EMPLOYMENT TRIBUNALS

Claimant: **Miss A Siddique**

Respondent: **Roundhay School**

HELD **by CVP** **ON: 8 December 2021**

BEFORE: **Employment Judge Speker OBE DL**

REPRESENTATION:

Claimant: **In person**
Respondent: **Miss A Greenley of counsel**

JUDGMENT

1. The claim of unfair dismissal was presented out of time. It was reasonably practicable for the complaint to have been presented within the period of three months beginning with the effective date of determination. Accordingly, the claim is dismissed.
2. The claims of discrimination on the grounds of race and of religion or other belief were not brought within the period of three months starting with the date of the act to which the complaint relates namely dismissal and the Tribunal does not find that it is just and equitable to extend the period. Accordingly, the claims are dismissed.
3. In so far as the discrimination claims relate to the claimant's grievance and appeal being closed down on 17 December 2020 and 5 January 2021 respectively, the Tribunal finds that those claims have no reasonable prospect of success and are struck out.

REASONS

1. This open preliminary hearing was held pursuant to a direction made by Employment Judge Shepherd in a telephone private preliminary hearing on 9 September 2021 in order to consider whether the Tribunal has jurisdiction to hear the claims of unfair dismissal, wrongful dismissal and race and religion or belief discrimination.

2. The respondent contended that the claims are out of time. As to unfair dismissal it was argued that it had been reasonably practicable to present the claim in time. As to the discrimination claims these were also out of time and it was argued that time should not be extended on the basis that it was just and equitable to do so. For today's hearing I was provided with a bundle of documents running to 68 pages, a skeleton argument prepared by respondent's counsel and the case report of **Croke v Leeds City Council** [2008] WL 2148290.

3. The claimant gave evidence under affirmation. She relied upon the brief statement within her claim form in section 8.2 and a short statement which she had filed at the request of the Tribunal to explain the lateness of her applications and the reasons for the late submission of the claim form. Although she made reference to other documents including her notice of appeal against dismissal and a document setting out aspects of alleged unfairness in the suspension and dismissal process and also the notice of appeal which she had submitted, these documents were not produced at the Tribunal. There were in the bundle a number of documents relating to the claimant's medical condition upon which she also relied.

4. The facts as a chronology were set out in some detail in the respondent's skeleton argument but these are summarised as follows:

   (1) The claimant was employed by the respondent as a special educational needs (SEN) teaching assistant and also as a teaching assistant in the respondent's school in Leeds.

   (2) Part of her role involved supporting student A, a highly vulnerable student who suffers from multiple complex needs including autism, oculocutaneous albinism, visual impairment, oral aversion (ie tube fed), food allergies and eczema and was described as one of the most complex children in the school requiring one to one support at all times of which the claimant was aware. Student A's requirements were set out in his risk assessment, education, health and care plan (EHCP) and other documents.

   (3) On 30 January 2020 it was alleged that the claimant left Student A alone and unsupervised whilst he went to the toilet thus placing him at significant risk of harm and this being in breach of his risk assessment and EHCP as well as in breach of the respondent's policies.

   (4) When the headteacher asked the claimant where she had been, she initially told an untruth saying that she had left Student A unsupervised in order to search for her keys but later she admitted that this was dishonest and that in fact she had taken an unauthorised break from duties in order to pray. The respondent has a policy which allows members of staff authorised time to pray during the school day with a private space for this.

(5) The claimant was suspended from work on 3 February 2020. The head appointed the deputy head as investigating officer to undertake disciplinary investigation into allegations of gross misconduct. The investigation was completed on 17 June 2020, concluding there was a case to answer in respect of the disciplinary allegations.

(6) The claimant was invited to a disciplinary hearing on Monday 13 July 2020 and was represented by her GMB union representative who had submitted a number of procedural questions for the panel to answer. The claimant also submitted her own document entitled "unfair actions and inactions" which was without consultation with her union representative. This document was not produced to me and it went back over matters in May 2018. The panel decided that it would not investigate these issues but that they would be looked into subsequently as a grievance. This applied in relation to other allegations of race and religious discrimination which the claimant raised. The conclusion of the panel was that the claimant was dismissed for gross misconduct and she was told of the right to appeal. She submitted her appeal on 29 July 2020. The notice as mentioned earlier was not produced to me.

