EMPLOYMENT TRIBUNALS

Claimant: Ms K Francis-Lyons

Respondent: The Gym Ltd

Heard at: London South Employment Tribunal, Croydon (by video)

On: 16 July 2024

Before: Employment Judge Abbott (sitting alone)

Representation
Claimant: representing herself
Respondent: Mr J Feeny, barrister

JUDGMENT ON TIME LIMITS

1. The Tribunal does not have jurisdiction to hear the claimant's complaint of unfair dismissal, and such complaint is therefore dismissed.

2. The Tribunal does not have jurisdiction to hear the claimant's complaints under section 26 of the Equality Act 2010, and such complaints are therefore dismissed.

3. The Final Hearing listed for 20-23 May 2025 shall be vacated.

REASONS

Background

1. This claim came before me for a Preliminary Hearing today further to an order of Employment Judge Burge ("**EJ Burge**") dated 1 February 2024 to consider, among other things, whether the Tribunal had jurisdiction to hear the claimant's claims in view of time limit issues.

2. By way of background, the claim was originally brought against two respondents, Pure Gym Limited and The Gym Limited, those being two consecutive employers of the claimant (the latter being the first in time). EJ

Burge ordered that the claims be separated, with the claim against Pure Gym Limited continuing under the original claim number (2304702/2022), and the claim against The Gym Limited proceeding under a new claim number (2301814/2024).

3. This judgment concerns only the claim against The Gym Limited and not the claim against Pure Gym Limited.

4. Before dealing with the time limits issues, I ruled on the scope of the claimant's claim as pleaded. Having considered the original ET1 claim form, subsequent clarifications provided by the claimant, the List of Issues prepared by EJ Burge and the parties' subsequent submissions, I ruled that the pleaded claim encompassed the following complaints:

    a. A complaint of constructive unfair dismissal (ss.94-98 Employment Rights Act 1996 ("**ERA**"));
    b. A complaint of harassment related to age (s.26(1) Equality Act 2010 ("**EqA**")) and/or harassment of a sexual nature (s.26(2) EqA) in respect of an incident alleged to have happened at a Christmas party at the claimant's manager's house in December 2021 whereby the claimant's manager attempted to kiss her;
    c. A complaint that the claimant's dismissal with effect from 19 June 2022 amounted to harassment related to age (s.26(1) EqA); and
    d. A complaint that the claimant was 'blackballed' (i.e. excluded from being offered a job at two of the respondent's other gyms following applications she made in June/July 2022) because of her rejection of her manager's conduct at the Christmas party in December 2021 amounting to harassment (s.26(3) EqA).

5. Insofar as other allegations had been identified in EJ Burge's List of Issues and/or in an amended ET1 claim form that the claimant had prepared on or around 5 April 2024, I ruled that the claimant would need permission to amend the claim to advance those allegations. Since all of those additional allegations faced the same (in fact, worse) time limits issues as the original claim, I decided as a matter of case management to determine the time limits issues in respect of the originally pleaded claim first and then, only if the pleaded claim survived, would it be necessary to consider the amendment applications.

6. Time limits issues arise in this case because all of the claimant's complaints (both her unfair dismissal complaint and her complaints under the EqA) were brought more than 3 months after the relevant events, and the relevant statutory provisions regarding time limits (which I quote later in these reasons) provide for a primary 3 month time limit:

    a. The claim was presented on 8 December 2022.
    b. For the unfair dismissal complaint, the relevant date is her effective date of termination – she resigned without notice on 19 June 2022. That claim therefore should have been presented by 18 September 2022.
    c. For the EqA complaints, the relevant dates are the dates of the relevant acts –the only formally pleaded acts are the incident at the Christmas party in December 2021, the alleged dismissal with

effect from 19 June 2022 and the failure of the respondent to respond to the claimant's job applications for gyms in Battersea and Wandsworth made in around June / July 2022. Even assuming a relationship between the different acts, these complaints should have been presented around mid-October 2022.

7. In considering the time limits issues, I heard oral evidence from the claimant, and submissions from both Mr Feeny (written and oral) and the claimant (oral). I also considered the documents in the 242-page hearing bundle.

