EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs R Van Rheede-Toas	**v**	Diocese of Ely Multi-Academy Trust

Heard at: Cambridge **On**: 30 August 2023

Before: Employment Judge Conley

Appearances
For the Claimant: Mr J van Rheede-Toas, representative
For the Respondent: Ms C Sleep, solicitor

RESERVED JUDGMENT

1. The claim for constructive unfair dismissal is dismissed due to a lack of jurisdiction.

2. The claims under the Equality Act 2010 have no reasonable prospect of success and are struck out under Rule 37(1) of the Employment Tribunal Rules of Procedure 2013.

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 27 March 2023, following a period of ACAS early conciliation between 29 October 2022 and 31 October 2022, the Claimant sought to pursue the following complaints
   I. Unfair constructive dismissal;
   II. Discrimination on the grounds of disability
   III. Discrimination on the grounds of race

2. It is right to say that, on the face of the claim form, only the unfair constructive dismissal claim was particularised in any detail; both discrimination claims lacked detail and amounted to a bare assertion that the claimant had been bullied on the grounds of her race and her disability.

3. The claims were resisted by the respondent and they presented a response on 16 May 2022 which included comprehensive Particulars of Response, setting out detailed grounds of resistance to the claim.

4. In its response, the respondent correctly identified that the applicable time limit for bringing any of these claims would have been 1 December 2022 based upon an effective date of termination (EDT) of 31 August 2022; whereas the claim was not presented until 27 March 2023, 117 days later.

5. Accordingly, in a letter accompanying the response date 16 May 2023 the respondent sought to apply for the Employment Tribunal to dismiss the claims in their entirety due to a lack of jurisdiction, or else strike out the claims pursuant to rule 37 of the Employment Tribunal Rules as having no reasonable prospects of success; or in the alternative, direct that the claimant pay a Deposit Order of £1,000 in order to continue with the proceedings.

6. Further, in the same letter, the respondent also indicated that the lack of particulars in relation to the discrimination claims should also give rise to those parts of the claim being struck out.

7. On an order made by Employment Judge Tynan seeking further particularisation of all claims, and requiring the claimant to provide these details by the 7 August 2023, and setting the case down for a preliminary hearing on the 30 August 2023. It is right to say that the further particulars sought were not received by that date. By a further order of 31 July 2023, Employment Judge Ord directed that the preliminary hearing be held in public for the determination of the issues of jurisdiction/strike-out.

8. The hearing was due to take place with all parties appearing in person. However, due to a misunderstanding on the part of the claimant and her lay representative (her husband Mr John van Rheede Toas), they both appeared via CVP.

9. I have considered a bundle of documents provided by the respondent consisting of 69 pages, and a bundle prepared by the claimant consisting of 80 pages.

10. During the course of the hearing, I heard evidence from the claimant, cross-examined by Ms Sleep for the respondent; and I heard submissions by both representatives.

11. The claimant was extremely distressed for much of the hearing and was frequently tearful and exhibiting signs of anxiety. In order to allow her to feel more comfortable during the course of her evidence, I permitted her to have her dog with her for emotional support.

Background

12. Much of the background to the case I have taken from the Particulars of Response, together with a document prepared on behalf of the claimant and which appears at pages 1 - 15 of the claimant's bundle, entitled 'Background and Issues Contributing to Constructive Dismissal'.

13. In summary, the claimant was employed as a lunchtime supervisor at the William de Yaxley Church of England Primary Academy, in Yaxley, near Peterborough, from 6 May 2002, which is one of a number of schools which is administered by the respondent, an educational trust. She submitted her resignation on 27 July 2022; her EDT (following her contractual notice period) was 31 August 2022.

14. Prior to, and for the duration of her employment, the claimant suffered from myalgic encephalomyelitis/chronic fatigue syndrome (ME/CFS), a long-term debilitating condition that causes symptoms including memory loss, foggy brain, severe joint and muscular pain and extreme tiredness.

15. It would appear that the claimant felt supported whilst working at the school for much of her time there. However, according to the claimant, matters deteriorated following the appointment of a new Head of School, Mrs Kay Corley, and senior lunchtime supervisor, Mr Graham Ingham. The claimant perceived that adjustments for her condition that had been put in place by the previous Head were not being maintained; that after periods of disability-related absence she would have to attend intimidating back-to-work interviews that were often cancelled at short notice; and that she (and other lunchtime staff) were treated dismissively. She also perceived resentment because of her race and background (the claimant being from Zimbabwe and having had previous teaching experience in Southern Africa).

16. In March/April 2021, the claimant suffered a nervous breakdown, she says because of the way in which she had been treated at work, by Kay Corley in particular. The claimant was signed off sick from 22 January 2021 to 6 July 2021. She was referred to Occupational Health, and a report was prepared on 15 July 2021 which confirmed that she was fit to return to work.

