatment at work on 9 July 2021. At this time the claimant was considering making a complaint to an Employment Tribunal. At a grievance hearing on 30 July 2021 the claimant stated that she had spoken to a solicitor and the CAB. The claimant's evidence is that CAB advised her to go to ACAS. She did not go to ACAS at this time. The solicitor she mentioned was a friend of a friend and later in her evidence she stated this person actually worked for the Scottish Employment Tribunal but she does not recall being informed about time limits for bringing claims to the Tribunal.

11. On 8 September 2021 the claimant emailed the respondent resigning her employment (page 37) stating *"I feel rail roaded all week and bullying into leaving HRC and my solicitor will be shown everything."* The reference to a solicitor was a friend of a friend (who worked in the Tribunal in Scotland). On 13 September 2021 the claimant emailed the respondent stating "*I am still going to continue with my claim."* The claimant received the grievance outcome on or about 12 November 2021. On 14 November 2021 the claimant emailed the respondent stating *"I will be going to a solicitor..I want loss of earnings and compensation.."* and confirmed by email on 15 November 2021 she would be appealing the grievance outcome.

12. The claimant 's evidence is that she did contact ACAS in the period after she left work (between September and December 2021; but she is uncertain of the date) but was unaware of a timeframe to make complaints to the employment tribunal. Her evidence is that ACAS did not inform her about a time limit and instead informed her to progress her complaints through an internal work process. The claimant also looked online but was unaware of employment tribunal time limits. She also made online enquiries with solicitors about making a complaint to a Tribunal but they wanted the claimant to pay for advice; she did not have sufficient means and therefore she was not advised about time limits.

13. The claimant made a job application in September 2021 to a company called Lifeways via the indeed website whereby she attached from her profile on indeed her CV and did not update the CV on her profile to include work with the respondent for some two years. By November 2021 the claimant had secured as a care support worker at Lifeways and was working a 13 hour shift at Lifeways. The claimant worked there for a four week period until she went off sick again. In January 2022 the claimant applied for another role at AMG and applied for a further role in June 2022 at Maple court in a similar manner by uploading her CV from her profile. The claimant’s evidence which was accepted by the Tribunal is that she needed to obtain work because she did not have an income.

14. In May 2022 the claimant contacted ACAS again and spoke to a different person who advised the claimant she had a case and about time limits. The claimant and entered the ACAS conciliation process on 27 May 2022 and submitted her complaint to the employment tribunal on the 31 May 2022.

15. The claimant contacted ACAS again in April/May 2022 because she believed she had been badly treated and felt something should be done about it. The claimant stated that she would have made a claim to the Tribunal with or without advice. The claimant’s evidence to the Tribunal is that it was only at that stage she was made aware of the three month time limit to bring claims to the Tribunal.

The Law

16. Time limits are set out in section 111 of the Employment Rights Act 1996 for unfair dismissal claims. An employment tribunal shall not consider a complaint under this section (111 of the ERA 1996) 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.
17. Time limits for wrongful dismissal/breach of contract claims are set out in Article 7 of the Employment Tribunals Extension of Jurisdiction Order 1994. An employment tribunal should not entertain a complaint in respect of an employee's contract claim unless it is presented (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim or (b) where the tribunal is satisfied that it was not

reasonably practicable for the complaint to be presented within whichever of those periods is applicable within such further period as the tribunal considers reasonable.

18. Time limits for rest breaks are set out in Regulation 30 of the Working Time Regulations 1998. An employment tribunal should not consider a complaint under this regulation unless it is presented (a) before the end of the period three months beginning with the date on which it is alleged that the exercise of the right should have been permitted or in the case of a rest period or leave extending over more than one day the date in which it should have been permitted to begin or as the case may be the payment should have been made (b) within such further period is 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.

19. What was “reasonably practicable” means what was reasonably feasible (see **Palmer and another v Southend on Sea Borough Council 1984 ICR 372**). A claimant's complete ignorance of her right to claim unfair dismissal may make it not reasonably practicable to present a claim in time but the claimant’s ignorance must itself be reasonable. In **Dedman v British Building and Engineering Appliances Limited 1974 ICR 53** the Court of Appeal stated the relevant questions were what were her opportunities for finding out her rights; did she take them; if not, why not; was she misled or deceived. In the case of **Porter v Bandridge Limited 1978 ICR 943** the Court of Appeal ruled the correct test is whether the claimant ought to have known of her rights.

20. Where ill health of a claimant is relied upon it should be supported by medical evidence which should not only support the claimant’s illness but also show that the illness prevented the claimant from submitting the case in time; see **Pittuck v DST Output London Case No. 2500963/15.** In the case of **Schultz v Esso Petroleum Co (1999) ICR 1202** it was held the claimant's disabling illness took place at the end of the limitation period in question and it was not reasonably practicable for him to have made the claim in time. The Court of Appeal here accepted the illness may justify the late submission of claims. The court found that during the last six weeks of the three month time limit the claimant had been too depressed to instruct solicitors and that it was not reasonably practicable for the claimant to have presented the claim in time. The court emphasised that this test is one of practicability what could be done; not whether it was reasonable not to do what could be done. In the court's view the tribunal had failed to have regard to all the surrounding circumstances which included the fact that the claimant had been trying to avoid litigation by pursuing an appeal against his dismissal and it was necessary to consider what could have been done during the whole of the limitation period attention should be focused on the closing stages rather than the earlier ones. Mere stress as opposed to illness or incapacity is unlikely to be sufficient.

