EMPLOYMENT TRIBUNALS

Claimant: **Shazia Shah**

Respondent: **Pinnacle FM Ltd**

Heard at: **East London Hearing Centre (video hearing)**

On: **30 May 2024**

Before: **Employment Judge Housego**

Representation

Claimant: In person

Respondent: Angelica Rokad, of Counsel

JUDGMENT

1. It was reasonably practicable for the Claimant to present her claim for unfair dismissal within the time limit and it is struck out.

2. It is not just and equitable to permit the Claimant's discrimination claim submitted later than three months after her dismissal to proceed and it is struck out.

REASONS

Purpose of hearing

1. The Claimant was dismissed on 26 June 2023. She contacted Acas on 09 October 2023, which was more than 3 months later. Her early conciliation certificate was issued on 11 October 2023, and the claim was issued on 13 October 2023. The claim form claims unfair dismissal and disability discrimination.

2. This hearing was called to decide whether to permit the claims to proceed.

3. The Claimant then applied to amend her claim to include a further head of discrimination, that the appeal hearing had been a further example of discrimination. As that was on 05 September 2023, with an outcome letter dated 15 September 2023, received by the Claimant a few days later in September 2023, that would bring the disability discrimination claim within the primary time limit of three months.

4. As the detriment asserted in the disability discrimination claim included dismissal that would also mean the dismissal remained a live issue even if the unfair dismissal claim was struck out.

5. I decided to deal with the amendment application first, as if it succeeded there was no time point for the disability discrimination claim. The parties agreed that this was the best way to proceed.

6. Ms Shah gave oral evidence and was cross examined. She had provided a lengthy witness statement which she adopted.

7. I was provided with a substantial bundle of documents, to which my attention was drawn part way though the hearing. There was an adjournment during which I familiarised myself with its contents.

8. I refused the application to amend and struck out the claims for unfair dismissal and disability discrimination. It was reasonably practicable for the Claimant to have presented the unfair dismissal claim within three months. It was not just and equitable to allow the disability discrimination claim to proceed, it not having been presented within three months.

9. I gave an ex tempore judgment. The Claimant did not agree with it and so these written reasons are provided.

Law

10. The law about amending claims is explained in the well-known case of Selkent Bus Co Ltd (t/a Stagecoach Selkent) v Moore [1996] UKEAT 151_96_0205.

11. A claim for unfair dismissal must be presented within 3 months of the effective date of termination[1], extended in a variety of ways by the requirement to obtain an Early Conciliation Certificate from Acas before filing a claim. What the extension is depends on when the notification is given by the Claimant and when the certificate is issued[2]. If not so filed, time may be extended for such further time as is reasonable, but only if it was not reasonably practicable for the claim to have been filed in time. Here there was no extension by reason of the Acas early conciliation period as the Claimant did not approach Acas within three months of her dismissal.

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[1] Employment Rights Act 1996 S 111 Complaints to employment tribunal.
(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
(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.

[2] S207B of the Employment Rights Act 1996.

12. General guidance for the parties about the approach of the Tribunal in such cases (not all will be applicable) is:

    The test for extending time has two limbs to it, both of which must be satisfied before the Tribunal will extend time:

    - first the Claimant must satisfy the Tribunal that it was not reasonably practicable for the complaint to be presented before the end of the three-month primary time limit;

    - if the Claimant clears that first hurdle, she must also show that the time which elapsed after the expiry of the three-month time limit before the claim was in fact presented was itself a 'reasonable' period.

13. Hence, even if the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the three-month time limit, if the period of time which elapsed after the expiry of the time limit was longer than was 'reasonable' in the circumstances of the case, no extension of time will be granted.

14. As regards the first limb of the test, it is quite difficult to persuade a Tribunal that it was 'not reasonably practicable' to bring a claim in time. A Tribunal will tend to focus on the 'practical' hurdles faced by the Claimant, rather than any subjective difficulties such as a lack of knowledge of the law, an ongoing relationship with the employer or the fact that criminal proceedings are still pending. The principles which tend to apply are:

    - section 111(2)(b) ERA should be given a liberal construction in favour of the employee

    - it is not reasonably practicable for an employee to present a claim within the primary time limit if she was, reasonably, in ignorance of that time limit (here the Claimant did not make enquiry until too late, but knew from the date of dismissal that she could bring a claim)

    - the question of reasonable practicability is one of fact for the Tribunal, and should be decided by close attention to the particular circumstances of the particular case

