



EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 18 8 2022

Claimant: Ms M Olenska

Respondent: London United Busways Ltd T/A RATP Dev London

Before: Employment Judge Mr J S Burns

Representation

Claimant: Mr F Neckles (Trade Union Representative)

Respondents: Ms I Cernis (Solicitor)

JUDGMENT

1. The claims in 2204397 21 and 2201310 22 are struck out
2. The trial/final hearing listed for 10-14 October 2022 is cancelled.

REASONS

1. On 12/4/22 today's OPH was arranged to consider whether the Claimant's second claim (2201310 22) had been brought in time. On 11/8/22 the Respondent applied for the claims generally to be struck out in full under Rule 37.
2. I have considered the strike out in relation to both claims 2204397 21 and 2201310 22 and the time point in relation to the second claim.
3. The documents were in a Respondent's bundle of 204 pages and a Claimant's bundle of 23 pages and a 6 page further bundle of additional Claimant medical documents. I also received a witness statement and impact statement from the Claimant both dated 10/8/22 and a document from Mr F Neckles dated 18/8/22 containing the Claimant's response to the strike out warning and application. I have considered all these documents. I received evidence from the Claimant and then oral submissions from each side exceeding one hour each.
4. The Claimant whose date of birth is 28/2/1957, and who has many long-standing health problems, started work for Respondent on 12/12/1994. She worked as a Garage Support Assistant but during the Covid19 pandemic the number of these roles was reduced from 4 to 2 leading to the Claimant being selected for redundancy in July 2021.
5. She contacted ACAS on 23/7/2021 and presented her first claim on 26/7/21 claiming Breach of Section 44(1)(c) Employment Rights Act 1996 ("ERA 1996"), Direct Age Discrimination

contrary to Section 13 Equality Act 2010 ("EA 2010"); Harassment on Grounds of Age contrary to Section 26 EA 2010; Victimisation on Grounds of Age contrary to Section 27 EA 2010; Direct Disability Discrimination contrary to Section 13 EA 2010; Discrimination Arising from Disability contrary to Section 15 EA 2010; Victimisation on Grounds of Disability contrary to Section 27 EA 2010; and Harassment on Grounds of Disability contrary to Section 26 EA 2010.

6. The impairments referred to in support of the disability discrimination claim were listed in the POC as Rheumatoid Arthritis, Osteoarthritis, Diabetes Type 2 and Underactive Thyroid (Hypothyroidism).
7. The first claim was presented on 26/7/21 with the assistance of Mr J Neckles (Trade Union representative on behalf of the PTSU) who has considerable prior experience of Employment Tribunal claims, and who is the brother of Mr F Neckles who is representing the Claimant today and who also takes a leading role in the PTSU). Mr J Neckles gave his email address in box 1.9 on the ET1 form for purposes of any communications from the Tribunal or Respondent.
8. The first claim was presented while the Claimant's employment was continuing and as a matter of substance relates to the redundancy exercise which commenced in July 2021.
9. On 22/8/21, as part of an attempted redeployment exercise, the Claimant accepted a new role (Garage Support Assistant (Claims)) on a trial basis planned to last from 6/9/21 to 22/10/21 but this was not successful.
10. On 6/10/21 the Claimant sent a letter to the Respondent's HR (Ms N Knight) stating that she had made a final decision not to remain in the trial role but rather to accept her redundancy package. On 7/10/21 she sent a further request demanding an exit form. Ms Knight replied the same day offering to meet with the Claimant to explore other vacancies but on 8/10/21 the Claimant replied declining the offer of a meeting and stating that "*the last day of my employment as per my contract is today*". She went on to demand 12 weeks notice pay as well as the redundancy payment. On 8/10/21 Ms Knight replied stating that it was the Claimant who had ended her employment and that no payment in lieu of 12 weeks notice would be paid to the Claimant because it was Claimant who had ended her employment early and the Respondent, if it had issued a notice of dismissal, (which it had not), would in any event have required the Claimant to work any notice period.
11. Ms Knight asked the Claimant to revert to HR by return if in the light of this information she (the Claimant) had changed her mind about terminating her employment.
12. On 10/10/21 the Claimant replied saying that she had ended her employment on 8/10/21 and she wished to have her redundancy payment.
13. The exit form was then issued showing the last day of service as 10/8/21 and the Claimant was paid her redundancy payment but no notice pay, which omission seems to have been the source of the dispute.
14. The Claimant told me in her oral evidence today that she had copied to Mr J Neckles at the time the correspondence between her and HR which confirms the termination of her employment on 8/10/21.

