EMPLOYMENT TRIBUNALS

Claimant: **Miss Oyebambo Sobowale**

Respondent: **Compass Group UK & Ireland Ltd**

Heard at: **London South Employment Tribunal**

On: **28 October 2024**

Before: **Employment Judge Dyal**

Representation:

Claimant: **Mr O Oyegoke, Lay-Representative.**

Respondent: **Mr Joicey, in-house Lay Representative**

WRITTEN REASONS

Introduction

1. These are the written reasons for my judgment of 28 October 2024. I have prepared them in advance of any request from the parties for same because I am leaving the employment tribunal jurisdiction and anticipate that the parties might ask for written reasons after I have left. I have instructed the tribunal's administration to only promulgate these reasons if either party requests them.

2. This matter came before me to determine the following:

    a. *To determine the nature of the Claimant's claim for ill health disability allowance and whether the Tribunal has jurisdiction to consider it.*
    b. *Whether the Tribunal has jurisdiction to consider the Claimant's claim for unfair dismissal, (and, if relevant, a claim for deductions from wages and/or breach of contract in relation to ill health disability allowance) because it (they) were presented outside the statutory time limit(s). The Judge will consider whether it was reasonably practicable to present the*

claim(s) within the time limit? If not, was it (they) presented within a reasonable period?

c. *Whether the Tribunal has jurisdiction to consider the Claimant's claim for disability discrimination because it was presented outside the statutory time limit. The Judge will consider why the claim was not presented sooner and, in any event, whether it just and equitable to extend time. The claimant must persuade the Judge to extend the time limit. If time is not extended the claim (or that part of it) will be dismissed.*
d. *Whether the Claimant's claim for a redundancy payment should be struck out under Rule 37(1)(a) because it has no reasonable prospects of success.*
e. *If the claim is permitted to proceed, to make further case management orders for the future conduct of the proceedings.*

Redundancy payment

3. The claim for a redundancy payment was withdrawn and I dismiss it on withdrawal.

Ill-health disability allowance

4. Before turning to the way the Claimant put her case today, it is important to set out the background to this matter. The striking of this claim does not come out of the blue. It has long been unclear what this complaint is and the Claimant has been given fair warning of the importance of being able to explain what the case is today.

5. Employment Judge Reed said this in his record of the (postponed) preliminary hearing of 4 September 2023:

> *15. In her claim form, the claimant refers to a claim for an ill heath disability allowance. From the papers, it is not clear to me what is being claimed. The respondent appears to believe it is a reference to Critical Illness Cover insurance.*
>
> *16. The claimant will need to be able to explain the nature of this claim, including a) the source and nature of her entitlement to any such allowance (i.e. why she says she is owed such a payment, where it is written down and how much she is claiming) and b) what she says the respondent has done wrong in relation to it.*
>
> *17. Since this will be discussed at the case management hearing, I will not make any order for further and better particulars. But the claimant might find it useful to write down a brief description of this part of the claim and to send it to the Tribunal and Respondent. If her entitlement to any payment is based on a contract, policy or other document, it would be sensible to send a copy to both the Tribunal and respondent in advance of that hearing.*

6. In his record of the PH of 6 October 2023 Employment Judge Pritchard said this:

5. I discussed at some length the Claimant's claim in relation to ill health disability allowance. Her case is that she was/is entitled to monetary benefits and other benefits (such as redeployment) under the London Bridge Hospital Ill Health Disability Policy. She maintains that she continued to be entitled to those benefits when her employment transferred to the Respondent under the Transfer of Undertakings Regulations (TUPE) in April 2018. The Respondent has in place an insurance policy to provide permanent ill health benefits for employees. Mr Joicey thought that the insurance policy was put in place by the Respondent on transfer to provide employees with equivalent benefits to that provided by London Bridge Hospital. He told me that the Respondent supported the Claimant's application for benefits but the insurers declined cover because the Claimant was not thought to be not permanently incapacitated.

6. The policy was not placed before me and the Respondent does not have a copy. The Claimant will provide a copy of the policy she relies to be included in the file of documents in accordance with the case management order above.

7. Having read the tribunal file, the respondent's bundle (221 pages) and the Claimant's bundle (66 pages), I remained unclear what kind of claim in law the Claimant was making under this heading and what the details of it were. I therefore asked Mr Oyegoke to explain the claim. In essence, he said he was not able to understand it/explain it even having had the benefit of taking the Claimant's instructions and invited me to hear from her directly. I therefore did so.

