EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Miss G Machingura	**v**	Oxford University Hospitals NHS Foundation Trust

PRELIMINARY HEARING

Heard at: Reading **On:** 11 September 2018

Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: Ms F Mubayiwa (sister)
For the Respondent: Mrs H Winstone of Counsel

JUDGMENT

1. The Employment Tribunal cannot consider the Claimant's complaint of unfair dismissal presented on 25 September 2017. It was not presented before the end of the period of three months beginning with the effective date of termination. It was reasonably practicable for the complaint to be presented before the end of that period of three months.
2. The Claimant's complaint of direct discrimination (race) presented on the 25 September 2017 was presented outside the time limits for the presentation of complaints contained in section 123 of the Equality Act 2010. It is not just and equitable to extend the time for the presentation of the complaint.

REASONS

1. The preliminary issue is whether a Tribunal is prevented from considering the claim because it was presented outside the time limit for doing so or whether the limited exceptions to that prohibition apply. In this particular case the law applicable is contained in section 123 of the Equality Act 2010 and also in section 111 of the Employment Rights Act 1996.

2. The parties agree that the effective date of termination was 30 September 2016. According to the normal time limit in the Equality Act 2010 and the Employment Rights Act 1996 the claims would have needed to be presented by 25 December 2016.

3. There are provisions in both statutes which provide for an extension of the time limit to facilitate early conciliation through ACAS. In this case, the

Claimant did not contact ACAS until 20 September 2017. The extension of time for early conciliation does not help the Claimant. The claim is about nine to ten months out of time.

4. In the claim form the Claimant states:

> *"I did not bring my claim within the 3-month time limit and I am seeking an extension of time for bringing my claim based on the following grounds:*
>
> 1. *Before the ruling in R (on the application of Unison) v The Lord Chancellor [2017] UKSC 51, I could not afford to pay fees required to bring an employment tribunal claim within the time limit. The fees imposed under the Employment Tribunals and Employment Appeal Tribunal Fees Order of 2013 … in respect of proceedings at the Employment Tribunal ... prohibited me from exercising my employment rights. I am therefore, asking the tribunal to exercise its discretion and allow my claim to proceed.*
> 2. *Furthermore, I am requesting that my claim be allowed because it would be just and equitable to do so. The discrimination that I suffered because of my past employer's conduct caused me psychiatric injury which made it difficult for me to continue working as a dental nurse. I had to leave that employment on 30 September 2016, and have been unable to continue in that career.*
> 3. *The employer was uncooperative, and dismissive of my case. During the internal grievance procedure, I asked the employer for financial compensation, but this was not addressed. With no recourse to the tribunal for redress, I was forced to leave that job with nothing to compensate me for my injury to feelings, psychiatric injury and financial loss.*
>
> *I therefore request that, in the interests of justice and equit, my claim be allowed."*

5. The notice of hearing for this preliminary hearing contained the following note.

> "You may submit written representations for consideration at the hearing. If so they must be sent to the Tribunal and to all the other parties not less than 7 days before the hearing. You will have to chance to put forward oral arguments in any case."

There were no further directions given for the provision of witness statements. At the hearing today the Claimant has given oral evidence.

6. In her evidence, she stated that she wants to make a complaint about discrimination at work; she wants to complain about discrimination on the grounds of race.

7. She referred to an incident which occurred in April 2016 where a patient did not want to be treated by a black nurse. She complains that the Trust, her employer, went ahead and provided the patient with treatment. The Claimant's complaint is about the incident, the way that her colleagues reacted on the

date that the incident occurred, and the way that the matter was considered by the Trust through is internal procedures.

8. The Trust accepts that there were errors made in dealing with the incident and the Claimant received apologies made on behalf of the Trust on at least two occasions. One from the Clinical Lead, Mr McLaren on behalf of the Chief Executive and another from the Chairman of the Trust. The apologies related to the Claimant the way that the Claimant had been treated.

9. The Claimant was not happy with the way matters were dealt with. She was unfortunate in that as a result of that incident, she became unwell and was off work for a period between April and July 2016. During that time, the took advice from her union and also made contact with ACAS.

10. The Claimant raised a grievance which was initially dealt with on an informal basis and then subsequently on a more formal basis.

11. The Claimant's evidence was that there was some discussion with ACAS about the Claimant bringing proceedings in the Tribunal. At that stage the advice from the Claimant's union related to pursuing matters internally. The Claimant's union assisted her during her internal processes.

12. The Claimant was dissatisfied with the way that the Respondent dealt with her claim. She was of the view that the Trust was employing delaying tactics and as a result she decided that she would tender her resignation. The Claimant gave her resignation on 5 September 2016 to bring her employment to an end on 30 September 2016.