17. On 4 July 2021, the claimant's husband/representative prepared a formal Notification of Grievance (pages 41 - 44 of the respondent's bundle), setting out a number of issues relating to both alleged discriminatory behaviour connected to the claimant's disability, and to various other issues relating to the attitude and behaviour of Mrs Corley and the treatment of lunchtime staff in general. The grievance meeting was held on 14 July 2021, chaired by Alexandra Duffety.

18. Following an investigation, Ms Duffety upheld the grievance in part (although it should be said that she dismissed most of the grievance), and

made a series of recommendations. The claimant returned to work in September 2021 for the autumn term and noted an improvement initially, but claimed that as time went on, similar issues as before began to develop.

19. On 27 July 2022 the claimant submitted a letter of resignation to Mrs Corley, citing the allegation that the respondent had 'reneged on a number of agreements made' as a consequence of her grievance of 2021; alleging that she was being discriminated against by being reassigned to perform duties that she was unable to do because of her disability; that she was, essentially, being set up to fail; and the 'final straw' was that she had been left out in the sun for an hour on the hottest day of the year.

20. Significantly she stated the following:

    'Due to your behaviour as an employer as detailed above I believe that the employment relationship has now irrevocably broken down. Further I consider that your conduct to be a fundamental breach of the employment contract on your part in particular the duty of trust and confidence towards the staff under your care . I resign as a fundamental breach of the employment contract and consequently I believe that my resignation constitutes constructive dismissal.'

21. It is clear from the tone and content of the letter that a degree of thought and planning had gone into its preparation, and in my judgment it was plainly sent in contemplation of an imminent action for constructive unfair dismissal and/or disability discrimination.

22. Ms Georgia Chapman, HR advisor for the respondent, wrote back to the claimant on 3 August 2022 inviting her to attend a formal grievance meeting and giving her the opportunity to reconsider her resignation . The claimant replied to Miss Chapman on 7 August 2022 in which she declined to attend the grievance meeting, and reiterated the main points of her resignation letter . She concluded her letter by stating 'there would be little point in withdrawing my resignation as both at the head teacher and DMAT have already had the opportunity to resolve these issues in the past'.

23. Miss Chapman wrote to the claimant a second time on 9 August 2022 and once again invited her to take the opportunity to attend a grievance meeting which would be chaired by a person independent of the school , and once again invited her to reconsider her resignation . This letter did not receive a reply and therefore on 5 September 2022 Ms Chapman indicated by email that she would be processing the claimant's resignation effective from 31 August 2022. The claimant did ultimately write back to Miss Chapman on 18 September 2022 apologising for the late reply indicating that she had been unwell during August and September as a direct result of having been left out in the sun on Tuesday 19 July 2022 contrary to government advice.

She went on to reiterate her previous allegation that Mrs Corley had 'no regard whatsoever for her disability'.

24. The claimant submitted her early conciliation notification to ACAS on 29 October 2022 , and received her certificate via email on 31 October 2022. However, despite taking this initial step towards commencing proceedings in the employment tribunal the claim form was not submitted for a further five months on 27 March 2023.

Time limit for claims of unfair dismissal

25. Section 111(2) of the Employment Rights Act 1996 states:

> [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.

26. It is self-evident, and not disputed, that the claimant's claim of constructive unfair dismissal was presented to the tribunal outside of the period of three months. Therefore, in order for the claim to be considered, it would be necessary for the claimant to demonstrate on the balance of probabilities (the burden being upon her, per *Porter v Bandridge* [1978] IRLR 271) that, firstly, it was not reasonably practicable to present the claim within the statutory time limit; and if so, secondly, that the claim was presented within a reasonable period of time thereafter.

27. The first limb of this test is to be strictly applied. Judge LJ in *London Underground Ltd v Noel* [1999] IRLR 621 said this:

> "By section 111(2)(b) this period may be extended when the tribunal is satisfied 'that it was not reasonably practicable for the complaint to be presented before the end of that period. The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, 'in all the circumstances', nor when it is 'just and reasonable', nor even where the tribunal, 'considers that there is good reason' for doing so."

28. The test to be applied is an empirical factual test based on practical common sense (*Wall's Meat Co. Ltd v Khan* [1979] ICR 52 CA) To construe "reasonably practicable" as being the equivalent of "reasonable" is to take a view that is too favourable to the employee; whereas at the other extreme, it means more than merely what is reasonably capable physically of being done.

29. As a starting point, it is necessary to consider a number of factors: (i) To identify the substantial cause of the claimant's failure to comply with the statutory time limit; (ii) To determine whether and if so the claimant knew of his rights; (iii) To determine whether the claimant had been advised by anyone; and iv) To determine the nature of any advice given and whether there was any substantial fault on the part of the claimant which led to the failure to present a claim in time.