8. As the Claimant put the case today, the complaint was that the Respondent was obliged to enter a settlement agreement with her if it did not follow HCA's policy on disability (the Claimant transferred to the Respondent from HCA). It had not followed that policy and therefore it was obliged to enter a settlement agreement with her but had failed to do so.

9. I asked the Claimant what the basis of this case was and she took me to p28 of her former HCA's Corporate Attendance Policy, and in particular the section on disability. I read this and noted to her that it did not say anything about an obligation to enter a settlement agreement. I asked her again what the basis therefore was for her case that the Respondent was obliged to enter a settlement agreement with her and I was unable to discern any coherent answer. She said that yesterday she had contacted HCA's HR and they had told her that settlement negotiations were confidential. She asserted that there was an obligation to enter a settlement agreement if the disability policy was breached but was unable to explain the nature of the obligation or where it came from.

10. I indicated to Mr Oyegoke that it was not clear to me that this complaint had any reasonable prospect of success and I invited him to make any submissions he had on that and/or on jurisdiction. He did not have any points to make.

Law

11. Under R37(1)(a) of the ET Rules a Tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospects of success. The power to strike-out is a draconian one that should be exercised with care and restraint. The core principles to be applied were summarized by the EAT in ***Mechkarov v Citibank NA*** [2016] ICR 1121 as:

    a. where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without an oral hearing;
    b. C's case must ordinarily be taken at its highest;
    c. If C's cases is "conclusively disproved by" or is "total and inexplicably inconsistent" with undisputed contemporaneous documents it may be struck out; and
    d. A Tribunal should not conduct an impromptu mini trial or oral evidence to resolve core disputed facts.

12. However, there cases in which what is asserted is so inherently implausible that it can be struck-out even where there is a central dispute of fact. In *Ahir v British Airways plc [2017] EWCA Civ 1392,* Underhill said this:

> *[16] Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between "exceptional" and "most exceptional" circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be "little reasonable prospect of success"*

13. In my view this claim has no reasonable prospect of success:

    a. There is no basis beyond a pure and almost entirely unreasoned assertion that the Respondent had an obligation to enter a settlement agreement with the Claimant;
    b. The basis of the assertion is incoherent in that no coherent basis for it has been put forward. Nothing in the documentation I have seen remotely supports the assertion. The policy relied upon does not support the assertion. The reference to settlement agreement negotiations being private takes matters no further.

c. Moreover, the assertion is inherently and wildly implausible. It flies in the face of business, industrial and common sense that there would be an obligation to enter a settlement agreement in these circumstances, rather than it being voluntary/a matter for the parties at any given time.

14. The Claimant has also not identified the claim in a way that would bring it within the tribunal's jurisdiction. She has not said, for instance, that this is a breach of contract claim. The same would in any event be wholly implausible since she has been unable to point to any express term requiring the Respondent to enter a settlement agreement and I consider it wholly implausible that such a term could or should or would be implied. Further, she has not identified any statutory basis for this claim.

15. I see absolutely no merit in this claim to the extent that I am able to understand it, and I think it plain that it has no reasonable prospect of success.

Time limits

16. The remaining complaints are of unfair dismissal and failure to make reasonable adjustments. I heard oral evidence from the Claimant and she was cross-examined. I make the following findings of fact to enable me to determine the limitation issues.

17. The Claimant was an extremely long-serving employee, latterly in the role of House Keeping Supervisor. Her continuous employment began with HCA in the 1990s (there is a dispute as to the date within the 1990s but it is not material so I do not resolve it). She transferred to the Respondent under TUPE on 1 April 2018.

18. The Claimant commenced a period of long-term sick leave arising out of serious spinal problems in August 2021. During this period of sick-leave she had numerous meetings with management in relation to her absence. She was also seen by OH twice. The second OH report was dated 8 March 2022. The advice in that report was essentially that it was not realistic for the Claimant to return to her existing role and that she would benefit from redeployment to a sedentary role which she may, with further adjustments, be able to manage.

19. The Claimant's manager was Mr Richard Blyth. On around 14 March 2022, Mr Blyth informally told the Claimant something to the effect that no alternative role was available for her and that she should look for other work.

20. The Claimant was a member of Unison who were assisting her at this time. She raised a number of issues around non-compliance with HCA's policies and entitlement to critical illness cover. These matters were discussed at a number of meetings.

21. The Claimant contacted South West London Law Centre (SWLLC) in around early April 2022. She has disclosed the content of the advice that the law centre gave her. Essentially it told her that there were issues around whether the Respondent was failing to make reasonable adjustments and gave her some information to help her analyse whether that was so or not. She was also told that the time limit for bringing a claim for discrimination was 3 months. She was told her that in the case of

reasonable adjustments time ran from when the employer ought to have made the adjustment. The advice said that if the OH report was dated 10 March 2022 and if it would take, say. until 10 April 2022 to implement the adjustments, time would run out on 9 July 2022. The advice also said that the Claimant needed to start Early Conciliation before the three month deadline expired and that it was an essential precursor for making an employment tribunal claim. She was given a link to ACAS' EC webpage.