13. The Claimant contacted the British Dental Association (BDA) for assistance. Having contacted the BDA, the Claimant's state of mind was that she could bring proceedings against the Respondent but if she was to do so she would require legal assistance from a solicitor and she did not have the funds to pay a solicitor to represent her. The BDA was not in a position to provide this for the Claimant.

14. The Claimant had discussions with ACAS.As a result of the discussions that she had with ACAS, the Claimant was of the view that she needed money in order to be able to bring her case.

15. The Claimant had discussions with her union. The Claimant was told the union's position was that the matter had been dealt with informally and that "the Trust cannot give money in compensation for the events which occurred."

16. The Claimant approached the Citizens Advice Bureau. It was not entirely clear whether she approached the Citizens Advice Bureau before her employment with the Respondent came to an end as well as after or only after her employment came to an end. As a result of her discussions with the Citizens Advice Bureau, the Claimant's position was that she could not bring a claim because she could not afford it because of the requirement to pay fees.

17. Following the termination of her employment with the Trust, the Claimant sought and obtained alternative employment. Initially she worked for the '111

service'. That employment only lasted a couple of weeks. Following that employment coming to an end, the Claimant approached the Citizens Advice Bureau who gave her advice on claiming benefits. At that time the Claimant also sought advice about bringing proceedings in the employment tribunal. The Claimant says that when she discussed her case with the Citizens Advice Bureau in November 2016 she was told: "I do not think you can do that. Your case is out of time".

18. The Claimant was able to secure a permanent employment in December 2016 and she also moved to the West Midlands.

19. In July 2017, the House of Lords gave judgment in the case of the Unison challenge to the Fees Order. That decision came to the Claimant's attention when she was told about the case by a family member. The Claimant again contacted ACAS in September 2017. She obtained a conciliation certificate on 20 September 2017 and she presented the claim which is under consideration before me on 25 September 2017. The Claimant states that in the period between the termination of her employment (30 September 2016) and 20 September 2017 she did not approach ACAS.

20. What is the impact of that sequence of events on the Claimant's right to bring a complaint of unfair dismissal and race discrimination before the employment tribunal?

21. I considered the position in relation to unfair dismissal first. In the claim form, the Claimant has ticked the box which reads 'unfair dismissal'. The termination of her employment was on 30 September 2016. This was about a week short of the Claimant gaining two years qualifying employment to give her the right to claim unfair dismissal pursuant to section 94 and 98 Employment Rights Act 1996. A preliminary perusal of section 97 Employment Rights Act 1996 suggests that it is not clear that the Claimant in fact would have had the right to bring the claim where a two-year qualifying employment was required. Without determining the question of qualifying employment, I deal with the case on the assumption that the Claimant would have enjoyed the right to do so nonetheless.

22. A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer. An employment tribunal shall not consider such a complaint of unfair dismissal unless it is presented to the tribunal before the end of the period of three months beginning with the effective date of termination, or 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.

23. Where, as the Claimant here, a person has not presented a claim within three months, they must show that (1) it was not reasonably practicable to do so; and (2) that (where it was not reasonably practicable to do so) that the claim was presented within a reasonable period of time. The burden of proving that it was not reasonably practicable rests on the Claimant.

24. Palmer and Saunders v Southend-On-Sea Borough Council [1984] IRLR 119, explained that the words "reasonably practicable", contained in section 111(2): "…to construe the words 'reasonably practicable' as the equivalent of 'reasonable' is to take a view too favourable to the employee. On the other hand 'reasonably practicable' means more than merely what is reasonably capable physically of being done… In the context in which the words are used in the… Act … they mean something between these two. Perhaps to read the word 'practicable' as the equivalent of 'feasible'… and to ask colloquially and untrammelled by too much legal logic- 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'- is the best approach to the correct application of the relevant sub section." Factors which an employment Tribunal may consider include: the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used; what was the substantial cause of the employee's failure to comply with the statutory time limit; whether he or she had been physically prevented from complying with the limitation period for instance, by illness or postal strike or something similar; whether at the time when he or she was dismissed, and if not then when thereafter, he or she knew that he or she had the right to complain that he or she had been unfairly dismissed; whether there has been any misrepresentation about any relevant matter by the employer to the employee; whether the employee was being advised at any material time and, if so, by whom; the extent of the advisors' knowledge of the facts of the employee's case; the nature of any advice which they may have given to him; whether there was any substantial fault on the part of the employee or his advisor, which has led to the failure to comply with the statutory time limit.