(7) The claimant maintained that she contacted ACAS herself and was advised that she should proceed with her appeal and that when she knew the outcome of the appeal that she could contact ACAS again regarding commencement of an application to the Tribunal if appropriate. She maintained that she was told that not to proceed with the appeal would be contrary to her interests and would adversely affect her position. The claimant maintained that she no longer had the benefit of advice from her union because after she had lost her job, she would not be paying her membership fees and therefore would not be treated as a member of the union.

(8) The claimant's appeal letter raised allegations unrelated to her dismissal and the claimant was informed by the school that these would be part of the grievance which would be dealt with before the hearing of her appeal and the appeal hearing would be delayed until the grievance investigation had taken place.

(9) The respondent engaged an external independent HR consultant to undertake the grievance investigation in November 2020. The claimant was invited to an online session on 26 November 2020 but on that day the claimant stated that she was ill because of muscle pain from a pinched nerve and would not be able to attend but she would contact the HR professional to rearrange. She failed to do so and made no further contact.

(10) On 17 December 2020 the claimant was advised that the grievance investigation was closing with no conclusions drawn. The claimant did not respond and made no further contact with the respondent.

(11) On 5 January 2021 the respondent wrote to the claimant noting that despite protracted communications and the respondent's efforts to move the matter forward, the claimant had not engaged. As a result of the failure to engage the respondent was closing the case. The claimant did not respond to this or raise any objection.

(12) On 25 March 2021 the claimant contacted ACAS to commence the early conciliation process. An early conciliation certificate was issued on 6 May

2021. The claimant presented her claim on 21 May 2021. The claimant conceded that presentation of the claims was out of time.

Submissions

5. Counsel for the respondent supplemented her skeleton argument with oral submissions. She referred to the two separate tests with regard to unfair dismissal and discrimination claims, respectively reasonable practicability and just and equitable extension. She argued that that the burden was on the respondent to show why it was not reasonably practicable to file her unfair dismissal claim in time and that this was a high test. The claimant had said at the earlier preliminary hearing that she was aware of time limits. However, she had not been able to show that she had been reasonable in her failure to present the claim in time. If she was ignorant then there was a duty for her to show that this was reasonable ignorance. She had a duty to make enquiries. She had not shown that there was any basis to persuade the Tribunal that it was not reasonably practicable to present the claim in time. Miss Greenley referred to the cases of **Palmer v Southend on Sea** [1984] 1 WLR 1129 CA and **Marks and Spencer v Williams-Ryan** [2005] ICR 1293 CA. She also referred to **Wall's Meat v Khan** [1979] ICR 52 CA and in particular the comments made by Brandon LJ as to the duty upon a claimant to make enquiries. As to the test of just and equitable for extension of time in relation to discrimination claims Miss Greenley referred to a number of cases set out in her skeleton argument including **Robertson** v **Bexley Community Centre** [2003] IRLR 434 CA and **Adedeji** v **University Hospitals Birmingham NHS Hospital Trust** [2021] EWCA which emphasise that it is for the claimant to persuade the Tribunal that it is just and equitable to extend time but acknowledging that there is a wide discretion open to the Tribunal. She argued that the time limits are to be strictly applied but are usually in terms of days or weeks out of time rather than in this case very many months out of time. It was important for the Tribunal to look at the length and reasons for the delay and questions of prejudice to the claimant or to the respondent.

6. The claimant she argued had not met either of the tests. She cast doubt upon the claimant's arguments with regard to representation by the GMB. She also suggested that the explanation given by the claimant with respect to advice which she said she had received from ACAS was not credible. Reference was also made to the advice which the claimant said she had received from ACAS that this was not credible bearing in mind the role of ACAS and the fact that they give advice on a very regular basis. The evidence presented by the claimant with regard to medical matters was not cogent and did not explain the delay on her part. The claimant had contributed to the delays very substantially.

