EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs K Soyemi	**V**	**Monster Energy Europe Ltd**

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

Before: Employment Judge G D Davison

Appearances:
For the Claimant: **Mr A Effiong (Representative)**
For the Respondent: **Ms C Mallin-Martin (Counsel)**

Numbering in [ ] refers to the bundle produced for the Open Preliminary Hearing.

JUDGMENT

1. The claim for constructive unfair dismissal was not brought in time. The Claimant has not established that it was not reasonably practicable for the claim to have been advanced in time and so the Tribunal does not have jurisdiction to hear the claim.

2. The various claims under the Equality Act were also not brought in time. The Claimant has not established that it would be just and equitable to extend time.

REASONS

1. At the conclusion of submissions, the tribunal delivered its judgment. Mr A Effiong representing the claimant, asked for written reasons on 3 June 2023. For the sake of clarity, I have repeated the judgment given on the day (above) with these reasons.

2. On 2 March 2023 a letter was sent to the parties setting out the purpose of the preliminary hearing [35]. This stated inter alia;

'At the hearing, an Employment Judge will ***"determine if the Tribunal can hear the claim, which appear to be presented late."'***

3. No documents had been presented about the issue of timeliness. When the Claimant's representative was asked about this he responded that he believed it best to address this issue orally. He accepted that the claims advanced had been made late, he had spent his time prior to the hearing trying to better particularise the claims.

The issues

4. The issue in this case was whether time should be extended to admit the claims advanced.

The evidence

5. The claimant was not called to give evidence. Her representative wished to present the issue of timeliness by way of submissions.

6. A bundle of documents comprising of 59 pages was produced.

7. In addition various emails had been presented shortly before the hearing. Only one addressed the issue of timeliness. In an email of 31 May 2023 the Claimant's representative addressed various issues from Counsel's skeleton argument for the Respondent but also stated on the issue of timeliness:

'Some other issues raised, such as ET1 being submitted Out of Time, may be best addressed orally in the Preliminary Hearing.'

Findings of fact

8. The Claimant was employed by the Respondent from 23 June 2015 to 9 June 2022.

9. It is not in dispute that the Claimant gave one months' notice so her effective date of termination was 9 June 2022. She approached ACAS to commence Early Conciliation on 6 September 2022, she was given an Early Conciliation Certificate on 18 October 2022 and presented her claim to the Tribunal on 24 November 2022. This claim was 5 days late.

10. The Claimant's representative did not dispute that the claim was late.

11. Two sections of medical evidence were provided 3 May 2022 – 27 July 2022 and 5 December 2022 to 15 March 2023. Neither cover the relevant period of October – November 2022.

Submissions

12. The Claimant's Representative asserted that at the time the claim was submitted to ACAS the Claimant had '*lots of mental health issues and anxiety and depression and that affected her ability to get things together.'* He pointed to pages [56] and [59] for the medical evidence in support of this submission.

13. The letter at [56] states the Claimant has been suffering from Long Covid since December 2021 and is trying to get a personal trainer to improve her recovery. Page [59] is a copy of the ACAS certificate.

14. The Respondent's representative relied on her Skeleton Argument and noted that the substance of the claim was 'not very good' and 'weak'. The claims advanced were said to 'not make sense' and they 'kept changing'. These factors should also be considered in the balance of prejudice.

The law

15. Counsel for the Respondent had helpfully summarized the legal position on the timeliness of claims in her Skeleton Argument (paragraphs 24 – 34);

'Unfair dismissal complaints – time limits – s.111 ERA

24. S.111 ERA makes provision for the three-month time limit in which a claimant must bring their unfair dismissal claim:

> *(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—*
>
> > *(a) before the end of the period of three months beginning with the effective date of termination, or*
> >
> > *(b) within such further period as the tribunal considers reasonable in a case* ***where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months****. (Emphasis added)*

25. On the question of whether it is reasonably practicable for a claimant to present their unfair dismissal claim in time, R submits that the following additional principles are relevant:

> *25.1.* ***Construction of clause 111(2)(b) ERA****. This clause should be given a liberal construction in favour of the employee: Dedman v British Building & Engineering Appliances Ltd6. Reasonably practicable does not mean 'reasonable', but, rather, 'reasonably feasible': Palmer & Another v Southendon- Sea BC7).*

> *25.2. **Burden of proof**. The onus of proving that presentation of the claim in time was not reasonably practicable rests on the claimant. In Porter v Bandridge Ltd8, the Court of Appeal held this burden imposes upon a claimant a duty 'to show precisely why it was that he did not present his complaint' in time.*
>
> *25.3. **Extent to which time should be extended**. Even if a claimant satisfies a Tribunal that presentation in time was not reasonably practicable, the Tribunal must go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'.*

Equality Act Claims - time limits – s.123 EqA

26. Section 123 EqA reads as follows:

> ***123 Time limits***
> *(1) Subject to section 140B 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.*

…

27. The burden is on the claimant to persuade the Tribunal that it would be just and equitable to extend time. Further, the Tribunal has a broad discretion to extend the application of primary time limits where it would be just and equitable to do so: see the Court of Appeal's decision in Chief Constable of Lincolnshire Police v Caston9, at paragraphs 31 and 32.

