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## THE EMPLOYMENT TRIBUNALS

**Claimant:** Mrs M McCullough  
**Respondent:** The London Borough of Havering  
**Heard at:** East London Hearing Centre  
**On:** 17 October 2018  
**Before:** Employment Judge Russell

**Representation**  
**Claimant:** In person  
**Respondent:** Mr S Thakerar (Counsel)

## JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is:-

- 1 The claims of unfair dismissal and of disability discrimination were presented out of time.
- 2 It was not reasonably practicable for the unfair dismissal claim to be presented in time. It was presented within a reasonable time thereafter.
- 3 It is just and equitable to extend time to accept the disability discrimination claim.

### REASONS

1 The Claimant commenced employment with the Respondent on 3 September 1996 as a Participation Assistant, Early Help Service. Her employment ended on 19 October 2017. That is the date from which time presentation of a Tribunal claim began to run.

2 The Claimant appealed against her dismissal. The appeal was not concluded until she received a decision letter on 12 March 2018. I accept the Claimant's evidence today that she was hopeful and indeed expected that the appeal would be successful and result in her reinstatement. She was keen to allow the internal process to run its course rather than resort to litigation which would be against an employer to whose service she hoped to return.

3 As the primary time limit was due to expire the next day, she took the precautionary step of contacting ACAS on 16 January 2018. The ACAS conciliation period lasted until 2 March 2018. Again I accept the Claimant's evidence that she engaged with ACAS in a genuine attempt to resolve the dispute without recourse to litigation. The time limit for presenting a claim expired on 2 April 2018.

4 When she received the appeal outcome on 12 March 2018, the Claimant was still in time to present a claim. The claim was not in fact presented until 13 April 2018, some 11 days late. In her witness statement and evidence on oath today, the Claimant provided an explanation for the delay, namely her significant medical conditions and their effect upon her ability to present the claim sooner. The Claimant was a truthful witness and I accepted her evidence.

5 The Claimant suffers from Ehlers Danlos Syndrome Hypermobility type (EDS) which essentially affects her muscles and joints and causes physical problems. She also has Postural Orthostatic Tachycardia Syndrome (POTS), a cardiac condition which affects her blood pressure and her heart rate. The effect of both conditions is significant and debilitating.

6 Upon receipt of the appeal letter, the Claimant immediately experienced a serious POTS episode which required her to be bed-ridden. During this time, the Claimant was entirely dependent upon her husband and parents for personal care. The Claimant's anxiety was increased by her knowledge that she needed legal advice and had a time limit for presenting a claim, having previously been advised by a trade union official. She was aware that she needed to act swiftly. The anxiety caused an exacerbation of her POTS symptoms including regular ectopic heartbeats which made her feel lethargic, caused confusion, sickness and migraine. The Claimant was unable to hold conversations without forgetting what she was trying to communicate or stumbling over words and her mental well-being was at all-time low. The first opportunity the Claimant had to seek legal advice was by telephone just two days before she issued the claim when she was finally recovered sufficiently to sit up in bed and make a telephone call without becoming unmanageably symptomatic. The Claimant took notes during her telephone conversation with the solicitor. In doing so, she subluxated her right wrist which required it to be strapped up. The Claimant nevertheless filled out the online ET1 using her left hand, although it took her an extra day to do so. She form was presented on 13 April 2018.

## Law

7 The primary time limit for presenting claims of unfair dismissal and of disability discrimination is three months from dismissal or act of discrimination. The effect of section 140B is to "stop the clock" during a period when the parties are in ACAS early conciliation or to extend the time by one month after the end of the conciliation period. Even allowing for the period of ACAS early conciliation, it is common ground that all claims are out of time.

8 Section 111 of the Employment Rights Act enables me to extend time, if I am satisfied that it was not reasonably practicable for the Claimant to have brought the claim within time *and* where it has been brought within a reasonable time thereafter. This is a question of fact to be determined in a two stage process. Ill health may

prevent an employee from presenting a claim in time but the burden is on the Claimant to produce evidence in support of a contention that her health was the reason for delay. The test is not one of absolute incapability or impossibility but of reasonable practicability, namely what could be done given the Claimant's health in the relevant period.