7. After I had announced my findings with regard to the statutory time limit tests affecting respectively the unfair dismissal and the discrimination claims, Miss Greenley asked that I consider separately the question of whether the discrimination arising from the closure of the grievance and the appeal as being discriminatory factors should be looked at separately. If they were potentially in time then the application she was making was for those claims to be struck out on the grounds that they had no reasonable prospect of success and she referred to her skeleton argument and the cases of **Anyanwu** as well as **Ahir v British Airways Plc** [2017] EWCA Civ 1392 and argued that the case had no reasonable

prospect of success. She also referred to the case of **Croke** v **Leeds City Council UK EAT**/0512/07/LA and the position where the Tribunal found that a claimant was unable to provide any suggestion of a causal link and that therefore the claim should be dismissed. Reference was made to the observation of Lord Hope in **Anyanwu**:-

"*The time and resources of the Employment Tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail*".

She also made reference to the overriding objective and the need to ensure that cases including claims by other litigants would be dealt with and that the system was not to be adversely affected by cases which were bound to be unsuccessful.

The Law

8. The statutory time limits being considered are as follows:-

Unfair dismissal. Employment Rights Act 1996

Section 111(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.

Discrimination claims. Equality Act 2010 Section 213(1)

Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three 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.

Findings

9. At the earlier preliminary hearing it was recorded that the claimant confirmed that her claims of race and religion or belief discrimination "related solely to her dismissal and her grievance and appeal.

Unfair dismissal

The claimant was dismissed for gross misconduct namely leaving Student A unattended. The effective date of termination was 13 July 2020. The claim was not presented until 21 May 2021 which was eight months after the effective date of termination and therefore very clearly out of time.

It is necessary for me to consider whether it was reasonably practicable for the complaint to be presented before the end of the period of three months. If it was not so practicable then the Tribunal could grant such further time as is reasonable in the circumstances. The onus is upon the claimant to persuade the Tribunal that it was not reasonably practicable for the complaint to have been presented in time.

The primary and initial justification put forward by the claimant was that after dismissal and after she lodged her appeal she spoke to ACAS and they advised her that she should proceed with her appeal and then depending upon the outcome then contact ACAS with a view to the question of taking further action namely a claim to an employment tribunal. The claimant provided no material to the effect that she had taken this advice or that the advice was in the terms that she described. Whilst Employment Judge Shepherd at the earlier preliminary hearing expressed scepticism with regard to that advice, I rely upon my own judgement and my assessment of the evidence and testimony presented by the claimant. I do not find that the claimant's description of the so-called advice to be persuasive. ACAS exists in order to give advice and conciliation to parties involved in employment disputes. Many thousands of people approach ACAS of which a high proportion are those who have been dismissed. I find it not to be credible that anyone engaged with ACAS could give advice to a potential claimant to the effect that they should proceed with an appeal without making it clear that such appeal would not extend the three month time limit which is the basic period for presenting an unfair dismissal to the Tribunal (subject to any extension given under the early conciliation procedure). In addition to this the claimant conceded that she had obtained some details online in relation to ACAS. The ACAS website is prepared in clear terms for the benefit of members of the public and not couched in jargon or intended to be read solely by lawyers or others with legal training or experience. By making even the most rudimentary enquiries the claimant would have been able to ascertain that the statutory time limit applied and that delaying the commencement of proceedings by awaiting the outcome of her appeal would put her at risk of her claim being out of time.

10. To the extent that the claimant suggests that she was ignorant as to such matters, caselaw makes it clear where such a suggestion is put forward that there is an obligation upon the claimant to show that her ignorance is reasonable. This is affected by the obligation upon the claimant to make reasonable enquiries. As stated in **Wall's Meat v Khan**, such ignorance will not be reasonable "if it arises from the fault of the complainant in not making such enquiries as she should reasonably in all the circumstances have made".

