EMPLOYMENT TRIBUNALS

Claimant: **Ms M Kamara**

Respondent: **London Borough of Waltham Forest**

Heard at: **East London Hearing Centre**

On: **12 March 2018**

Before: **Employment Judge Russell**

Representation
Claimant: **Mr D Dapo (McKenzie Friend)**
Respondent: **Mr M Springer (Solicitor)**

JUDGMENT

It is the judgment of the Employment Tribunal that:-

1. **The complaints of unfair dismissal and race discrimination were presented out of time.**

2. **It was reasonably practicable to have presented the complaint of unfair dismissal within time. Alternatively, the Claimant has not presented it within a reasonable time thereafter.**

3. **It is not just and equitable to extend time for the complaint of race discrimination.**

REASONS

1. By a claim form presented to the Tribunal on 5 December 2017, the Claimant brought complaints of unfair dismissal and race discrimination arising out of the termination of her employment with the respondent with effect from 23 November 2016. The Claimant engaged in ACAS Early Conciliation from 20 February 2017 until 15 March 2017. The primary time limit would have expired during the period of early conciliation. The effect of that early conciliation period was to extend the primary time limit to 12 April 2017. It is not in dispute that the case is out of time. The issue before me today is whether I should exercise my jurisdiction to extend time.

Law

2. There are two different discretions available to me. The first is under the employment rights act, section 111 where I can extend time if I am satisfied that it was not reasonably practicable 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. The burden is on the Claimant to produce evidence in support of such a contention. The test is not one of absolute incapability but of practicability, namely what could be done given the Claimant's health in the relevant period. In considering whether the claim was brought within a reasonable period thereafter, the Tribunal is entitled to have regard to the public interest in claims being brought promptly and the prejudice caused in allowing the claim to proceed out of time.

3. 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. 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. For the purposes of this section conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

4. 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.

Facts and Conclusions

5. The facts of this case may properly be described as tragic. The claimant was a good, long-serving employee of the respondent about whose work there was no criticism. The Claimant suffered the indescribable trauma of having her son murdered in September 2015. Not surprisingly, this caused a significant harmful effect upon her mental health, such that she was unable to continue to attend work. Medical certificates for the relevant period and until January 2018 refer to bereavement reaction, depression and other significant mental health difficulties.

6. The Claimant's absence from work commenced on 4 November 2015. In early 2016, the Respondent initiated its Managing Sickness procedure. Whilst the reason for the Claimant's sickness was tragic and exceptional, it was appropriate for the Respondent to consider her absence under this procedure. The Claimant was absent from work for health reasons, albeit that this was entirely understandable given the cause.

7. On 14 April 2016, Occupational Health produced a report which set out the severity of the effect of the bereavement on the Claimant's health. The first formal meeting took place on 20 June 2016. The Claimant was represented by a trade union official. The Respondent's case is that various options were discussed, including working days instead of nights, working elsewhere or a career break. The Claimant denies such options were offered.

8. Further Occupational Health evidence was obtained on 18 July 2016, setting out the effect upon the Claimant's ability to focus and concentrate. The final formal hearing under the procedure was held on 18 November 2016. The letter of dismissal sent on 22 November 2016 records the contents of that meeting. In it the decision makers says that she took into account the difficult and distressing time suffered by the Claimant, the fact that she was on medication and had found it hard to engage and participate in the meeting. The letter recorded the offers that the Respondent says were made in June 2016 and that there was a further discussion about a career break in the November meeting. The claimant did not want this is an option. There was some discussion about medical ill-health retirement that this was considered and available on the medical evidence. The dismissal was effective on 23 November 2016, but the Claimant was paid 12 weeks' salary in lieu of notice.

9. The Claimant appealed against her dismissal by letter of 9 December 2016, again setting out the circumstances in which she found herself. She referred to the effect upon her mental health and the duties the Respondent owed her under the Equality Act. She describes herself as suffering from depression and being very emotional.

10. The appeal hearing took place on 10 February 2017. Again, the Claimant was represented by a trade union official, Ms Price. The notes of the meeting record a discussion about the career break option. Ms Price said that the reason it had not been accepted at the time was the emotion that the Claimant was going through made

her feel unable to accept it. The HR advisor said that this was not the first time that a career break been offered; it had been offered at the initial meeting, which I take to be that on 20 June 2016. Ms Price did not deny that such an offer had been made at that stage but rather said that the Claimant was not sure that she would be able to return to the same line of work. The Claimant's appeal was rejected by letter dated 15 February 2017.

11. The Claimant commenced early conciliation on 20 February 2017.

12. On 3 March 2017, Victim Support wrote to the Respondent on behalf of the Claimant. The letter sets out the circumstances in which the Claimant found herself. It stated that the service specialises in providing practical and emotional support and often requires them to advocate on behalf of victims' families with their employers. It asks that the Respondent show sensitivity and understanding show.

13. The early conciliation period ended on 15 March 2017.

14. The Claimant contacted her MP and met with him in early July 2017. On 11 July 2017, he wrote to the Respondent on her behalf, asking for sensitivity and whether the Respondent may be able to re-employ the Claimant in a similar role. The Respondent replied on to the effect that it had relied on medical evidence which suggested that there was no identified timeframe for recovery. The Claimant was not offered re-employment. Correspondence between the Claimant's MP and the Respondent continued into September 2017. The Respondent's email to the MP on 15 September 2017 referred to the approach to ACAS but that no Employment Tribunal application had been received. The MP's response on 22 September 2017 did not refer to this point.