9 The ongoing conduct of an internal appeal of itself does not render it not reasonably practicable to have presented the claim in time. However, as accepted in **Schultz v Essex Training Co Ltd** [1999] ICR 1201, the Court of Appeal held that in deciding whether it was reasonably practicable to have presented the claim in time, the Tribunal has to consider the surrounding circumstances and the aim to be achieved by limitation periods, including whether the applicant was hoping to avoid litigation by pursuing other remedies in which context attention would normally focus on the closing rather than the early stages of the period of limitation. Where illness is relied upon, although its effects had to be assessed in relation to the overall period of limitation, the weight to be attached to a period of disabling illness varied according to whether it occurred in the earlier weeks or the far more critical weeks leading up to the expiry of the limitation period.

10 Since **Schultz** was heard in 1999, a statutory requirement to attempt early conciliation via ACAS has been introduced. This has the key aim of encouraging parties to resolve their disputes without resort to litigation.

11 As for the discrimination claim, section 123 of the Equality Act 2010 provides that no complaint may be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable.

12 If the claim is presented outside the primary limitation period, the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

- Time limits in employment cases should be observed strictly and an extension is the exception not the rule, see **Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576.
- The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended;
- The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;
- This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks

to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues;

- There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, **British Coal Corporation v Keeble** [1977] IRLR 336. These are the length of and reasons for delay, the extent to which the cogency of evidence is likely to be affected by delay, the extent to which the party pursued is cooperated with any request for information, the promptness of which the Claimant acted whilst he/she knew the facts given was the cause of action and the steps taken by the plaintiff to obtain appropriate professional advice one he/she knew of the possibility of taking action.

13 This is essentially a balancing exercise: balancing the prejudice to the Claimant of not permitting the claims to proceed against the prejudice to the Respondent of requiring them to defend the claim where time has expired. I also accept Mr Thakerar's submission that the Claimant who leaves it to the very last minute to present their claim is running the risk of being out of time and care must be taken.

## Conclusions

14 I have accepted the Claimant's evidence that she wanted to await the outcome of the internal appeal which she believed would resolve the dispute. The Claimant was aware of the relevant time limits at all material times and it is not suggested that she had inaccurate advice. The Claimant contacted ACAS in a timely manner and sought to benefit from early conciliation over a six week period. The limitation period was not left to expire due to the appeal alone and I conclude that the Claimant was genuinely seeking to avoid litigation by pursuing other remedies, internally and externally. It was only upon receipt of the appeal decision on 12 March 2018 that the Claimant decided she had no alternative but to proceed to a Tribunal claim.

15 At the date of receipt of the appeal decision, the Claimant still had some three weeks within which to present her claim. She had not left it to the day before time expired. Whilst the period of ill health in this case was less significant than that in **Schultz** (where the Claimant had only been sufficiently well for seven or eight weeks of the limitation period), the same principle applies and the focus is therefore on the closing stages of the limitation period.

16 Mr Thakerar's submissions were careful and considered, addressing only the period of time before receipt of the appeal decision. He fairly accepted that the Claimant's health had significantly deteriorated following receipt of the appeal outcome letter and that she would struggle to have presented her claim after that time. I agree. For these reasons, I am satisfied that was not reasonably practicable for the Claimant to have presented her claim in time. Once sufficiently recovered from her POTS to sit up in bed and make a telephone call, the Claimant acted with expedition to seek legal advice and present her claim. The subluxated right wrist was caused by the Claimant's EDS and caused a further one day delay. The claim was presented within a reasonable time thereafter.

17 Turning to a possible extension of time under the Equality Act, I have accepted that the Claimant had a good reason for the 11-day delay. There is no suggestion by

the Respondent that this relatively short delay has adversely affected either the cogency of the evidence or the ability to have a fair trial. The Claimant's failure to issue proceedings or seek legal advice closer to her dismissal are relevant factors but I consider them to carry little weight in this case given the ongoing genuine attempts to resolve matters through the internal appeal and timely contact with ACAS. The prejudice to the Claimant in not permitting her to proceed with her claims would be significant. She will be entirely shut out from the Tribunal process and the ability to have the Tribunal scrutinise whether or not her treatment was discriminatory. The prejudice to the Respondent is that it is being required to defend the claim which if strict time limits were applied, it would not have to do.

18 In the absence of any material prejudice and given the reasons for the delay, I am satisfied that the burden comes down in favour of the Claimant and that time should be extended.

19 Accordingly therefore all claims will proceed. The issues are identified and Case Management Orders made in a separate Summary.

Employment Judge Russell

13 November 2018