EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Labongo Alum	v	**Thames Reach Charity**

OPEN PRELIMINARY HEARING

Heard at: London South by CVP **On: 14 October 2020**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: **Mr T Akinsanmi friend**
For the Respondent: **Mr T Sheppard of Counsel**

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable to do so.

JUDGMENT on PRELIMINARY HEARING

1. The claimant's claim for unfair dismissal was not presented within the time limit imposed by Section 111 of the Employment Rights Act 1996 although it was reasonably practicable for her to have done so. Accordingly, the Tribunal has no jurisdiction to entertain that claim and it is dismissed.

2. The claim for unpaid wages/breach of contract has not been lodged within the time limit provided by section 23 of the Employment Rights Act 1996 and Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, Article 7 although it was reasonably practicable for her to have done so. Accordingly, the Tribunal has no jurisdiction to entertain that claim and it is dismissed.

3. The claimant's claim for discrimination was not presented within the time limit imposed by Section 123 of the Equality Act 2010 and it is not just and equitable to extend the time for the presentation of the claim. Accordingly, the Tribunal has no jurisdiction to entertain that claim and it is dismissed.

4. The hearing fixed for 11-14 May 2021 is discharged.

REASONS

Preliminary

1. This preliminary hearing was fixed in order to determine whether the claimant's claims of unfair dismissal; disability, sex, race and age discrimination, and monetary claims which were all contained in the same claim form should be struck out as being out of time.

2. The claimant gave evidence on her own behalf. She provided a statement in advance of the hearing [92]. There was a bundle of documents to which reference will be made where necessary.

Findings

1. The claimant commenced employment with the respondent on 22 November 2002. She worked as a Kitchen Assistant/Relief Cook. Her employment terminated on 6 March 2019 by reason of redundancy. She started writing down a history of her employment after her dismissal which was to become a lengthy attachment to her ET1.

2. The claimant commenced ACAS early conciliation on 26 March 2019 and the Early Conciliation Certificate was issued on 11 April 2019 [4].

3. The claimant was due to return from Africa on 3 June 2019, but missed her flight due to unforeseen circumstances and was therefore unable to return to the UK until 7 June 2019 [92]. The claimant originally submitted her claim by email to londoncentralet@Justice.gov.on 5 June 2019 from an agent in Uganda using the email address agietapatcy2@gmail.com [85].

4. The Tribunal emailed the claimant on 10 June 2019 to say that the claim had been rejected because the claim could not be validly presented by email [86 - 87]. The Tribunal used the email address of the agent in Uganda who forwarded it to the claimant on 11 June 2019.

5. On 11 June 2019, the claimant submitted a claim form without the Early Conciliation number which was returned by the tribunal on 13 June 2019 as the claim was invalid [88].

6. The claimant added the Early Conciliation number to the claim form and lodged it with the Tribunal which was accepted by the Tribunal on 24 June 2019 [5].

Submissions

7. The Tribunal received written submissions from Counsel for the respondent and heard oral submissions from both parties.

Law

8. Section 18A of the Employment Tribunals Act 1996 provides that claims before the Employment Tribunal are all subject to the early conciliation provisions.

Time limits and extension

Not reasonably practicable to present claim in time

9. Section 111(2)(b) of the Employment Rights Act 1996 provides that the three-month time limit can be extended:

> (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.
>
> [(2A) … [and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2)(*a*).]

10. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the claimant (**Porter v. Bandridge Ltd** [1978] ICR 943 CA). Second, if he succeeds in doing so, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable. The leading authority on the subject is the decision of the Court of Appeal in **Palmer and Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA.

11. When considering whether to extend time under S.111(2)(b), Employment Tribunals should always bear in mind the general principle that litigation should be progressed efficiently and without delay; **Nolan v. Balfour Beatty Engineering Services** EAT 0109/11.

Just and equitable extension

12. Section 123(1)(b) permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable. Section 140B of the Equality Act 2010 serves to extend the time limit under Section 123 to facilitate conciliation before institution of proceedings.

13. The Tribunal has reminded itself of the developed case-law in relation to what is now Section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR 279, the approach adopted by Smith J. in **British Coal Corporation v. Keeble** [1997] IRLR 336, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

14. The Tribunal also notes in passing the guidance offered by the Court of Appeal in the cases of **Apelogun-Gabriels v. London Borough of Lambeth & another** (2002) IRLR 116 and observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

15. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment cases', and that there is no presumption that a

tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but see LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** where he said in relation to what LJ Auld said "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised."

16. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

the length and reasons for the delay;
the extent to which the cogency of the evidence is likely to be affected by the delay;
the extent to which the party sued had co-operated with any requests for information;
the promptness with which the claimant acted once she knew of the possibility of taking action; and
the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

17. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

18. The Tribunal has additionally taken note of the fact that what is now the modern Section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as "the just and equitable power" has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

19. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the "just and equitable" discretion should be exercised in the particular case. That obligation is not just a matter of the burden of proof. It also raises the question of what is the standard of proof to be established in order to persuade the Tribunal that a period other than the normal three months should be applicable. It is therefore a matter which requires evidence – which may be oral and subjected to cross examination or documentary.

DISCUSSION and DECISION

20. The deadline for submitting the claim to the Tribunal was 5 June 2019 which was extended by 16 days to 21 June 2019 by the Early Conciliation procedure. The claim was accepted on 24 June 2019, 3 days late.

21. The claimant explained that she was able to submit her ET1 by email on 5 June 2019 from Uganda but was not able to do so via the online form (i.e. via a valid method of presenting her claim). She resubmitted her ET1 by hand on 11 June 2019, it did not contain the ACAS Early Conciliation number, so was returned on 13 June because it was invalid.

22. She has not given an explanation for the delay between 13 June and 24 June 2019. The claimant has said that she was moving home at the time [92] and it is understood that this is time consuming and stressful experience but she does not explain what impact this had on her ability to submit her claim on time as it only needed the addition of the ACAS Early Conciliation number.

23. The monetary claims advanced by the claimant include complaints of unlawful deductions from wages and breach of contract. The reasonable practicability test applies to both types of complaint as well as the claim of unfair dismissal.

24. The Tribunal accepted the claimant's evidence but it did not establish that it was not reasonably practicable to lodge the claim. The Tribunal considered that it was reasonably practicable for the claimant to add the Early Conciliation number to the claim in time.

25. In relation to the discrimination claims, the claimant had been formulating her claim which was a very extensive one since she was dismissed. She did not explain why she did not do so validly within time. The Tribunal considered that without the explanation the balancing exercise was very difficult. The delay was for a short but crucial period. The cogency of the evidence would be unlikely to be affected by the delay. On the guidance set out earlier, the Tribunal considers that it is not just and equitable to extend the time for lodging the discrimination claims.

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Employment Judge Truscott QC

Date 15 October 2020