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EMPLOYMENT TRIBUNALS

Claimant:	**Ms C L Soroaga**	
Respondent:	**Mr Peter McCarthy**	
Heard at:	**East London Hearing Centre**	**On: 22 August 2016**
Before:	**Employment Judge Ferris (sitting alone)**	

Representation

Claimant: G Padure (Solicitor)

Respondent: A Mills (Consultant)

JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The complaints of unfair dismissal, working time regulations and working time regulations annual leave, unlawful deduction of wages, breach of contracts/wrongful dismissal, and failure to pay national minimum wage are all out of time and the Tribunal declines to extend time

(2) The complaint of race discrimination is also out of time and the Tribunal declines to extend time.

(3) The Claimant's claims are dismissed.

REASONS

1 The Claimant presented her ET1 claim form to the Tribunal on 6 February 2016. The Claimant gave her dates of employment in the ET1 as being 8 August 2013 to 10 September 2015. The dates for her ACAS certificate were 8 December 2015 to 7 January 2016. The Claimant has brought claims for unfair dismissal, notice pay (wrongful dismissal), holiday pay namely breach of Working Time Regulations and unlawful deductions from pay based on a national minimum wage claim. The Claimant

has also brought a claim for race discrimination; her protected characteristic being that she is of Romanian national origin.

2 The Respondent in his ET3 asserts that the Claimant's employment began on 25 April 2014 and ended on 3 September 2015. Both those dates are significant. Even if I had extended time in relation to the unfair dismissal claim on the Respondent's dates the Claimant did not have a qualifying period of employment (note an application to amend to plead a claim of automatic unfair dismissal for asserting a statutory right was rejected by Employment Judge Goodrich on 27 June 2016).

3 The Respondent contends that the Claimant does not have a qualifying period of employment to claim unfair dismissal. There is a factual issue as to whether the Claimant's employment began in 2013 or in April 2014. I have not been asked to resolve that issue today. Accordingly I assume for the purposes of this hearing on Jurisdiction that the Claimant began her employment with the Respondent on 8 August 2013. It is now conceded by the Claimant that her correct termination date was 3 September 2015. The explanation for the error in the ET1 will be examined further in my findings of fact, but I note at this stage that it appears to have been the Claimant's error and not a typographical or other error made by the solicitors acting for the Claimant.

4 It is accepted by the Claimant (who has been throughout these proceedings represented by a firm of solicitors) that the accrual of the cause of action for the unfair dismissal, Working Time Regulations, breach of contract claims including the alleged failure to pay annual leave is the finish date of 3 September 2015. Time had expired for those claims on 2 December 2015 and before the reference to ACAS. Those claims were two months out of time as at the date of presentation of the claim on 2 February.

5 As to the claim for unlawful deduction of wages and the complaint under the national minimum wage legislation - in respect of those claims the cause of action accrues on the last day for payment of wages. The start date is agreed to be 6 September 2015 and accordingly time ran out on 5 December 2015 and again the claim was presented about eight weeks late.

6 As to the claim for discrimination the position is a little more complicated. The direct discrimination claim identified by Employment Judge Goodrich contains two allegations: first that in November 2013 the Claimant was present with her partner Mr Muresan who asked for paid leave. The Claimant contends that Mr McCarthy responded by saying: *"annual leave is not paid to Romanians*". That allegation is denied as is the allegation that the Respondent has not paid annual leave to the Claimant or indeed any of her colleagues.

7 The second allegation of discrimination noted by Employment Judge Goodrich is that Mr McCarthy used to come into the kitchen it is alleged from time to time to check production and when doing so would mimic a whip hitting the Claimant. That allegation is also denied.

8 This morning Mr Padure added to those allegations. He contended first of all that the Respondent's alleged failure to pay any annual leave during the pendency of

employment was an act of less favourable treatment because of the Claimant's protected characteristic. He also contended that the dismissal was discriminatory. I note that Mr McCarthy in completing his ET3 response appears to acknowledge that he understood the claim to be one of a discriminatory dismissal.

9 Even if the ET1 bears the interpretation put on it by the Claimant's representative today and the last of the relevant acts of discrimination was the 3 September 2015 there are two points to be made. First the claim for discrimination was presented out of time. It should have been presented by 2 December 2015 but was not in the event presented until 2 February 2016. Secondly, the key event in the allegations of discrimination made by the Claimant in the ET1 is the reference to the incident in November 2013 when the Respondent is alleged to have made a remark which links the less favourable treatment (allegedly not paying or allowing annual leave) to the protected characteristic of the Claimant.

10 The parties referred me to the relevant law. The relevant statutory provision for the not reasonably practicable test is at section 111(2) of the Employment Rights Act 1996:

> "… an employment tribunal shall not consider a complaint …unless it is presented to the tribunal –
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> (a) before the end of the period of three months beginning with the effective date of termination, or
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> (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."

The power to disapply the statutory time limit (as was confirmed by Judge LJ in the case of *London Underground v Noel* 1999 ICR 109 at page 117) is:

> "… very restricted. In particular, it is not to be exercised, for example, 'in all the circumstances', nor even when it is 'just and reasonable' nor even where the Tribunal 'considers that there is a good reason' for doing so. As Browne-Wilkinson J observed: 'The statutory test remains one of practicability ……… The statutory test is not satisfied just because it was reasonable not to do what could be done:' *Bodha (Vishnudut) v Hampshire Area Health Authority* [1982] ICR 200, 204."