30. Ostensibly, the 'cause' of the failure, according to the claimant, is her ill health as a result of her ME/CFS. In her ET1, there is a single line dealing with this by stating

    'This case could not be actioned within 3 months due to medical reasons'

31. In the claimant's bundle submitted for the purposes of this hearing there is a little more detail, but not a great deal more - a paragraph, which reads as follows:

    'In mitigation of the late submission of [the claimant's] claim to the Tribunal, she has suffered mental health issues of depression and anxiety and has not felt able until this point in time to deal with this case. The Tribunal is asked to respectfully take this into consideration when determining whether this case can go forward.'

32. In evidence, the claimant, when asked about her ill health and in particular, the nervous breakdown that she suffered in the spring of 2022, said the following:

    'I'm still going through it, I'm still on medication. It all started again, I don't see an end to anything…That's why I'm relying on my husband, he gives me the support I need and said that he would help me with it…I seem to cry all the time. It takes a long time for something to get through.'

33. However, whilst I accept without reservation that the claimant has endured prolonged bouts of debilitating ill health as a result of the serious chronic condition with which she suffers, I found her evidence as to precisely how and why this would have been an impediment to her ability to file her claim on time difficult to understand. Being as generous as I can to her, my interpretation of her evidence was that she may have struggled emotionally to deal with the stresses of the proceedings (it was clear from her demeanour during the hearing that continued to be the case); but it was not clear why that would be, of itself, a reason not to submit the claim at all.

34. She did state in her letter of 18 September 2022 that her late response to Ms Chapman's letter was due to having been ill during August and September, she was nevertheless well enough to approve the content of that letter (in precisely the same way that she had approved her earlier correspondence), and then to go on to apply for her Early Conciliation certificate in late October. It was difficult for me to understand why, having applied for and received the certificate, which to me is indicative of a person

who is ready to proceed with their claim, she and her representative did not take the next logical step and present the claim knowing, as I have no doubt that they did, that the clock was ticking.

35. The claimant gave no evidence as to being so ill during the month of November such that she could not have progressed her claim and submitted the claim to the Tribunal in order to do so within the time limit.

36. Turning to the second question, there can be no doubt whatsoever that the claimant fully understood her rights in connection with a prospective claim to the Tribunal. Her letter of resignation and subsequent correspondence with the school is framed in such language as to make it absolutely clear that she understood the concept of constructive unfair dismissal (and for that matter the concepts of discrimination on the grounds of disability, which I will return to later); and the associated concepts of fundamental/repudiatory breach of contract by an employer, and the implied contractual condition of the 'duty of trust and confidence' between employer and employee. Indeed, the letter was quite obviously drafted in contemplation of a claim being made to the Tribunal.

37. As far as the third question, in relation to whether the claimant had received any legal advice, it is firstly clear that she has had her interests safeguarded and advanced by her husband, who appeared on her behalf at the hearing, and who prepared most if not all of the documentation upon which the claimant relies. Whilst he is a lay representative and not legally-qualified, it is nevertheless clear that he has undertaken a substantial amount of private study in order to become conversant in many of the matters that are pertinent to the claim, and if I may say it is clear that he has acquired a good working knowledge of many of the relevant concepts and procedures.

38. Secondly, in the claim form at page 10, and in evidence, it emerged that the claimant and her husband had sought external legal advice from a firm called Landau Law; although on this point the claimant's evidence was also vague - she could not recall, for example, whether the appointment had taken place before Christmas 2022 or whether Landau Law had advised them of the time limit.

39. As regards the fourth question, there is no suggestion here on the part of the claimant that she was badly advised or misinformed. As to whether there is substantial fault on the part of the claimant, I am bound to find, absent any compelling explanation as to why the claim was not submitted on time, that there is fault on the part of the claimant in not submitting what was a fully-formed claim.

40. All of the salient facts and were known to the claimant and were neatly encapsulated within her letter of resignation and subsequent correspondence with the respondent. She was clearly motivated to pursue her claim, understood her rights and had done all of the necessary groundwork. As the respondent has submitted, the claimant (or her

husband) had contacted ACAS who doubtless would have explained the importance of compliance with the time limit. There appears to be no practical (or 'practicable') reason why the claim could not have submitted the claim on time.

41. In the circumstances, there is no reason for me to go on to consider the second limb of the test (whether the claim was presented within a reasonable time thereafter). However, if I were to consider that question, I would be bound to find that a further delay of almost 4 months, without clear evidence of a compelling reason, would inevitably be regarded as unreasonable in the circumstances of this case.