25. The requirement for fees was introduced on 29 July 2013 and a Supreme Court decision in the Unison case held that such fees were unlawful and it struck down the legislation. Part of the Judgment of the Supreme Court given by Lord Reed said as follows:

> "As explained earlier, the review report itself estimated that around 10% of claimants said that they did not bring proceedings because they could not afford the fees. The review report suggests that they merely meant that affording the fees meant reducing other areas of non-essential spending in order to save money. It is not obvious why the explanation given by the claimant should not be accepted but even if the suggestion in the review report was correct, it is not the complete answer. The question whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on the behaviour in the real world. Fees must therefore be affordable not in a theoretical sense but in the sense that they can reasonably be afforded. Where households on low to middle incomes can only afford fees by sacrifice of the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living the fees cannot be regarded as affordable."

26. Lord Reed placed emphasis on low value claims, thus he stated:

> "Further, it is not only where fees are unaffordable but they can prevent access to justice they can equally have that effect if they render it futile or irrational to bring a claim if for example fees of £390 have to be paid in order to pursue a claim of £500 no sensible person would pursue the claim unless he can be virtually certain that he would succeed in his claim that the award would include the reimbursement of the fees and that the award would be satisfied in full. If those conditions are not met, the fee will in reality prevent the claim from being pursued whether or not it can be

> afforded. In practice however, success can rarely be guaranteed. In addition, on the evidence before the court, only half of the claimants who succeeded in obtaining an award received full payment and around a third of them received nothing at all."

27. Section 123 Equality Act 2010 provides that proceedings on a complaint of direct discrimination brought by an employee against her employer may not be brought after the end of the period of 3 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.

28. The test contained in the Equality Act 2010 and is different to that in the Employment Rights Act 1996, the is whether it is just and equitable. I have been referred to the case of British Coal Corporation v Keeble (1997) where it was stated that an employment tribunal can be assisted by consideration of the factors which are mentioned in section 33(3) of the Limitation Act 1980 which deals with the exercise of discretion to disapply time limits in personal injury cases.

29. Adapting the section 33(3) factors to an employment tribunal case the factors to consider could include the following. The length of, and the reasons for, the delay on the part of the claimant; the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the parties is or is likely to be less cogent than if the action had been brought within the time allowed by section 123 Equality Act; the conduct of the respondent after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claimant's cause of action against the respondent; the duration of any disability of the claimant arising after the date of the accrual of the cause of action; the extent to which the claimant acted promptly and reasonably once she knew whether or not the act or omission of the respondent, to which the injury was attributable, might be capable at that time of giving rise to an action; the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

Unfair dismissal

30. If this case had been simply a consideration of whether the Claimant would afford to pay the fees, or it was rational of her to pay the fees in order to pursue this case I would have expected the Claimant to produce evidence about her means which was more cogent that the general statements she made about not having the means.

31. I would have expected some enquiry carried out into the schedule that the claimant provided setting out her means and her resources. The document provided by the Claimant is to support her statement that she was not in a position to be able to afford to pay fees and on the face of it that document appears to substantiate that.

32. The difficulty that is presented in relation in this case comes not from the fact that the Claimant is able to show that she was not in a position to pay the fees but from the fact that the Claimant has completely failed to address a significant feature of the fees regime which was the ability to obtain a remission. The Claimant had advice from ACAS; the Claimant had contact with BDA-it is not clear whether they gave her advice in relation to the bringing

of claims and the fees regime; the Claimant had the assistance of her trade union; the Claimant on at least one occasion also had the assistance of the Citizens Advice Bureau about bring proceedings in the employment tribunal.

33. It was an inherent part of the fees regime that claimants had the ability to apply for remission. The failure to address the availability of remission of fees to me is a significant and important failing. The Claimant simply has not addressed it in the terms of what if any advice she got about remission and what enquiries she made about remission or whether she would have qualified for remission and if so to what extent.

34. The Claimant says that nobody made any mention of remission. It is in my view quite possible that a person dealing with the Claimant might fail to appreciate the significance or existence of the fee remission. I find it impossible to accept that each and every one of the institutions and persons who the Claimant approached in this period, all of whom (apart from the BDA about whom I am not clear on whether or not there was a discussion of fees) discussed with the Claimant the question of fees, would fail to mention the availability of a possible remission of fees. Part of the public discussion in the media and specialist publications concerning the fees regime was about the affordability of fees for people just like the Claimant and the availability of remission was very much part of that. The omission of all of the people that the Claimant approached to discuss the fees remission scheme is so unlikely that I am unable to accept the Claimant's evidence on this.

35. The Claimant who is acting in person has been able to produce, person either from her own research or with the assistance of other people close to her, documents which clearly and articulately argue her case. She has been able to research and produce references to pertinent decided cases, she has made reference to the Presidential Guidance. It is surprising that somebody who is able to carry out the quality of research and preparation which the Claimant has been able to do for this hearing was not able to find out about and make enquires about whether she would have qualified for fees remission. In my view what is critical in this case.