    - there is no issue with misleading advice in this case

    - it is not reasonably practicable to bring a claim if a Claimant is unaware of the facts giving rise to the claim. However, once they have discovered them, a Tribunal will expect them to present the claim as soon as reasonably practicable, rather than allowing three months to run from the date of discovery (here the Claimant always knew all the facts)

    - if a Claimant knows of the facts giving rise to the claim and ought reasonably to know that they had the right to bring a claim, a Tribunal is likely not to extend time. If the Claimant has some idea that they could bring a claim but does not take legal advice, a Tribunal is even less likely to extend time (this is pertinent in this case)

    - if the first limb of the test is satisfied, the Claimant must then satisfy the second as well: even if a Tribunal concludes that it was not reasonably

practicable for a Claimant to present the claim within the three month time limit (or extended period where the requirement for early conciliation applies) no extension of time will be granted unless the claim was presented within a 'reasonable' time (judged according to the circumstances of the case) thereafter.

15. The law is clearly set out by Eady J in Paczkowski v Sieradzka (Jurisdictional Points: Extension of time: reasonably practicable) [2016] UKEAT 0111_16_1907 at paragraphs 18-22, and I have applied it. The essence is that the issue of reasonable practicability is largely one of fact and falls to be determined on the particular circumstances of the case.

16. The test for discrimination claims (which have the same time limit) is whether it is just and equitable to extend time to permit the claim to proceed[3]. There is a similar extension of time for the Acas early conciliation procedure.

17. The most recent Court of Appeal guidance is in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23:

> *"37. The first concerns the continuing influence in this field of the decision in Keeble. This originated in a short concluding observation at the end of Holland J's judgment in the first of the two Keeble appeals, in which the limitation issue was remitted to the industrial tribunal. He said, at para. 10:*
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> > *"We add observations with respect to the discretion that is yet to be exercised. Such requires findings of fact which must be based on evidence. The task of the Tribunal may be illuminated by perusal of Section 33 Limitation Act 1980 wherein a check list is provided (specifically not exclusive) for the exercise of a not dissimilar discretion by common law courts which starts by inviting consideration of all the circumstances including the length of, and the reasons for, the delay. Here is, we suggest, a prompt as to the crucial findings of fact upon which the discretion is exercised."*
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> > *The industrial tribunal followed that suggestion and, as we have seen, when there was a further appeal Smith J as part of her analysis of its reasoning helpfully summarised the requirements of section 33 (so far as applicable). It will be seen, therefore, that Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar",*

[3] S123 Equality Act 2010 Time limits
(1) Subject to sections 140A and 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.

so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

38.I am not the first to caution against giving the decision in Keeble a status which it does not have. I have already noted the Judge's reference to the decision of this Court in Afolabi. At para. 33 of his judgment in that case Peter Gibson LJ said:

"Nor do I accept that the ET erred in not going through the matters listed in s. 33 (3) of the 1980 Act. Parliament limited the requirement to consider those matters to actions relating to personal injuries and death. Whilst I do not doubt the utility of considering such a check-list … in many cases, I do not think that it can be elevated into a requirement on the ET to go through such a list in every case, provided of course that no significant factor has been left out of account by the ET in exercising its discretion."

In Department of Constitutional Affairs v Jones [2007] EWCA Civ 894, [2008] IRLR 128, Pill LJ at para. 50 of his judgment referred to Keeble as "a valuable reminder of factors which may be taken into account" but continued:

"Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found."

That point was further emphasised by Elisabeth Laing J, sitting in the EAT, in Miller v Ministry of Justice [2016] UKEAT 0004/15: see paras. 11 and 29-30 of her judgment. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, [2018] ICR 1194, Leggatt LJ, having referred to section 123, says, at paras. 18-19 of his judgment:

"18. … [I]t is plain from the language used ('such other period as the employment tribunal thinks just and

> > *equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see [Keeble]), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see [Afolabi]. …*
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> > *19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."*
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> *Although the message of those authorities is clear, its repetition may still be of value in ensuring that it is fully digested by practitioners and tribunals."*

18. In Owen v Network Rail Infrastructure Ltd EA-2022-000609-JOJ, heard on 27 June 2023 and promulgated on 01 August 2023, Auerbach J held that the absence of an explanation did not mean that overall it might still be just and equitable to extend time in a discrimination case. This means that it is not a precondition of the just and equitable consideration that an explanation must be given.