The facts

8. The relevant facts here are, I find, as follows:

9. The claimant has a history of PTSD, anxiety and depression dating back to a diagnosis in August 2019.

10. The claimant was employed by the respondent between August 2019 and June 2022 as a personal trainer, working at the respondent's Catford gym from February 2020. During that time, her ability to go to work was not materially affected by her mental health diagnoses. There is no evidence of her having been unfit for work during that period prior to June 2022, and her GP records indicate that these conditions were not 'active' ones.

11. The core incident that forms part of the claimant's claim is alleged to have happened at a Christmas party in December 2021, where the claimant says her manager attempted to kiss her. Everything else (to her resignation and beyond) is said to have stemmed, in effect, from that incident.

12. The claimant resigned from her employment on 19 June 2022 by email.

13. On 21 June 2022 the claimant was issued with a fit note following a consultation with her GP. She was signed off as unfit to work due to "stress-related problem" for the period 6 June to 11 July 2022.

14. Shortly after her resignation, the claimant applied for roles at two other of the respondent's gyms, in Battersea on 30 June 2022 and Wandsworth in early July 2022. In respect of one of these applications she was told on visiting the gym that the space for a personal trainer had been filled, having observed a change in demeanour of the relevant manager after she mentioned her previous manager's name. The other application was not responded to.

15. The claimant subsequently found a role with Pure Gym in Streatham. She commenced this role on 19 July 2022, working 12 hours a week as an employee of Pure Gym and also as a self-employed personal trainer at the same gym in parallel.

16. From that time until November 2022, the claimant's ability to go to work was not materially affected by her mental health diagnoses. There is no evidence to the contrary.

17. During the period from June to November 2022, the claimant considered she

had been a victim of fraud. She made reports to the police, but nothing came of these reports. In June and July 2022 the police referred the claimant to Bromley Mental Health Hub due to concerns about her vulnerability, but that agency discharged her on both occasions having not identified any clear mental health concerns.

18. The claimant resigned from Pure Gym on 21 November 2022. Her resignation message indicated that her "mental health is being seriously affected" and that she was leaving on the advice of her family. I find that the claimant's mental health had deteriorated by this time, which is consistent with her medical records which show an active diagnosis of "mixed anxiety and depressive disorder" from 9 December 2022.

19. As already mentioned, the claimant presented her claim (brought against both Pure Gym and the respondent in a single claim form) on 8 December 2022.

The law: unfair dismissal time limits

20. Section 111(2) ERA, which concerns remedies for unfair dismissal complaints, 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."

21. In other words, in circumstances where an unfair dismissal complaint is brought more than 3 months after the effective date of termination (as is the case here), it can only proceed if the Tribunal is satisfied that (1) it was not reasonably practicable for the complaint to be presented within the 3 month period and (2) it was then presented within a reasonable period after the 3 month period expired.

22. The Court of Appeal in *Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490 summarised the principles that apply:

> "There has been a good deal of case law about the correct approach to the test of reasonable practicability. The essential points for our purposes can be summarised as follows:
> (1) The test should be given "a liberal interpretation in favour of the employee (*Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] ICR 1293, which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53).
> (2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119. […]
> (3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been

reasonably practicable for them to bring the claim in time (see *Wall's Meat Co Ltd v Khan* [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.
(4) If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (*Dedman*). […]
(5) The test of reasonable practicability is one of fact and not of law (*Palmer*)."

23. Where the Claimant prays in aid ill health and other matters as reasons why she was not able to present the claim in time, the Tribunal should consider what else she was able to do over that period to assess the practicability of presenting a claim: *Cygnet Behavioural Health Ltd v Britton* [2022] IRLR 906.

Application of the law to the facts: unfair dismissal time limits

24. In this case, on the basis of the facts I have found, I consider it was reasonably practicable for the claimant to have presented her unfair dismissal claim within the 3 month primary time limit. In the weeks following her resignation, the claimant was able to apply for roles at other gyms, ultimately securing a position at Pure Gym in Streatham. She was able to work in that position from 19 July 2022 through to November 2022 (i.e. long after the expiry of the primary 3 month time limit). In parallel, she was able to report to the police her allegations of fraud and other criminal offences. Whilst I accept the claimant had an underlying mental health condition, I find that did not prevent it being reasonably feasible for the claimant to present an unfair dismissal claim by 19 September 2022. Indeed, as I have found, the claimant's mental health condition had worsened by the time that she did, eventually, bring her complaint on 8 December 2022, which indicates that she could reasonably feasibly have brought the claim earlier when her mental health was actually in a better state.