15. In the aftermath of the termination of her employment, the Claimant suffered poor mental health including stress, anxiety and depression. She obtained on 13/10/21 a GP fit note stating that she was not fit to work from 11/10/21 to 11/1/2022, on 12/1/22 she obtained a further fit note stating that she was unfit to work from 11/1/22 to 12/2/22 and on 11/2//22 stating that she was unfit to work from 12/2/22 to 12/5/22. These notes were obtained by her for purpose of an application for Universal Credit which she completed in January 2022. She also arranged psychological therapy counselling sessions from January to April 22.
16. In her oral evidence the Claimant said that during that time (from October 21 to February 22) she was well enough to make and receive telephone calls but had not been contacted by Mr J Neckles, but had been made aware in some way of the fact that a preliminary hearing in the first claim had been arranged for 18/2/22, which she decided not to attend as Mr J Neckles would be doing so on her behalf. She said she trusted Mr J Neckles to look after her claim and to take whatever steps were required on her behalf.
17. The case management preliminary hearing in the first claim took place on 18/2/22 before EJ E Burns. The Claimant was represented by Mr J Neckles who acknowledged that the Claimant's employment had been terminated in October 2021 and that any unfair dismissal claim would by then (18/2/22) be out of time. He made no reference to the Claimant being incapacitated or that he had tried but failed to get instructions from her. He told EJ E Burns that "he did not have any instructions in relation to an amendment application to add a discriminatory dismissal".
18. I find that to the extent that Mr J Neckles did not have instructions from the Claimant, this was because he had not bothered to contact the Claimant. Had he tried to contact her she would have been able to give him any necessary instructions, despite her ill-health.
19. During the 18/2/22 PH, the sec 44(1)(c) ERA 1996 claim was dismissed on withdrawal by the Claimant. The matter was listed for trial on 10-14 October 22.
20. It was recognised that the Claimant may wish to amend her claims to include reference to a possible unfair dismissal claim - and if so she was directed to send an amendment application in the first claim by 18/3/22 which, if objected to by the Respondent, would be dealt with at a further hearing on 12/4/22. These directions appear to have been made by consent and represented an agreed way forward for dealing with any proposed amendments or additions to the claims.
21. The Claimant was also directed to provide further particulars of her existing claims by 18/3/22 and to serve medical notes and an impact statement in relation to her claimed disability by 29/4/22. Disclosure by lists and copies was ordered for 17/6/22 so the parties could agree a trial bundle by 8/7/22 and exchange witness statements on 2/9/22.

22. On 18/3/22 Mr Neckles, who had failed to provide the further particulars which the Claimant had been ordered to provide by that date, instead sent an email to the tribunal stating that the Claimant proposed to present a second ET claim instead and seeking reassurance that it would be accepted and dealt with by the Tribunal. This step was contrary to the scheme of the directions issued, with the Claimant's consent, on 18/2/22, and introduced a considerable degree of unnecessary procedural complexity in what should have been a fairly straightforward matter.
23. The second claim presented on 18/3/22 confirmed that dismissal had taken place on 8/10/21 and brought the following new claims; Unfair Dismissal, Failure to Make Reasonable Adjustment, Unlawful Deductions from Wages and Breach of Contract. The new claim also included in amended forms all seven heads of claim referred to within the Claimant's first claim including what appeared to be a section 44 ERA claim which had already been dismissed on withdrawal. The impairments relied on for disability were again stated as Rheumatoid Arthritis, Osteoarthritis, Diabetes Type 2 and Underactive Thyroid (Hypothyroidism).
24. On 11/4/22 Mr J Neckles sent in late the further particulars for the first claim, which had been due on 18/3/22.
25. The two claims came before EJ Isaacson at a second PH on 12/4/2022. Again Mr J Neckles was in attendance for the Claimant. The first and second claims were consolidated and today's OPH was listed, with the trial remaining listed for 10-14 October 2022. The EJ noted the lateness of the FPs and warned Mr J Neckles of the importance of complying with Tribunal orders on time and communicating with the Respondent and agreeing any amendment to any ordered timetable as long as it did not affect the hearing dates.
26. A fresh timetable was set out for the FMH case-preparation as follows: Medical notes and impact statement to be served by 27 May 2022, Amended response, being a combined response including the response to the claimant's second claim by 17 June 2022, Disclosure for final hearing on 8 July 2022, Agreed bundle by 29 July 2022 and exchange of witness statements by 9 September 2022.
27. The Claimant served her medical evidence on 6/6/22, which was late as it was due by 27/5/22. Mr F Neckles suggested today that this was because it had been collected/received from the GP only on 3 June. There is no documentation or other objective evidence to show this and it is contradicted by an email dated 31/5/2022 which, during another part of today's hearing, Mr F Neckles said he had sent using Mr J Neckles's email address. The said email reads "*We will be getting possession of the Claimant's documents today, which will be disclosed by no later than Wednesday 1st June 2022*".
28. The Claimant provided no impact statement as ordered by 27 May 22.