19. I have also taken note of the case of Jones v Secretary of State for Health and Social Care (RACE DISCRIMINATION) [2024] EAT 2 at paragraphs 27-38 (in particular its reference to the judgment of Auld LJ in Robertson v Bexley Community Centre [2003] IRLR 434). In short "just and equitable" means exactly what it says – is it fair in all the circumstances relating to the Claimant and the effect on Respondent to allow the claim to proceed?

Chronology

20. The chronology is as follows:

    20.1 The Claimant suffered a health issue and was admitted to hospital in September 2002. She remained off work on sick leave until her dismissal on 26 June 2023.

    20.2 She lodged an appeal on 12 July 2023.

20.3 In August 2023 she was invited to a hearing, which was held on 05 September 2023.

20.4 The outcome letter was emailed to her on 15 September 2023, but it was 17 September or thereabouts when she first read it.

20.5 Three months from her dismissal ended on 25 September 2023.

20.6 On 09 October 2023 the Claimant contacted Acas for her early conciliation certificate. As this was more than three months from dismissal Acas issued the early conciliation certificate immediately, it being dated 11 October 2023.

20.7 On 13 October 2023 the claims were filed.

21. The Tribunal pointed out the difficulty with the time limit. The Claimant then applied, on 01 May 2024, for leave to amend to include a claim that the disciplinary hearing had been a further act of disability discrimination.

The amendment application

22. The Claimant said that when she put in the claim she did not know or appreciate that it was possible to claim for matters occurring after employment ended. She says that when she found this out, from research by her husband and by her friend Sannah, she applied to amend her claim to include this claim.

23. I asked what, specifically, the Claimant said about the appeal that amounted to disability discrimination. The Claimant said that the Respondent had failed to agree that she was disabled, and so had not made reasonable adjustments.

24. This amounts to no more than to disagree with the outcome of the appeal, which upheld the decision to end Ms Shah's employment on capability grounds. The Claimant did not suggest that anything about the conduct of the appeal was disability discrimination. It is not disability discrimination not to accept that an employee is not disabled. What an employer does because it does not accept that someone is disabled may amount to disability discrimination. That would be if that person is disabled, and the respondent knew (or should have known) and then does something inappropriate by reference to the disability.

25. I decided that this was not "relabelling" an existing complaint, but an attempt to introduce a wholly new claim. There was no reason why it could not have been included earlier. I appreciate that the Claimant said that she did not know she could refer to things that happened after she was dismissed, but this amendment application is made seven months after the three-month period elapsed. It is not a matter of which she was unaware, as she has always thought it was unfair. The application is made to attempt to circumvent the out of time point. In addition, the new claim is weak. The Claimant was unable to point to any factor which might indicate that there was any disability discrimination in the way this hearing was conducted. She

just disagreed with the outcome. This is another factor indicating that the amendment should not be permitted.

Late filing of the claims – Claimant's explanation and findings of fact and observations on it

26. Ms Shah was a candid witness, and I accept that she is truthful. Inevitably she spoke with emotion about her circumstances, and her evidence conflated discussion of the merits with reasons why the claim was not submitted earlier.

27. Ms Shah was good at her job. The Respondent accepts that this is so. She considered that she had a very good relationship with the Respondent. She was convinced that her appeal would enable them to see sense and reinstate her. She thought that it was morally wrong to put in an Employment Tribunal claim in these circumstances. For these two reasons she did not do so. It follows that she knew that she could claim.

28. She now thinks that that the Respondent deliberately ran down the clock so as to mean that she would be out of time. The chronology was not swift, but there is nothing to suggest that this was a deliberate ploy to spin matters out. This was over the summer period, and the period is not excessive long, and there was adequate time after the appeal decision was known to put in a claim.

29. The Claimant said that she found putting in her appeal very hard but was helped by the Respondent's human resources team. She says had she had that help with her Employment Tribunal claim she would have been in time with her claim.

30. The Claimant was helped by her husband, who is her full-time carer (and who also works), and by a friend, Sannah. She was not alone, and she had always thought that her dismissal was unfair and was disability discrimination.

31. Ms Shah thought that fees were payable for Employment Tribunal claims and this deterred her from thinking about it. There is no reason why she could not have made a simple internet search about how to bring a claim in an Employment Tribunal and all would have become clear.