21. In the recent case of **Cygnet Behavioural Health Limited v Britton 2022 EAT 108** the EAT held at paragraph 56 “it flies in the face of reason to conclude that the claimant was able to do all of this and yet was not able to ask somebody so as to find out the time limits for a tribunal.” At paragraph

56 of the judgement it is stated *“the claimant plainly and perhaps understandably prioritised the regulatory proceedings over the ET proceedings. That was a matter for him but it does not begin to explain why he took no steps to find out what the timing of it was or to look for the e-mail from ACAS. Even though during this he was depressed and had dyslexia this did not mean that he was incapacitated and did not mean that it was not reasonably practicable for him to find out the time limits.”*

22. Any substantial faults on the part of the claimant’s adviser that has led to the late submission of her claim may be a relevant factor when determining whether it was reasonably practicable for the claimant to present the claim within the prescribed time limit. Where wrong advice has been given by advisers, the timing and nature of the advice is of relevant. In **DHL Supply Chain Limited v Fazackerley EAT 0001819** a claimant contacted ACAS a few days after dismissal and was advised to pursue his claim following the exhausting the internal appeal process. The EAT observed that if the claimant had simply awaited the outcome of an appeal this would not have been enough. However the ACAS advice while limited in scope was relied upon by the claimant and tipped the balance. Time was extended here.

23. Discrimination complaints time limits are set out in section 123 of the Equality Act 2010 proceedings may not be brought after the end of (a) the period of three months starting with the date of the ACT to which the complaint relates or (b) such other period is the employment tribunal thinks just and equitable.

24. The not reasonably practical test extending time is it stricter test for extending time then the just and equitable test.

25. In **Robertson v Bexley Community Centre t/as Leisure Link 2003 IRLR 434** the Court of Appeal stated that when employment tribunals consider exercising the discretion under section 123 (1)(b) of the Equality Act 2010 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 claim unless the claimant convinces it that it is just and equitable to extend time this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

26. In exercising the discretion to allow out of time claims to proceed the tribunal may also have regard to the checklist contained in section 33 of the limitation act 1980 see **British Coal Corporation v Keeble and ors 1997 IRLR 336.** Section 33 requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case in particular the length of 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 parties sued has cooperated with any requests for information the promptness with which the claimant acted once he or she knew of the facts giving rise the cause of action and

the steps taken by the claimant to obtain advice once she knew of the possibility of taking action.

27. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021EWCA Civ 23** the Court of Appeal held it was not healthy for the keyboard factors to be taken as the starting point for tribunals approach just next to extensions. The best approach for a tribunal in exercising the discretion is to assess all the factors in the particular case that it considers relevant including in particular the length of and the reasons for the delay.

<u>Submissions</u>

28. The respondent submitted that the burden rested upon the claimant to persuade the Tribunal that an extension of time should be granted. The claimant was well enough to seek and secure alternative work following the ending of her employment with the respondent and was working 13 hour shifts. There was insufficient evidence to establish that it was not reasonably practicable to submit her claims in time taking into account the amount of resource available for advice on time limits; the claimant had spoken to CAB, ACAS and a solicitor/individual working in the Scottish Tribunal as well as other online enquiries and online enquiries with solicitors; the claimant should have known about time limits to pursue her claims and there was no need to pursue an internal process. The period of submitting her claim 5.5 months late was not reasonable; she contacted ACAS again in April/May and did not enter ACAS conciliation until 30 May 2022. The respondent relied upon the cases of **Walls Meat v Khan; Porter v Bandridge; Cygnet Behavioural Health Limited v Britton.**

29. Further the respondents submitted that discrimination/harassment complaints were about 18 months late. The claimant was able to engage in a grievance process from July 2021. There was an inadequate explanation for a delay in bringing the proceedings; she did not act promptly; the period of delay in lengthy; through passage of time memories fade and there is inevitable prejudice to the respondent by reason of the delay. Key personnel who could have given witness to the Tribunal about events have not left the respondent's employment.

30. The claimant submitted that she did not genuinely know about the three month time limit and she had evidence to support her allegations if her case goes to a final hearing.