11. Where the claimant knows of the existence of a right, it may in many cases at least though not necessarily all, be difficult for the claimant to satisfy a Tribunal she has behaved reasonably in not making such enquiries.

12. Of further relevance was the suggestion that the claimant, who had had the benefit of representation from her GMB union leading up to and during the disciplinary hearing, did not have further guidance from the union thereafter. Her suggestion that because she had lost her job and that in the future would not perhaps be able to pay her union dues meant that she was no longer a member of the union, was not credible. It would be expected that the claimant would have discussed the position with her union representative moving on to the appeal that she had lodged. This would have been a reasonable investigation expected of her.

13. The claimant's suggestion that delay in presenting the claim to the Tribunal was affected by illness involved consideration of such medical material as was produced. In particular the claimant suggested that she did not engage with the grievance investigation because she was in pain. This related to a shoulder or arm problem which was mentioned in the medical records during December 2020. However, in explaining her lack of any action at all in 2021 up to March when she contacted ACAS, was explained by the claimant maintaining that she suffered from

Covid which developed into long Covid. The medical records showed that she had an isolation note from 4 January to 14 January 2021 because of symptoms of Coronavirus and a positive test which was dated 3 January 2021. Whilst the claimant maintains that thereafter she suffered from long Covid she provided no evidence to persuade the claimant that this was the case or that it interfered in any way with her ability to make telephone calls or send emails by which she could have obtained advice, made enquiry and contacted ACAS. There was no reason at all for her not to have progressed her tribunal claim. The claimant produced nothing in her medical records to the effect that she was suffering from any medical problem which required attention. What was noted was that she was a person about whom a letter had been written to her GP by the Yorkshire Ambulance Service on 16 December 2020 referring to the fact that the claimant had called the emergency services six times during November and requesting the GP to look into whether there were any particular clinical reasons for the frequency of calls. This did indicate that the claimant was a person who would seek medical assistance if she felt there was a need. For the period between 5 January 2021 and 25 March 2021 (when the claimant contacted ACAS) there was no evidence as to any medical problem. The claimant referred to the fact that she was receiving physiotherapy sessions sent to her remotely during this period. However, there was no evidence of this and nothing to suggest that because she was having physiotherapy, albeit remotely, this interfered with her ability to advance her claim.

14. The claimant confirmed that by the end of March she had obtained other employment. She was questioned as to when the process began leading up to her taking new employment by the end of March as this would have involved consideration of her suitability by her new employer and some type of interviewing process. All the claimant could say about this was that she heard about the job at the end of March and the vetting process was also at the end of March and she commenced the employment at the end of March. The Tribunal did not find this convincing and did not explain the claimant's failure to take any steps to commence her claim in that period.

15. On the basis of all of the above evidence the claimant failed to demonstrate that it was not reasonably practicable to issue her claim within three months of the effective date of termination. Even if she had any preliminary justification for delaying the issuing of the application because she had commenced her appeal, that would not have persuaded me that it continued to be other than reasonably practicable to do so during the very many months which followed and particularly the period from the beginning of January to the end of March 2021.

Just and equitable

16. In considering whether it would be just and equitable to extend the time for the claimant to issue her claim, much of the material referred to above in relation to the reasonably practicable test applies most particularly the claimant's actions or rather inaction. Her failure to engage with the respondent in relation to the investigation of her grievance which was to precede the hearing of her appeal was not properly explained. Whilst there was some delay during the school holidays for which of course the claimant was not responsible, she failed to explain why she did not engage with the appointed HR professional. Her explanation for not joining in with the Zoom meeting to commence the investigation was not convincing. Furthermore, her failure to get back to the HR professional to rearrange the session or to acknowledge the communication that the grievance was regarded as closed and that the deal was closed, were not adequately explained. This was the

claimant herself failing to make adequate or reasonable steps. it also displayed that she was not acting in her own interests by taking advantage of the ample time to initiate her claims.

17. The lack of activity by the claimant between the beginning of January 2021 and the end of March 2021 also argued against a finding that it would be just and equitable to extend time further. These were claims which the claimant says she was wishing to advance. Her explanation for not doing so during the first three months of 2021, as stated above, was unsatisfactory.