*28. The 'burden' on a claimant to persuade the Tribunal to extend time is not an unreasonably high one: see HHJ Shanks in Abertawe Bro Morgannwg University Local Health Board v Morgan10 (EAT) ('**Morgan 2016**'), who said that 'it is not a "burden of proof" which needs to be "satisfied" as when a party seeks to prove a fact or circumstance'.*

*29. In Abertawe Bro Morgannwg University Local Health Board v Morgan11 (EAT) ('**Morgan 2014**'), Langstaff J considered that a litigant can hardly hope to satisfy that 'burden' unless they provide an answer to two questions (see paragraph 52):*

The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was.

30. The answer to those two questions need not be good, however. The Court of Appeal in Morgan 2016 held that a Tribunal is not obliged to reject a claimant's case for extending time because they are not persuaded by the claimant's explanation for any delay12.

*31. In Rathakrishnan v Pizza Express (Restaurants) Ltd ('**Rathakrishnan**'), HHJ Peter Clark QC (as he then was) held that the authorities indicate that the wide discretion as to whether it is just and equitable to grant an extension of time involves 'a multifactorial approach' and no single factor is determinative13. He accepted, however, that 'if the claimant advances no case to support an extension of time, plainly, he is not entitled to one'14.*

32. While the Tribunal may find it helpful to consider the 'Keeble checklist' of factors - namely those listed in section 33 of the Limitation Act 1980 and approved as 'illuminating' in British Coal Corporation v Keeble15 - Underhill LJ in Adedeji v University Hospitals Birmingham NHS Foundation Trust16 cautioned tribunals against using the factors in s.33 of the 1980 Act as a strict checklist.

33. In Miller & Others v Ministry of Justice (EAT)17, Laing J commented (at paragraphs 10(iv) and 12) on the extent to which a Tribunal should consider any prejudice which a respondent may face when defending a complaint which is otherwise out of time:

…

12. … 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. As I understood their arguments, neither Mr Allen nor Mr Sugarman suggested that a lack of forensic prejudice to a Respondent was a decisive factor, by itself, in favour of an extension of time. But both argued, in slightly different ways, that the ET was bound in every case, in Mr Allen's phrase, "to balance off" the relative prejudice to the parties, and that, if the ET did not do so expressly, that was an error of law, even if there was, otherwise, no good reason to extend time.

34. In Kumari v Greater Manchester Mental Health NHS Foundation Trust18, a Tribunal refused to extend time for Ms Kumari's race discrimination claim having weighed in the balance its view that the merits of the claim appeared to be weak. It was not, in principle, wrong to consider and assess the merits of a proposed claim, and to weigh these in the balance, even if the Tribunal was not in a position to say that it was so weak as to have no reasonable prospect of success.'

Conclusions

16. The delay in bringing the claims was short, a matter of 5 days. A liberal construction must be applied, and it is whether it was reasonably feasible for the claims to have been advanced. There is however still a burden on the Claimant to show precisely why the claims were not advanced in a timely manner. The issue in this matter is, I find on balance, there was nothing that prevented the claim being made in time. No medical evidence has been presented to show the Claimant was suffering from any form of mental health issue that would have prevented her in bringing the claim. She managed to go through the ACAS requirements without issue. I am not therefore satisfied that it was not reasonably practicable/ feasible for the unfair dismissal claim to be presented in time.

17. For the Equality Act claims the time limit is again 3 months or 'such other period as the employment tribunal think just and equitable.' There is again a broad discretion but there remains a burden on the Claimant. I acknowledge this is not an unreasonably high burden but there must be something advanced. I find no reason why the primary time limit was not met. As noted in the ***Rathakrishnan*** case; '*if the claimant advances no case to support an extension of time, plainly, he is not entitled to one*'.

18. All that was advanced was an unsupported submission from the Claimant's representative, I do not find on balance that this surpasses the low threshold to extend time.

19. It follows from my conclusions that all claims are not admitted as the Tribunal has no jurisdiction to consider claims made out of time.

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Employment Judge G D Davison
28 July 2023
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Sent to the parties on
28 July 2023
For the Tribunal
GDJ