42. The claim of constructive unfair dismissal is therefore dismissed.

Time limit for claims under the Equality Act

43. The applicable time limit for claims under the Equality Act 2010 is also 3 months (section 123(1)(a))

44. However, under s123(1)(b), a Tribunal is empowered to grant an extension of time if it considers that it is 'just and equitable' to do so. Where these words appear it has been held that 'Parliament has chosen to give the employment tribunal the widest possible discretion' (per Leggatt LJ in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] IRLR 1050, [2018] ICR 1194 at [17]). As stated by the Court of Appeal in that case, s123 does not prescribe the factors which should be taken into account when exercising the discretion. The discretion is broader than that given to tribunals under the 'not reasonably practicable' formula.

45. Although the test for what is 'just and equitable' is different to the test of what is reasonably practicable (it being wider and more generous to the employee), for the purposes of this claim, in my judgment there is virtually no distinction in terms of the factors that I must consider in reaching my conclusion. There is no rigid checklist either from statute or case law, that I am bound to consider in the exercise of my discretion. In fact, I need to remind myself that:

> 'There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.' - *Abertawe Bro Morgannwg University Local Health Board v Morgan*

46. That being said, it is useful to address factors which fall into the following three broad categories: (1) the length of and reasons for the delay; (2) the

prejudice which each party would suffer as a result of granting, or refusing to grant, an extension; and (3) the potential merits of the claim.

47. As to the first, Harvey on Industrial Relations and Employment Law identifies five potential reasons why a delay might be the basis for finding a just and equitable to extend time. The only one that is relevant to this case is the claimant's ill health and disability.

48. I do not need to repeat here all that I have already said about the claimant's ill health in relation to the unfair dismissal claim, other that to reiterate that I sympathise greatly with her situation. It was clearly apparent from her demeanour and evidence that the claimant suffered and continues to suffer a great deal.

49. However I keep returning to the fact that I was unable to discern any reason why her ill health should have acted as a barrier to her submitting what was, if this ghastly phrase can be forgiven, an oven-ready claim from the very outset. The delay is simply inexplicable and despite being given every opportunity in the course of her evidence to explain how and why her ill health had prevented the claim from being submitted the very instant that the Early Conciliation Certificate had been received, no explanation came forth.

50. As previously stated, this was not a claim that was submitted days or even weeks late - it was several months late, which adds to my discomfort in considering whether to exercise my discretion in the claimant's favour.

51. As far as the second question, I must recognise that the prejudice to the claimant in refusing to allow the extension would be far outweighed by the prejudice to the respondent in allowing it. I acknowledge that there may be some additional challenges presented to the respondent by a delay of around 4 months, but these would not be insurmountable. The prejudice to the claimant would be insurmountable as it would result in her claim being dismissed or struck out.

52. As far as the merits of the claim are concerned, I can certainly find that the claim of discrimination on the grounds of race is, on the face of the material that I have seen, weak and tenuous. I have not seen any material which supports the contention that the there is any basis for concluding that the claimant's race played any part in her alleged treatment by the respondent, and the claim has not been adequately particularised, despite the earlier Order from Employment Judge Tynan, which which was not complied with by the specified date of the 7 August 2023.

53. Although subsequent to the that date the much more detailed 'Background and Issues' document was prepared and served, it is still very difficult to discern from the document what conduct is relied upon by the claimant in support of this claim. It seems to me that the alleged discrimination is no more than a bare assertion that the claimant has been harassed and discriminated against on the grounds of race.

54. It has been more difficult for me to reach any firm conclusions as to the strength of the claimant's case on discrimination on the grounds of disability from the material I have seen. There seems to be at least some semblance of an arguable case, possibly most obviously in relation to to a failure to provide reasonable adjustments and detriment arising from a disability (in relation to the changes to her duties). But even in this regard it is very hard to understand what the claimant's case is and therefore how strong it may be. In relation to direct discrimination and harassment it seems that, as with the race discrimination claim, on the material before me they appear to be bare assertions rather that identifiable claims.

55. The merits (or lack thereof) of an out-of-time complaint may be one relevant factor amongst others to be taken into account when determining whether it is just and equitable to extend time. In the case of *Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132* it was stated:

> 'It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform'.

56. Whilst acknowledging the inevitable (and terminal) prejudice that the claimant will suffer if she is not permitted to pursue her claims, the fact that the claims are at best nebulous is a factor that in my judgment mitigates the effect of that prejudice.

57. For all of the reasons set out above, and with all due sympathies to the claimant, knowing as I do that this decision will come as an enormous disappointment to her, the claims under s123 of the Equality Act are struck out, there being no reasonable prospect of success.

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Employment Judge Conley

Date: 22 October 2023
Sent to the parties on: 23 October 2023

For the Tribunal Office