32. The Claimant's health has been seriously affected. These judgments are public documents, and so I do not give the detail. It suffices to say that she had and has some very difficult issues with her pelvis and lower back, and that she suffers from episodes of catalepsy. Her back is managed with extensive pain-relieving medication, and she has medication for her catalepsy. She has been helped to see warning signs, to understand the triggers for catalepsy episodes, and has devised coping strategies for those triggers. Nevertheless, she was still suffering from them at the time of the appeal, and when the three months expired.

33. However, her health was not such that she was unable to put in an Employment Tribunal claim in October 2023. It had not markedly improved to permit her to do so.

34. Ms Shah was helping at her Mosque's Sunday School, which she has done for many years. She was doing this from home, by video. I accept entirely that this brings Ms Shah spiritual fulfilment and that it has therapeutic value for her. The point Ms Shah was unable to appreciate during the hearing is that that activity shows that her health was not so bad as to preclude her making an Employment Tribunal claim. Her catalepsy has a very large effect on her life, but the episodes do not preclude her from normal activities that can be carried out from home. They are debilitating only while they occur, but not the rest of the time. Her back issues did not prevent her from urging on her employer that she should be allowed to working from home. It is contradictory to say that her conditions did not stop her from working but are a good reason why she could not put in an Employment Tribunal claim.

35. The occupational health report in June said that while Ms Shah remained unfit for work her conditions had improved over the previous three months. Ms Shah agreed that was the case but said that the rejection of her appeal had a severe effect on her and that was a reason she did not act more quickly. I do not accept that this is a good reason for delay because her husband has been and remains hugely supportive of her. He, or her friend Sannah, could have looked for her. She says that she always regarded the dismissal as disability discrimination and unfair and so when the appeal outcome was known there was every reason to get on with a claim quickly and no reason not to do so.

The claim of unfair dismissal

36. It follows from the above that it was reasonably practicable to put in an Employment Tribunal claim within the three-month period, and so I must strike out that claim.

37. I observe that if a claimant decides, for whatever reason, to delay bringing a claim, and then encounters difficulty at the last minute, that is not good reason to find that it was not reasonably practicable to bring the claim within the three months if it was reasonably practicable to do so earlier.

The claim of disability discrimination

38. The delay was not particularly long – 25 September 2023 to 13 October 2023. The secondary time limit for a disability discrimination claim is such period as is just and equitable. What was the reason for the delay? First a conscious decision not to claim, secondly an unfounded belief that it would be too costly, and thirdly not acting swiftly when the appeal outcome letter arrived. It took well over a week for Ms Shah to contact Acas on 09 October 2023. These are not good reasons for delay.

39. The stronger a potential claim the more justice and equity weigh in favour of a claimant who has not filed a disability discrimination claim within three months. There are uncontested facts in this case which indicate that this was not a strong claim. They are:

    39.1 At the date of the dismissal Ms Shah had been away from work for some nine months.

    39.2 At the date of the dismissal Ms Shah still had a month left of a three month fit note signing her off work.

39.3 The occupational health report within a month of the hearing stated that Ms Shah was unfit for work, and while it was hoped there would be some more treatment and a hope that she would improve, there was no expectation or prognosis of a return in the foreseeable future.

39.4 Ms Shah was still experiencing substantial numbers of cataleptic episodes every week, which could come on anytime, and did so. In the hearing Ms Shah was good enough to tell me that she had a large cushion by her side, and that should she have such an episode she would fall onto it until she recovered some minutes later.

39.5 Ms Shah's work involved interfacing with colleagues on the telephone and in video calls. Her work could not be carried out solely through a keyboard. It could not be expected that an employer would permit an employee to work alone at home interfacing in real time with colleagues in video calls when likely to have a cataleptic episode while doing so.

40. With this background it cannot be thought unreasonable for the Respondent to think that the time had come to end Ms Shah's employment. The occupational health report commented on how accommodating the Respondent had been up to that point despite the effect this had on the running of the business.

41. In summary, Ms Shah conflates and equates a fair capability dismissal arising from problems stemming from disability with disability discrimination. In a sense it is discrimination – but for the disability related issues Ms Shah would not have been dismissed. That is not how the Equality Act 2010 defines disability discrimination. It is not disability discrimination to dismiss someone for capability reasons and it does not become so if the lack of capability is disability related.

42. I concluded that balancing the reasons for the delay, the relatively short length of the delay, the weakness of the disability discrimination claim, and the prejudice to the Respondent in having to defend a disability discrimination claim (which is always a substantial expense) it was not just and equitable to permit the claim for disability discrimination to proceed and so I dismiss it as out of time.

Employment Judge Housego
Dated: 30 May 2024