22. The Claimant's oral evidence was that she had also been advised that the time limit for presenting an unfair dismissal claim was 3 months from the dismissal. She said she had been given that advice in April 2022.

23. Matters progressed and ultimately the Claimant was invited to a meeting to take place on 4 May 2022. The invitation made clear that dismissal was 'on the cards'. The meeting took place on 4 May 2022, but went part-heard and completed on 5 May 2022. At the reconvened meeting on 5 May 2022, the Claimant was orally summarily dismissed with pay in lieu of notice. This oral dismissal was followed up in writing with a letter of the same date. In accordance with the evidence the Claimant gave in cross-examination, I find that the Claimant was aware on 5 May 2022 that she had been dismissed and aware that 5 May 2022 was the date of termination.

24. On 16 May 2022, the Claimant appealed against her dismissal. An appeal hearing took place on 27 July 2022. The appeal outcome was not promulgated until 20 September 2022 when the appeal was rejected.

25. The Claimant's evidence was that she received a combination of advice and assistance from Unison, SWLLC and ACAS in the period between her dismissal and starting Early Conciliation (EC) on 23 August 2022.

26. The Claimant was asked in cross examination, why she had allowed the time limit for presenting a claim to expire prior to starting EC. She did not accept any time limit had expired. In any event her explanation for doing what she did was that she had been told she had to pursue her appeal before commencing Early Conciliation and presenting her claim. She said she was told this by ACAS, SWLLC and Unison. It was only when the outcome of the appeal was delayed that she was then advised to commence Early Conciliation despite the appeal being outstanding, and she did so on the same day as she got the advice.

27. After the evidence had been completed and the closing submissions had been made, the Claimant sent in an email from her to her union rep on 23 August 2022. In the email of 23 August 2022, the Claimant forwarded on the notification from ACAS that EC had been commenced. She wrote in the body of the email that she had filled in the online form as she had been told to by 'Dino', who I infer is a union representative, that day. The parties agreed I should admit this email into the evidence. Neither suggested that the Claimant should be recalled and neither had any submissions to make about it.

28. Ultimately, on balance, I reject the Claimant's evidence as to the advice she was given. I agree with Mr Joicey that it is inconceivable, or at least extremely unlikely, that three advisors would have all given the same erroneous advice that the Claimant needed

to pursue the internal appeal before presenting a claim or starting early conciliation, even if that meant more than 3 months from dismissal passing. There is indeed an old myth that it is necessary to pursue an internal appeal before commencing tribunal proceedings/early conciliation. However, that three different advisors would all make the same mistake seems to me to be wholly implausible. I do not think that the Claimant's email of 23 August 2022, undermines this conclusion. It does corroborate her case that she was told to start early conciliation on 23 August 2022. However, that does not mean she was given incorrect advice before that date. All the email shows is that she was told to start Early Conciliation on 23 August 2022; it says nothing of what she was told before 23 August 2022.

29. Overall, I think it far more likely that the Claimant received correct advice on time limits. I reject her evidence that she was *advised* she needed to pursue her internal appeal before commencing Early Conciliation. However, I find that the reason the Claimant waited as long as she did before starting early conciliation is because she was hoping for a positive outcome to her internal appeal. Eventually, as time progressed without an outcome to the internal appeal, I infer that she returned to the idea of litigation and started Early Conciliation.

Law

30. S.123(1)(a) EqA provides that:

(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.
[…]
(3) For the purposes of this section--
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided
on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

31. By s.140B EqA, the primary time limit is extended by Early Conciliation but only if it commences before the primary time limit has expired.

32. Where a complaint is not brought in the primary limitation period, the tribunal nonetheless has jurisdiction to hear it if it is brought within such further period as the tribunal considers just and equitable. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which may include factors such as: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance

of prejudice (***Abertawe Bro Morannwg University Local Health Board v Morgan*** [2018] ICR 1194). Leggatt LJ said this:

> *"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."*

33. There are further complexities in determining when time runs from in a reasonable adjustments case. Leggatt LJ said this:

> *Section 123(3) and (4) determine when time begins to run in relation to acts or omissions which extend over a period. In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to section 20(3) of the Equality Act, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to address the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired.*

34. In ***Apelogun-Gabriels v London Borough of Lambeth*** [2002] IRLR 116, the CA held that, the correct law for whether it is just and equitable to extend the time limit for presenting a discrimination complaint which is out of time because the applicant was pursuing internal proceedings was laid down by *Robinson v Post Office*. The fact that the employee had deferred proceedings in the tribunal while awaiting the outcome of domestic proceedings is only one factor to be taken into account.