15. The Claimant's initial claim form when presented contains no details of the grounds upon which she said that her dismissal was an act of race discrimination. On 12 February 2018, the Claimant provided further details of her claim. She set out her belief that the Respondent had acted unfairly and discriminated against her by being entirely unsympathetic and uncaring, failing to follow its own procedures and making no genuine attempts to assist her. The Claimant stated that she was discriminated against by the Respondent as a result of her disability arising from ill-health after the murder of her son and that reasonable adjustments were not made. It pleads no facts to support the allegation of race discrimination.

16. At the beginning of today's hearing, I explored with Mr Depo the way in which the Claimant puts her discrimination claim. She relies upon her race, black African. Essentially, Mr Depo relies upon what he characterises as the extreme unreasonableness of the Respondent's actions as the basis of the discrimination claim. I reminded myself that as a matter of law, unfair or unreasonable treatment of itself is not sufficient. Where, however, there is a comparator who is treated more favourably the absence of an explanation for the unreasonable treatment or inconsistent explanations may amount to the 'something more', **Anya v University of Oxford** [2001] ICR 847, CA. The difficulty for the Claimant is that she relies upon no actual comparator but on a hypothetical comparator. As Mr Depo put it, there can be no actual comparator in such tragic circumstances as hers. As a result, I formed the overall view that her race discrimination claim is not strong. Indeed, I would characterise it as weak.

17. The Claimant's explanation for the delay in presenting her claim is that she was unable to manage her affairs due to the effect on her health of the murder of her son. The Claimant states that she now has the support of the church, is in receipt of pastoral care which has advised her to resume employment as it is therapeutic and the support of her local MP who has communicated with the Respondent.

18. The Claimant relies upon the effect of her health upon her ability to present a claim. A letter from her GP dated 20 July 2017 confirms that the Claimant suffered from a prolonged bereavement reaction to the death of her son, which had not improved and that she was not suffering with depression which made it hard for her to concentrate. The Claimant had started taking anti-depressants and had been referred for a mental health review. The GP stated that the Claimant was having great difficulty coping with day to day living. There is no medical evidence after this date.

19. Dealing first of the unfair dismissal claim, the appropriate test is whether it was reasonably practicable to have presented the claim in time. The Claimant does not need to show that she was absolutely incapable of presenting her claim. Rather I consider whether it was reasonably practicable for to her to have done so. There is no medical evidence before me to cover the period from November 2016 to April 2017. The earlier Occupational Health reports and later GP letter suggest that the Claimant was having problems with focus, concentration and day to day living as a result of her mental health. On the other hand, she had the support of Victim Support and was assisted by her trade union (at least until her appeal was rejected). The Claimant was apparently able to commence early conciliation. On balance, I do not find that the Claimant has proved that it was not reasonably practicable for her to have followed up the early conciliation process with presentation of a Tribunal claim.

20. Even if it had not been reasonably practicable for the Claimant to have submitted her claim within the primary time limit, I would not have concluded that she had presented her claim within a reasonable period thereafter. The Claimant was capable of meeting with her MP and providing sufficient information that he took up matters on her behalf in July 2017. There is no medical evidence beyond the fit notes after the GP report in July 2017 to suggest that the Claimant could not reasonably have presented her claim sooner than December 2017. The email correspondence between the Respondent and the Claimant's MP in September 2017 referred to the fact that there had been no Tribunal claim presented yet nothing was done. With a degree of regret, but applying the law as I must do, I conclude that the Tribunal does not have jurisdiction to hear the unfair dismissal claim.

21. As for the race discrimination claim, the Tribunal has a broader discretion to extend time as it considers whether it is just and equitable to do so. The Claimant was sufficiently aware of her ability to bring a Tribunal claim that she completed the ACAS early conciliation process. The delay following completion of that stage has been almost eight months (12 April to 5 December 2017). The Respondent's conduct has not contributed to the delay. The Claimant's health is undoubtedly poor, but I have no evidence as to the extent and effect of the Claimant's health between July and December 2017 for me to be satisfied that it was of such magnitude that she could not equitably have been expected to present her claim sooner.

22. If I had been satisfied that the race discrimination claim appeared strong, I would have concluded that the balance of prejudice required an extension be granted given the Claimant's health and the absence of any evidence of actual effect upon the cogency of the evidence. However, I have not concluded that the claim is strong. As such, the Claimant suffers very little prejudice in not being granted the extension of time whereas the Respondent would be greatly prejudiced. Overall, I conclude that the claim is just too weak and the delay too great for an extension to be granted.

23. I hope that the Claimant is able to move forward in some way and begin to recover from the terrible experience which she has suffered. I made the point to Mr Springer that all that the Claimant wants is to get back to work and work is generally recognised as having a very therapeutic effect. The Claimant was highly regarded and there appear to have been no concerns about her work. On its own case, the Respondent was prepared to offer a career break a year ago. Whilst not within the power of the Tribunal to order it, it may be that the Respondent could assist the Claimant in some way in her efforts to get back to work. The Claimant must be aware that Mr Springer cannot make any promises today and that local authorities are required to follow what can be quite rigid rules on recruitment. Nevertheless, on the exceptional circumstances of the case, it may be possible for the parties to have some meaningful discussion.

Employment Judge Russell

12 March 2018