EMPLOYMENT TRIBUNALS

Claimant: Ms H Watts

Respondent: Richmond and Hillcroft Adult Community College

Heard at: by video **On:** 10.01.2023

Before: Employment Judge Mensah

Appearances
For the claimant: In person
For the respondent: Mr Martin Palmer (counsel) Mr O Daw (Sol)
Observing: Ms Olrika Nucera Human Resources manager

JUDGMENT & REASONS

Background

1. This came before me as a Preliminary hearing on the order of Judge Aspinall dated 28 December 2023 warning the Claimant her claim may be struck out for being 354 days out of time with no real explanation for why. The Judge gave the Claimant 7 days to give her reasons in writing.

2. The Claimant filed a short letter dated 03.01.2023 in which she says. *"I respectfully ask the Tribunal / Judge M Aspinall to allow my claim because: - My claim was made late for genuine reasons, which is outlined below, and I have a right to have the issues I faced addressed for myself and to avoid such conduct repeated for others to suffer also. - I had already given my explanation for my late application in my communication on the telephone, and email and my application to the Tribunal explaining that a) I was unwell / mentally drained by dealing with the list of unfair treatment and was at breaking point and not able to deal with it until I rested my mind from all of it for some time; b) I also did not have the knowledge and understanding of the time limits for this application; c) I was in an exceptional circumstances during the Pandemic when having to deal with this matter, and d) I found difficulty to find legal support*."
3. The Respondent had not received any email or telephone contact from the Claimant regarding any other explanation and none were shown as sent on the Tribunal file. The only other document that might have been the document the Claimant is referring to is her claim form. The Claimant confirmed the only other document was the claim form. Therefore, I had before me the above explanation as the complete response from the Claimant.

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4. The Claimant appeared to have significant difficulties in using the technology to join the video hearing. The Claimant was initially communicating via the chat room function on the video hearing but despite three requests from myself and one from the clerk she failed to provide a contact number, and none was provided in the claim form. Fortunately, the Respondent's Human Resources manager found a contact number for the Claimant and the clerk was able to make contact. The Claimant joined at about 2.45pm, some 45 minutes after the hearing started but her connection was causing an echo. I asked her to join by telephone as a last alternative and this was the basis on which we were able to continue. I am satisfied the Claimant could fairly participate in the hearing on that basis.

5. Mr Palmer argued I should decide today the limitation point now on both Unfair Dismissal and Discrimination. He said Ms Watts had known for 6 months that claims out of time. He accepted Judge Aspinall didn't specify the need to provide documentation but argued Ms Watts would have understood the need to provide documents. He also pointed out his instructing solicitors raised the time point in correspondence with the Claimant.

6. I decided to apply the overriding objective and evidential flexibility and seek to allow the Claimant to expand on the very limited account she had given above by way of oral evidence. It became clear the Claimant had no medical evidence she might have adduced because she had not received any medical treatment or spoken with any medical professionals.

7. Ms Watts said she has been trying to get legal assistance but had not been successful and had been trying after a break due to her stress, but this had been months after employment had terminated. Miss Watts said she wasn't aware of the delay issue and gave the reasons she couldn't deal with it. The effect of the unfair treatment meant she needed a break. Ms Watts didn't take any other steps. Ms Watts says she hadn't filed any evidence in support because she did not have medical evidence regarding her stress and bad feeling because during the pandemic it was very difficult to access medical appointments. Miss Watts said she did not have medical evidence. Miss Watts says she had "extreme stress" but was herself not a doctor and so didn't have a label. Miss Watts said she was looking for help and saw ACAS information on the internet in a search she did for assistance.

8. The Claimant confirmed to me her reference to the pandemic in her letter of the 3 January 2024, was the same issue of inability to gain access to doctor and other sources of support because of the pandemic. Miss Watts says she hadn't been able to get legal support right up until today's hearing.

9. Mr Palmer cross examined the Claimant. He took the Claimant to the letter dated 3 January 2023 in which the Claimant said she was unwell and asked if she sought an appointment with her doctor. The Claimant replied, "*shortly after but I did difficult I did try*."