18. Whilst it is appropriate to consider the impact upon the claimant in not being able to pursue a claim, regard must also be had to prejudice to the respondent. Again, part of the delay in the entire history of this case was down to the respondent. However, the very significant delay on the part of the claimant and the delay in getting this case to a hearing would be of significant detriment to the respondent. This would risk the case having to be heard at a very significant time distance from the events in question with the prospect of damage to the cogency of the evidence and the reliable recollection of witnesses. Regard must also be had to the overriding objective set out in Regulation 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 which sets out the objective of enabling tribunals to deal with cases fairly and justly. This includes all cases, namely also those of other litigants. With this in mind the Tribunal must bear in mind that if cases are delayed this can have an impact upon other cases in the system and other litigants who are entitled to have their claims dealt with in a reasonable and expeditious manner.

19. Despite the very wide discretion which the Tribunal has in order to extend time as set out in the case of **Robertson**, that case also makes clear that time limits are exercised strictly in employment cases. There is no presumption that discretion will be exercised in allowing claims out of time. It is for the claimant to convince the Tribunal that it is just and equitable for time to be extended. The claimant has not persuaded me in this case that it is just and equitable to extend time as the case she has put forward with regard to advice received from ACAS, the lack of guidance from her union and medical aspects do not convince me that it is just and equitable to extend the time. The claim was presented on 6 May 2021. The effective date of termination was 13 July 2020 and the three months' primary time for presenting the claim was 12 October 2020. I therefore find that there are no valid grounds for extending the time for the discrimination claims on the grounds of being just and equitable to do so.

20. Therefore, the claims of discrimination are dismissed save for what is stated below. On behalf of the respondent Miss Greenley asked for clarification as to whether the dismissal of the claims also applied to those claims which potentially could arise in relation to the closure of the grievance and the appeal as these were, in accordance with the chronology on 17 December 2020 and 5 January 2021 respectively. Accordingly, I make it clear that the Order that I have made with regard to it not being just and equitable to extend time in relation to the discrimination claims applies to the discrimination claim in respect of the dismissal. In so far as such discrimination claim which the claimant wished to bring in relation to the closure of the grievance and the appeal I have considered the application made by the respondent for those claims to be struck out on the grounds that, if they survive, they have no reasonable prospect of success. The power to strike out claims is set out in Regulation 37 of the 2013 Regulations stating that a tribunal

may strike out all or a part of a claim or response on any of the following grounds (inter alia) :-

(a) That it is scandalous or vexatious or has no reasonable prospect of success.

21. The claim that the closure of the grievance or the appeal were discriminatory events was advanced by the claimant. However, there was absolutely no argument or material advanced by her to the Tribunal suggesting on what possible basis she argued that the closure of the grievance and the appeal were in themselves discriminatory. What was clear from what was presented was that the closure of those two processes related to the failure by the claimant to engage in the processes despite efforts made by the respondent for her to do so. Neither in the claim form nor in the letter written to the claimant about timing, did she say anything to explain on what basis she argued that the closure of the two processes was related to discrimination. Although invited to do so, she did not explain why she suggested that there could be any conclusion drawn that, absent any explanation by the respondent, a Tribunal could conclude that the closure of those two processes amounted to discrimination in relation to any protected characteristic. I am persuaded by the words of Lord Hope in **Anyanwu** that "*the time and resources of the Employment Tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail*". Similarly in the case of **Ahir** v **British Airways** *Plc* [2017] EWCA Civ 1392 Underhill L J stated as follows:-

If Tribunals "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 a conclusion in circumstances where the full evidence has not been heard and explored perhaps particularly in a discrimination context" then it is justifiable to strike out claims at the preliminary stage on the grounds that there is no reasonable prospect of success."

22. That is what I find is the case with respect to the claim made by Miss Siddique with regard to alleged discrimination arising out of the closure of her grievance and appeal. Therefore, I strike out those claims.

Employment Judge Speker OBE DL
Date: 22 December 2021