25. Accordingly, I find that the Tribunal has no jurisdiction to consider the unfair dismissal complaint, and that complaint must be dismissed.

The law: Equality Act time limits

26. Section 123(1) EqA, which concerns complaints to the employment tribunal under the EqA, states:

"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. Under s 123(1)(b) EqA the Tribunal has a broad discretion. There is no set list of factors to consider; the Tribunal can take account of any factors it considers to be relevant. However, two factors which tend to be most important are (a) length and reasons for delay and (b) prejudice to the Respondent caused by the delay: see the observations of Leggatt LJ in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194, CA §§18-20:

"[18] First, it 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 *British Coal Corporation v Keeble* [1997] IRLR 336), 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 *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, para 75.

[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).

[20] The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle – for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant – or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see *Robertson v Bexley Community Centre t/a Leisure Link* [2003] EWCA Civ 576; [2003] IRLR 434, para 24."

Application of the law to the facts: Equality Act time limits

28. It seems to me that the following factors are relevant in this case.

29. First, the length of the delay, which is (assuming all of the acts complained of are linked) around 6-8 weeks beyond the primary 3 month time period.

30. Second, the lack of a good reason for the delay. I have already discussed the claimant's mental health in respect of the unfair dismissal claim. I accept she did have an underlying mental health condition at the relevant time, but I do not accept this provides a good reason from not bringing her complaints earlier. Looking at the 'blackballing' complaint which is the last in time, on the claimant's case she must have perceived this was happening at the time given she observed a change in the demeanour of one of the managers after mentioning her previous manager's name. In the immediate aftermath, the claimant was able to secure a position at Pure Gym in Streatham. She was able to work in that position from 19 July 2022 through to November 2022 (i.e. after the expiry of the primary 3 month time limit). In parallel, she was able to report to the police her allegations of fraud and other criminal offences. Whilst certainly other things were going on with the claimant, there

was no good reason not to bring her complaint in respect of 'blackballing' (and the related complaints relating to the Dec 2021 party and her dismissal) within the 3 month primary deadline.

31. Third, the staleness of the claim. As pleaded, the core allegation in the claim concerns the events of a Christmas party that took place in December 2021. Other allegations are pleaded that are said to stem from that incident, though clarity in respect of those allegations (i.e. the background chain of events leading to the claimant's resignation and details of what the claimant meant by 'blackballing' in her ET1 claim form) have been provided much more recently. The claim will not come on for a final hearing until May 2025 if allowed to proceed. Plainly there will be a degree of prejudice to the respondent in dealing with what is a claim that has developed over time, even if it can be said that it has been on notice of the need to deal with the Christmas party incident since the claim was presented (albeit that was itself about 1 year after it had happened).

32. Fourth, the merits of the claims. Although this is not, in my judgement, a decisive factor, I do take account of the apparent merits. As Mr Feeny stated in his submissions, there is a genuine question as to whether the respondent can be liable, as a matter of law, for the events of the Christmas party in December 2021. I also have doubts about the likelihood of the claimant managing to establish on the facts a link between the alleged events of that party and the alleged 'blackballing', even taking account of the burden of proof provisions in the EqA. The same is true regarding the likelihood of the claimant managing to establish on the facts a link between her alleged dismissal and her age.

33. Taking account of these factors, in my judgement, the additional 6-8 weeks that the claimant took to bring her EqA complaints after the expiry of the 3 month primary period was not a period that is just and equitable. Accordingly, the Tribunal does not have jurisdiction to hear those complaints, and they must be dismissed.

Conclusion

34. The consequence of my decision is that the claimant's claim against this respondent is at an end. The claimant's claim against Pure Gym Limited, which I understand to be listed for a Final Hearing in March 2025, is not affected by this judgment.

35. I do not need to consider the claimant's applications to amend, as there is no subsisting claim that could be amended. I will briefly comment, though, that all of the amendments sought by the claimant would raise the same problem with time limits – worse, in fact, because the Tribunal would have to look at those complaints as being presented at the time they were first raised (which is months or years after the original ET1 claim form was presented). Given time limits is a key factor of relevance when considering applications to amend (as per *Selkent Bus Co Ltd v Moore* [1996] ICR 836), the outcome would inevitably have been the same had I considered the applications to amend first.

Employment Judge Abbott

Dated: 16 July 2024

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