35. Section 111 Employment Rights Act 1996 provides:

> *(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.

36. Section 207B ERA has the same effect on time limits as s.140B of the EqA does.

37. It is clear from ***Palmer v Southend-on-Sea Borough Council*** [1984] 1 WLR 1129, that:

    a. "not reasonably practicable" is best understood as meaning "not reasonably feasible";
    b. the tribunal should investigate the effective cause of failure to comply with statutory time limit.

38. In ***Cullinane -v- Balfour Beatty Engineering*** unreported UKEAT/0537/10, Underhill J (as he was) considered the second limb of the limitation test:

    "…the question of whether a further period is reasonable or not, is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. Instead, it requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted having regard to the strong public interest in claims being brought promptly and against the background where there is a primary time limit of 3 months."

Discussion and conclusions

Unfair dismissal

39. The unfair dismissal claim was not presented within the primary limitation period. In my view it was clearly reasonably practicable so to present it. There were no real barriers to presenting the claim.

40. The Claimant was aware of the right to make a claim to the ET. She was aware that there were time limits and what they were. She did not present her claim in time though it was reasonably feasible to do so.

Reasonable adjustments complaint

41. The reasonable adjustments complaint is spelt out in Employment Judge Reed's record of the preliminary hearing he dealt with. At the hearing before Employment Judge Pritchard the Claimant confirmed that EJ Reed had correctly described the reasonable adjustments claim.

42. It is not exactly clear when time began to run, and this is no a matter either party has addressed in their evidence or submissions. There are reasonable arguments that time ran from anywhere between, shortly after the OH report of 8 March 2022 and the dismissal on 5 May 2022. The Respondent's submissions

proceeded on the assumption that time ran from dismissal. In any event, on any view the complaint has been presented out of time.

43. The reason for the delay, in my view, is that the Claimant was awaiting the outcome of her internal appeal against dismissal. She delayed hoping it would arrive but when it still had not in late August she turned to litigation.

44. Since the Claimant did not start early conciliation during the primary limitation period, the clock does not stop during the period of early conciliation. The claim was therefore presented a matter of 2.5 to 4.5 months out of time. That is not a trivial delay by any means especially considering how short the primary time limits is (3 months). It is also not a very lengthy delay.

45. The Claimant did seek legal advice within the primary limitation period and indeed, on my findings, did not present the claim within the timescales she had been advised were required.

46. However, in my view the balance of prejudice heavily favours the Claimant. If I refuse to extend time, she will be debarred from pursuing any claim before the tribunal. None of her other complaints are proceeding. In a situation of this kind, that would be the ultimate prejudice.

47. On the other hand, the only prejudice I can see to the Respondent is that it will have to defend the claim if I extend time. I asked Mr Joicey specifically to address the balance of prejudice and he conceded that he could not say that there was any prejudice to the Respondent. Although I note from the file that there may be some difficulties in securing Mr Blyth's attendance as a witness, this is not a matter that Mr Joicey relied upon. In particular, I specifically note that there is no evidence before me that the delay occasioned by the late presentation of the case has caused any forensic prejudice to the Respondent.

48. On balance an in the round, I take the view, that it would be just and equitable to extend time (whether it began to run in March 2022 or on 5 May 2022 or inbetween). Although the reason for the delay is of modest quality at best, and although the Claimant did not follow the contemporaneous advice she had, my view is that the decisive factor that tips the scales here is the balance of prejudice.

Wages claim in respect of March and April 2022

49. In the course of the hearing the Claimant and her representative suggested that there were claims before the tribunal of unauthorised deduction from wages in respect of the Claimant's wages in March and April 2022.

50. I asked the parties to address me in submissions on whether any such claim was pleaded in the claim form and if not what I was being asked to do in relation to such complaints.

51. Mr Oyegoke submitted that those claims were pleaded by the Claimant checking the box 'other payment's in section 8.1. I do not agree. That box follows 'arrears of pay' which is not checked and is the appropriate box for this kind of claim. Moreover, the narrative given in the claim form does not refer or allude to unpaid wages in March and April 2022. Reading the claim form fairly and as a whole it does not raise these complaints. They are therefore not before the tribunal.

52. I note that no application to amend to add such complaints was made.

_____

Employment Judge

Date 29 October 2024

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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