36. In order for the Claimant to rely on the existence of the fees regime as preventing her from bringing a claim she should show that in fact that was the case. An essential part of that is for the Claimant to be able to say that "and I wasn't able to bring the claim because I could not afford it and I wasn't entitled to a fee remission" or an explanation I accept that shows she was unable to rely on the remission.

37. I do not accept that it is reasonable for the Claimant to say that she did not know about remission. It is likely that at that time anyone looking to make a employment tribunal claim concerned about the affordability of fees would have applied for remission of fees.

38. In the hearing before me the Claimant has not addressed the question what would have happened if she had applied for remission. The burden is on the Claimant. She has for example not said that had she applied for remission she would have been refused or that the extent of part remission would still have left her in a position where bringing the claim was beyond her.

39. I am unable to conclude that the Claimant was prevent from bringing her claim because of fees regime. It was reasonably practicable for the Claimant to bring her claim for unfair dismissal in 2016.

40. If it is right that the Claimant was not aware of fees remission, then it seems to me that that is a factor that I can also take into account in considering whether it is just and equitable to extend time. In my view the Claimant failed to carry out such reasonable enquiries as I would have expected a proposed litigant to an employment tribunal in the period between 2013 and 2017 to take who was genuinely interested in bringing proceedings and prevented from doing so by reason of fees.

41. I am unable to accept the Claimant's proposition that she was prohibited from bringing the claim by reason of fees because she could have applied for remission. The absence of any evidence of what would have happened had she applied for remission means that I cannot say that applying would have made no difference.

42. The sole basis on which the Claimant says it is not just and equitable to present the claim is arising from the existence of fees. I am of the view that her failure to apply for remission was not reasonable in c.2016. What the Claimant should have done was explore the fees regime in a reasonable way and have it determined whether or not a fee remission was possible.

43. In coming to my conclusion that it was unreasonable for the Claimant not to make enquires about remission, I take into account that the Claimant's schedule of loss gives a total loss claimed of £111,728.29. This is a figure which is more than six times the amount that the Claimant gives as her annual earnings in her employment with the Respondent.

44. The Claimant's claims of unfair dismissal and direct race discrimination cannot be considered by the Employment Tribunal. The complaints have been presented outside the time limit for the presentation of complaints. It was reasonably practicable to present the claim of unfair dismissal in time. It is not just and equitable to extend the time for the presentation of the complaint of race discrimination.

45. There are further factors that I considered which would also have led me conclude that it was not just and equitable to extend the time for presenting a claim if I had accepted the Claimant's position in relation to fees.

46. Considering the way that the Claimant puts her case and what she seeks to complain about. It seems to me that the gravamen of the Claimant's complaint is the way that the Trust reacted to the behaviour of a patient on the occasion in April 2016. What the Claimant does not say is that the Respondent acted in way that discriminated against her in the way that it treated her.

47. The Claimant does not make a comparison of her treatment in contrast to a person of a different race. She takes the action of a purportedly racist patient and says that the Trust should have reacted differently in her case and

amongst other things should have reacted in a way which was consistent with their policies.

48. This is a case which appears to me that would be difficult for the Claimant to succeed. In a case of direct discrimination as this appears to be at this stage, what is required is to take the circumstances of the complainant and compare them against an appropriate comparator whose circumstances are not materially different. The Claimant does not do that. What the Claimant does is ask that the Tribunal look at a 'racist incident' and then asks the Tribunal to look at the way that the Trust went on to respond to it.

49. Whilst the Claimant may well be able to make a number of complaints about the way that the Trust behaves, she may even be able to say that they were failing in some of their policies but it appears to me that it is not really an analysis of discrimination as is defined in the Equality Act 2010.

50. I cannot make any conclusions on whether the Claimant's claim would have succeeded but it seems to me that looking at it from a simple analysis of what was being alleged, there would be difficulties for the Claimant to satisfy the various hurdles that she would have to satisfy in order to be successful in the claim of discrimination.

51. In making these comments, I am not making any judgment whatsoever or suggesting in any sense that what the Claimant suffered was not very real, very painful and very upsetting. All I am saying is that there are occasions when the law does not necessarily always provide you with a remedy for the injury that you genuinely suffer. On my understanding of the circumstances giving rise to the case it is not the actions of the Trust towards the Claimant that cause her hurt but the patient it is difficult to see how the Claimant's case could succeed.

52. So, for those reasons, I am afraid that I am not satisfied that the Employment Tribunal has jurisdiction to deal with either of the claims and so the claims are struck out.

_____

Employment Judge Gumbiti-Zimuto

Date: 27 September 2018

Sent to the parties on: .....