And in the case of *Wall's Meat Co Ltd v Khan* [1979] ICR 52 at pages 60-61 Brandon LJ, said:

> "The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant in the form of ignorance of,

> or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

11 Whereas I need to make more elaborate findings of fact when dealing with the extension of time in relation to the claim for discrimination, I can deal very shortly with the other claims which depend on this stricter test. It is admitted by the Claimant that having been allegedly dismissed on 3 September she went on holiday to Romania from about the middle of September until 22 October. By 27 October the Claimant had arranged to see and did see a solicitor on that day, from the same firm of solicitors which has acted for her throughout these proceedings and by whom she was represented this morning at this hearing. The Claimant told that solicitor that the termination date was 10 September. That was an error. In fact it was 3 September.

12 The Claimant understood from her solicitors on 27 October that there was a time limit and that the date of termination was important because that was the date from which time was to run. The error made by the Claimant in identifying 10 September rather than the correct date the 3 September, is not easy to explain. The Claimant had colleagues who were also Romanian who remained employed by the Respondent and who had been aware of the date when the Claimant's claim terminated.

13 By 27 September 2015 a P45 had been sent to the Claimant which identified her leaving date as 3 September 2015. The Claimant speaks English well enough to have answered all the questions put to her today without difficulty. The Claimant also reads English and was able without prompting to read the oath card and other documents which were put to her during the course of her evidence.

14 The suggestion from the Claimant that she must have been in some turmoil following her alleged dismissal is, in my judgment, an inadequate explanation for the mistake which she made about the termination date. The Claimant contended that she was also depressed but never consulted a GP. The Claimant has not to date had any treatment for stress or depression. Moreover the Claimant had not only managed to find and attend a firm of solicitors to get effective advice by 27 October but at the same time the Claimant was looking for work elsewhere and attended an interview at a care home for fresh employment on 15 November 2015. That interview was successful and the Claimant began work for the care home in the first couple of days of December 2015. I am pleased to record that the Claimant remains a full-time employee at that care home.

15 It is necessary for me to consider not merely what the employee knew but what knowledge the employee should have had had she acted reasonably in all the circumstances. In this case I am not persuaded that it was reasonable for the Claimant to have made a mistake about the termination date and for that reason to have presented the claim late. Accordingly the complaints of unfair dismissal, working time

regulations, breach of contract and national minimum wage and unlawful deduction from wages are out of time. I decline to extend time and those claims are dismissed.

16 As to the discrimination claim I make the following findings of fact.

17 The Claimant said that she had been very upset on the date of termination but had enjoyed the support of her partner. She did not seek any medical assistance while she remained in the United Kingdom before departing for Romania sometime between 12 and 17 September. While the Claimant was in Romania (for about four weeks or so) the Claimant did not seek any medical assistance.

18 The Claimant returned to the United Kingdom on 22 October and five days later went to see the solicitors who act for her in these proceedings. The Claimant told me that she was really stressed but it is apparent that she was able to give full instructions to her solicitors to enable a claim to be prepared. She simply gave the solicitor the wrong date for termination. There appears to have been a decision notwithstanding the availability of the Claimant in this country from 27 October not to issue the claim and to delay in making a reference to ACAS. Even on the basis of the Claimant's instructions that the dismissal was on 10 September a decision was made to delay making a reference to ACAS until just before that mistaken deadline expired when on 8 December the reference to ACAS was made. With hindsight it would have been prudent to have made that reference at the first available opportunity that is to say before the end of October.

19 The Claimant told me that she had read and checked the claim form before it was submitted (in which the mistake was expressed). The Claimant confirmed that she could speak and read English and that she had understood the questions that were put to her. That was certainly my impression. The Claimant is an intelligent and resourceful person as demonstrated by her ability having lost one job to find another job fairly swiftly in this country.

20 The Claimant's representative has conceded that the discrimination claim is out of time even on the basis that the last event of discrimination occurred on the dismissal on 3 September 2015. I have reminded myself of the check list in *British Coal Corporation v Keeble* [1997] IRLR 336. I need to take into account in particular in this case the prejudice to the parties, the length of time for which the application was late, the fact that the Claimant had received efficient and competent legal advice during that period. The explanation for the delay in making the claim lies in the Claimant's error in identifying to her solicitors the end date of her employment. The explanation given to me by the Claimant for that mistake is less than clear. There is no good reason why that mistake was made.

21 The Claimant was still in contact with people who were working and who had been her colleagues on the day of the dismissal. The Claimant's partner also understood the correct date. The Claimant herself was well able to calculate the correct date for her dismissal and indeed it was referred to in her P45 which she had received long before the relevant deadline arose. In all those circumstances I am left with a situation where the explanation for the delay, even in the more forgiving environment of the "just and equitable test" is not helpful to the Claimant. It does not bear examination.

22 As to the impact of this claim on the Respondent, I note that even on the basis that the relevant acts of discrimination arguably continued until the 3 September 2015, a key event alleged by the Claimant goes back to November 2013. That is the occasion when and the only occasion on which the Respondent is alleged to have made an overt connection between the less favourable treatment allegedly meted out to the Claimant and her protected characteristic. That is nearly three years ago. The Claimant took no action about it at the time.

23 The Respondent employs about a dozen people, but there is a steady turnover of workers; some of them foreign employed in his baking business. In my judgment if the Respondent has to meet this claim it will be very difficult having regard to the passage of time for him to contradict the allegations about this incident which the Claimant contends was witnessed by her partner (nearly three years ago in November 2013). Although the relevant period of delay attributable to the late presentation of the claim is only a fraction of the overall period of time it does nonetheless compound the existing and already very long delay.

24 In my judgment the balance of prejudice favours the Respondent. It is clear from the authorities that the decision to extend time is exceptional. No compelling case has been made to me by the Claimant to persuade me in these circumstances where the Respondent will suffer prejudice, that I should extend time. Accordingly the claim for discrimination is out of time and it is not just and equitable to extend time and I dismiss the discrimination claim.

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Employment Judge Ferris

13 September 2016