<u>Conclusions</u>

31. The Tribunal was not persuaded that it was not reasonably feasible for the claimant to have submitted her claims in time. Although the claimant had been off sick from work since July 2020 for just over one year prior to her resignation she was able to engage in a grievance process in July 2021 by lodging a grievance and attending a grievance hearing and submitting an appeal against the grievance outcome in November 2021. The sick notes provided to the Tribunal run out on 14th September 2021 at about the same time as her resignation from the respondent's employment. There is an evidential gap where there are no sick notes. The next note is dated 30

March 2022. In the meantime, the claimant had applied for alternative work in September 2021; had secured that employment by October 2021 and was working for an alternative employer a 13 hour shift in November 2021. The last sick note in the series prior to the claimant's resignation did not concern a stress related issue but instead concerned a physical problem menorrhagia. Further a physical ailment namely a back problem is mentioned at the end of March 2022 through to May 2022 when the claimant submitted her claim. Mental ill health was last mentioned in a sick note in June 2021. On the balance of probabilities the tribunal finds that any ill health suffered by the claimant did not prevent the claimant from submitting a claim form in time; it was reasonably feasible for the claimant to have submitted her claim in time.

32. The Tribunal finds that the claimant's ignorance of time limits was not reasonable. The claimant ought to have known of the three month time limits (**Porter v Bandridge Limited 1978 ICR 943**). The claimant was considering making a tribunal complaint as early as July 2021 when she informed the respondent at a grievance hearing that she had spoken to a solicitor and CAB. The solicitor referred to was actually an employee of the tribunal in Scotland. On 8 September 2021 the claimant was envisaging showing her solicitor everything and on 13th of September was informing the press and she was going to continue with her claim. In November 2021 the claimant was stating she was going to a solicitor. The claimant stated that she had made online inquiries to solicitors about taking a case but they wanted her to pay for the advice. Further she had also undertaken some online research about taking a tribunal claim but she says she did not find this helpful.

33. The Tribunal concluded taking into account the availability of resource that the claimant had namely online research where employment tribunal time limits for claims are clearly set out as well as discussions with a tribunal member of staff the claimant should have at the very least inquired about time limits and should have been aware that she had only three months to make her complaints. Any ignorance of time limits was unreasonable.

34. In respect of the advice received by ACAS that informed the claimant that she had to pursue an internal process with her employer, the tribunal found this evidence vague and unreliable. The claimant was unable to inform the tribunal when she spoke to ACAS; she had been told by CAB in July 2021 to go to ACAS; she did not do so; she stated that it was at some point in the three month primary limitation period after her employment ended that she spoke to them. The Tribunal is not persuaded that the claimant was misled in any event because of the legal advice resource available to the claimant in particular the advice from an individual working in the employment tribunal (as well as online information). In the circumstances it was reasonably feasible for this claimant to have submitted her complaint in time.

35. In respect of the claimants' discrimination and harassment complaints, these date back to July and August of 2020. The claimant has submitted her claim to the Tribunal some 18 months late. The most relevant factors to consider when exercising any discretion to extend time are (a) length of and reasons

for the delay and (b) whether the delay has prejudice to the respondent; see paragraph 38 of **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23**.

36. The claimant's reasons for delay are (i) ill health (ii)ignorance of time limits and (iii)misled by ACAS. The tribunal has already determined that there is a lack of sick notes which establish any ill health from 14 September 2021 to 30 of March 2022. In fact the claimant's last sick note mentioning any mental health by reference to a stress related problem was the sick note which expired on 1 September 2021 (page 22). It is not established that the claimants mental health prevented her from submitting her claim within the primary limitation period.

37. Further as set out above the claimant was able to engage in a grievance process throughout July 2021 to November 2021 which did not indicate that the claimants mental health inhibited her from engaging in a process (see **Cygnet Behavioural Health Limited v Britton).**

38. The claimant had available to her advice from CAB, a solicitor who was in fact an individual who worked for the tribunal service in Scotland and ACAS as well as online research. The Tribunal has already found it is not persuaded that the claimant was informed post termination of her employment by ACAS she had to follow a process in order to bring a claim against her former employer.

39. In **Robertson v Bexley Community Centre t/as Leisure Link 2003 IRLR 434** the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123 (1)(b) of the Equality Act 2010 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 claim unless the claimant convinces it that it is just and equitable to extend time this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

40. If the claimant is not permitted to bring this claim out of time, she loses the opportunity of having her discriminatory complaints determined by the Tribunal. However, the period of delay in this case is significant; the claims are brought some 18 months out of time. The respondent is prejudiced by the delay. Discrimination complaints are fact sensitive and should be brought promptly. The passage of time undoubtedly affects the accuracy of recollections of events. The claimant's complaints as presently pleaded are inadequately particularised. The respondent is still unclear as to the case its needs to meet at trial. Although there was a grievance procedure followed in this case, key personnel who are no longer employed by the respondent have left its employment. This fact presents significant evidential prejudice to the respondent in seeking to defend the serious claims of discrimination and harassment.

41. In all of the circumstances the Tribunal determines that there is significant prejudice to the respondent in permitting the claims to go forward out of time and it is not just and equitable to exercise its discretion in the claimant's favour.

42. In the circumstances all claims have been brought out of time and there is no jurisdiction for the Tribunal to hear the claims. All claims are dismissed.

Employment Judge Wedderspoon

Dated: 1 June 2023

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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