10. Mr Palmer asked if it was weeks after March 2022 (EDT 31.03.2022). The Claimant said it was months or several weeks after. The Claimant says she was unable to secure an appointment with her doctor and could not say how many

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times she had tried. The Claimant was asked if she had sought any other help from the voluntary sector for mental health, or hospital and she said she didn't. The Claimant then said she believed she had rung a charity but couldn't recall when. The Claimant confirmed at no time since March 2022 had she sought or received any medical treatment. The Claimant confirmed in the past 21 months she couldn't get an appointment with her GP. Mr Palmer asked if the Claimant had worked since March 2022. The Claimant confirmed she had and then said, "*sought of*." The Claimant confirmed she had been working part time one day per week.

11. In terms of securing legal advice, the Claimant said she had approached employment solicitors but didn't manage to secure any. The Claimant says she was able to speak to some solicitors in an initial enquiry with a legal assistant, but they never agreed to take her case on.

12. Mr Palmer asked the Claimant to confirm she didn't speak to any solicitor or seek legal advice until June 2023. The Claimant says she tried to secure advice but didn't answer the question. The Claimant had said she contacted ACAS after reading ACAS on the internet and so she had access to the internet. Mr Palmer suggested to the Claimant she could have looked up how to bring a claim on the internet, but the Claimant admitted she didn't make that type of search.

13. Mr Palmer asked if the Claimant had even searched "*how to make an employment tribunal claim*." The Claimant was vague and said she couldn't recall it. The Claimant said she did approach Citizens Advice but didn't ask them about time limits, couldn't recall when she made contact and didn't consider it as she didn't know about time limits.

14. The Claimant says she asked for help to bring her claim. The Claimant said she had made friends aware of her employment situation, but none advised her to seek help. Mr Palmer pointed out the Claimant, as an intelligent woman could have picked up the phone and asked. The Claimant said when she was able to call a lawyer and try to get representation and this is when she was well enough. The Claimant says she couldn't recall the date she first contacted ACAS.

15. Mr Palmer asked when was the last discriminatory act on the grounds of race and age? The Claimant said she couldn't recall the date and would have to go back and carefully check. The Claimant admitted she didn't keep a diary of events and when questioned about where she recorded such events, she suggested she didn't recall making written notes but made mental notes she couldn't recall at the hearing.

16. I asked the Claimant if anything else she wanted considered. The Claimant confirmed the questions and her answers had covered her reasons for not bringing the claim in time but said she didn't want to take legal action but felt it was necessary.

17. Mr Palmer relied upon his written submission. He asked me to find the claims were not brought in time and when reasonably practicable. The claims were not brought until the 19 June 2023. He pointed out the discrimination claims are not particularised and are clearly out of time.

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18. Mr Palmer argued insurmountable problems are faced by the Claimant to prove she couldn't have acted earlier than she did. The onus is on the Claimant and Mr Palmer argued the Claimant has failed to put the necessary evidence before the Tribunal to show not reasonably practicable. He said the Claimant was an articulate and intelligent woman who has not sought medical evidence or evidence to offer, beyond her expressed feelings of unhappiness as to why she didn't act more promptly.

19. He argued the Claimant failed to take any reasonable steps to acquaint herself with the time limits, she would have known she needed to act. He said she was nonspecific as to when she sought legal advice or when she spoke to Citizen's advice and could not recall what was said. He argued the Claimant couldn't even say when she had spoken to ACAS before the claim in June 2023 and it was incredible didn't take the basic steps such as a google search to act in the three months to bring her claim. He asked me to strike out her claim for Unfair Dismissal.

20. Mr Palmer argued there were no obstacles to bring the claim in time and there was forensic prejudice to the Respondent as it will be some two years since the employment was termination and will be another year before the hearing. He pointed out the Claimant says she made mental notes of the events but couldn't even recall them today. He argued there is prejudice to Claimant as a stroke out would prevent her from pursing the claims, but the claims are weak and have no merit in any event.

21. Mr Palmer referred me to paragraph 5.129 of the IDS Handbook helpfully summarises the factors that the ET should take into account:

"A useful summary of the principles governing the exercise of the 'just and equitable' discretion was set out by Mrs Justice Elisabeth Laing (as she then was) in Miller and ors v Ministry of Justice and ors and another case EAT 0003/15:
• the discretion to extend time is a wide one
• time limits are to be observed strictly in employment tribunals. There is no presumption that time will be extended unless it cannot be justified. The reverse is true: the exercise of discretion is the exception rather than the rule
• if a tribunal directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, 'perverse', i.e. no reasonable tribunal properly directing itself in law could have reached it, or the tribunal failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence
• what factors are relevant to the exercise of the discretion, and how they should be balanced, are a matter for the tribunal. The prejudice that a respondent will suffer from facing a claim which would otherwise be time-barred is customarily relevant in such cases.
• the tribunal may find the checklist of factors in S.33 of the Limitation Act 1980 helpful (see 'Relevant factors' below) but this is not a requirement, and a tribunal will only err in law if it omits something significant."

22. The Claimant responded to say she had good merits in her claims and the pandemic affected her opportunity to seek medical assistance and she didn't

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know there were time limits. The Claimant said her circumstances were genuine and the pandemic affected her approach to lawyers, Citizen's advice, and others. The Claimant said she didn't google time limits as she didn't know about time limits. The Claimant argued the Respondent isn't prejudice due to the time limits. The Claimant said she couldn't recall any dates but once she saw work emails, she could work them out. The Claimant said she failed to get any legal representation and with Christmas she couldn't get help to provide her written explanation. The Claimant says she has a "housing issue" and a family.

Findings

23. Paragraph 5.46 of the IDS Handbook on ET Practice and Procedure helpfully summarises that:
When a claimant tries to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:
S.111(2)(b) ERA (and its equivalents in other applicable legislation) should be given a 'liberal construction in favour of the employee' — Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA
what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. An appeal will not be successful unless the tribunal has misdirected itself in law or has reached a conclusion that no reasonable tribunal could have reached. As Lord Justice Shaw put it in Wall's Meat Co Ltd v Khan 1979 ICR 52, CA: 'The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive' the onus of proving that presentation in time was not reasonably practicable rests on the claimant. 'That imposes a duty upon him to show precisely why it was that he did not present his complaint' — Porter v Bandridge Ltd 1978 ICR 943, CA. Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable — Sterling v United Learning Trust EAT 0439/14.
24. In Porter v Bandridge Ltd 1978 ICR 943, CA, the majority of the Court of Appeal ruled that the correct test is not whether the claimant knew of his or her right but whether he ought to have known of them (see 948 D - E). In Porter, the CA referred to the comments of Lords Denning and Scarman in Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA, and in particular per Lord Scarman that where a claimant pleads ignorance as to his or her rights, the tribunal must ask further questions: 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?' (see 946D – 947A).

25. I find the claim for Unfair dismissal is out of time. The date of termination was the 31.03.2022. The ACAS period is the 19.06.2023 and is one day. The claim was brought on the 19.06.2023. The claim was not brought within three months (plus early conciliation) of the date of termination but was brought about one year and

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3 months after dismissal. On any reading it is out of time. Was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

26. In Schultz v Esso Petroleum Co Ltd 1999 ICR 1202, CA, the Court held that illness may justify the late submission of claims. It was accepted that the 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, and attention should be focused on the closing stages rather than the earlier ones (per Potter LJ, see 1209G to 1210C).

27. I find as follows:

    (i) The Claimant's alleged medical reasons were said by her at the hearing to be 'extreme stress.' Beyond what she claims she has not evidence this before me. I do not accept the Claimant has proven stress prevented her from being able to bring her claims within 3 months of the effective date of termination, plus the early conclusion date. The Claimant's evidence is weak, and I found her account vague, inconsistent, and unsubstantiated as set out above. I don't accept she could not seek medical treatment in 2022/3. I do not accept she was unable to get a medical appointment with her GP, go to a walk in or Hospital, or seek treatment, if her stress was so debilitating. I note she was able to undertake some part time work after losing her employment. She was never signed off by a GP as unfit to work. Overall, I do not accept the claimed medical problems were as debilitating as she claims or prevented her from being able to make an intime claim.

    (ii) I don't accept the Covid 19 pandemic prevented the Claimant from being able to seek medical treatment in 2022/3 or prevented her from seeking advice. Whilst I might have taken a different view if the termination had been in early 2020 when the country went into lockdown, I do not accept she could not access the same in 2022/3.

    (iii) I accept the Claimant says she didn't initially know there were time limits as I believe she would have brought the claim in time if she had known, but I don't accept she could not undertake basic research and enquiries to understand she needed to take action within months of her employment termination. The Claimant was a tutor at a college and was using the internet and knew how to make google searches. I don't accept she couldn't access the myriad of resources either on the internet or available through Citizens Advice and ACAS, during the limitation period or beyond. The difficulties she says she experienced securing legal advice have not been evidence to be because of the firms lacking capacity and they could just as equally have been because no firm was willing to take on her case. I don't accept her evidence about this or that she was not able to secure at least initial advice about the first steps to bring a claim.

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28. I accept the forensic prejudice to the Respondent as per what is said in *Miller*,[1] as set out in Mr Palmers written submission,

> *""12. I should also say a little more about points 10(iii)-(v). 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.*
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> *13. It seems to me that it is not necessary for me to deal with that bald submission, because, as I explain below, the EJ did, to the extent that he was required to, take into account prejudice to both sides. But if I had needed to, I would have rejected that submission. It is clear from paragraph 50 of Pill LJ's judgment in DCA v Jones that it is for the ET to decide, on the facts of any particular case, which potentially relevant factor or factors is or are actually relevant to the exercise of its discretion in any case. DCA v Jones also makes clear (at paragraph 44) that the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive. But, as Mr Bourne put it in his oral submissions in the second appeal, the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts; and the facts are for the ET. I do not read the decision of the EAT in DPP v Marshall [1998] ICR 518 (and in particular pages 527H-528G, which were relied on by Mr Allen and Mr Sugarman) as contradicting this approach; but if it does, I bear in mind that the observations relied on are from the EAT, and pre-date DCA v Jones .* "

29. For those reasons I find the Claimant has not shown it was not reasonably practicable to bring the claims in time. For the avoidance of doubt, I find there was no hindrance to her bringing the claims at any time between the termination of her employment and the 19.06.2023.

30. The same findings apply to the claims under the Equality Act, so I relied upon them but do not repeat the same. The discrimination claims remain unparticularised both in terms of the alleged acts or omissions and the conduct

[1] Miller and ors v Ministry of Justice and ors and another case EAT 0003/15:

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being complained of within the Equality Act 2010. I must decide in section 123 of the Equality Act 2010 whether the claim was made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates. I accept the last possible date, being extremely generous to the Claimant is the date of termination, namely the 31.03.2022. The ACAS period is the 19.06.2023 and is one day. The claim was brought on the 19.06.2023. I find the claims for discrimination are out of time by nearly a year.

31. In Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434 CA, the Court of Appeal warned that when tribunals consider exercising the discretion (under what is now S.123(1)(b) 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 complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule*." I also have regard to guidance of Mrs Justice Elisabeth Laing (as she then was) in *Miller*, as already set out herein.

32. Applying the same findings as I have already made when dealing with the Unfair dismissal claim, I find the Claimant has not brought her claim in time. The Claimant has not acted in any reasonable time, and I accept a year is a significant period of excess delay. I accept I should exercise the discretion widely but with little merit being shown on the facts, no proven basis to show the Claimant could not have brought the claim at any time and the forensic prejudice to the Respondent, I find it is not just and equitable to extend time.

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Employment Judge Mensah
Date: 10 January 2024

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