29. The Claimant has failed to provide any list of documents or general disclosure in either claim by 8 July 2022 or at all. This has not been done even today. I reject Mr F Neckles's various submissions that (i) the limited medical documents sent in early June 22 satisfied this requirement (ii) that the Claimant has nothing further to disclose (iii) that she was and is not required to provide a List of Documents in any event and that (iv) the Respondent has itself not complied with disclosure.

30. EJ E Burns stated clearly that a List of Documents was required and EJ Isaacson simply postponed the date for compliance and did not revoke the requirement for a list. The Claimant plainly has possession of but has not properly disclosed relevant documents in her possession which go beyond the medical documents - for example she has produced in a supplementary bundle for today several documents showing her correspondence with Ms Knight in 2021. The Respondent did serve its List of Documents and 511 copies on time on 8/7/22, since when there has been no complaint or request from the Claimant about the contents of the Respondent's disclosure until a vague submission to this effect was made by Mr F Neckles in submissions today.

31. These defaults on the part of the Claimant occurred and continued notwithstanding numerous and repeated correspondence from the Respondent's solicitors sent to the Messrs Neckles and the Tribunal over the last few months. During the period 10/6/22 to 11/8/22 Ms Cernis sent 10 emails to Mr J and or Mr F Neckles with no reply from then whatsoever.

32. On 27 June 2022 the Respondent applied for an Unless Order. On 13/7/22 EJ Isaacson sent a Strike Out Warning to the Claimant's reps. This pointed out that the directions had not been complied with, pointed out that "*The Respondent cannot confirm its position regarding the Claimant's alleged disabilities until it has received the Claimant's impact statement*" and that "*the Claimant's representative had already been reminded by the Tribunal of the importance of complying with the Case Management Orders on time, after he failed to provide the Claimant's Further and Better Particulars on time*"

33. The warning required any objections from the Claimant to the strike-out to be sent to the Tribunal by 5/8/22.

34. The Claimant and Messrs Neckles did not reply by 5/8/22.

35. On 10/8/22 (about ten weeks late) the Claimant finally served her impact statement and today (18/8/22), shortly before the OPH started and nearly two weeks late Mr F Neckles served a Written Response to the Strike Out Warning.

36. The impact statement now provided is unsatisfactory. It contains little and generalised information about the effect on the pleaded Claimant's impairments on her ability to carry out day-to-day activities and introduces the following new previously un-pleaded impairments: Depression, Anxiety and depressive Disorder, Urinary Incontinence and Infections, close

fracture L/Little finger Proximal Phalanx; Multiple Joints Pain, Reynaud's disease, Fybromyalgia, Varicose veins in Left leg, fatty Liver disease, and obesity.

37. On reading the impact statement it is difficult to determine where the claimed symptoms/affect of one impairment ends and the next starts. The impact statement is not fit for purpose namely determining whether the Claimant was disabled by the pleaded impairments at the relevant time.
38. There is no application before me to amend the claims to add the new impairments - but if any such application had been made I would have refused it at this late stage.
39. The production of an impact statement did not depend on the Claimant's receipt from the GP or possession of her medical notes as such a statement should give an account of the affect of an impairment on day to day activities, a matter within the direct knowledge of the Claimant. Even if, which I do not accept, there was delay in the GP sending medical documents to the Claimant, this does not excuse or explain the protracted delay in producing the impact statement.
40. The written response to the strike out application served by Mr F Neckles today, as supplemented by Mr F Neckles's oral submissions, suggests two main reasons for the Claimant's failure and delay in complying with the directions since 1/5/2022. Firstly, it suggests that Mr J Neckles resigned from the PTSC union on 1/5/22 and took no active role in conducting the litigation from then on, because of health problems. Secondly it suggests that Mr Steve Harvey, a volunteer, agreed to take over conduct of the litigation but then failed to do the necessary work, and then spitefully deleted "a large number of ET Claimant files".
41. There is no medical or other objective evidence to support these bare assertions in Mr F Neckles's document and these problems, which allegedly date back to 1/5/22, were not mentioned to either the Respondent's solicitors or to the Tribunal prior to today. In any event the PTSC should not entrust legal work to unreliable volunteers.
42. Mr F Neckles also suggested that Mr J Neckles's email inbox was not monitored from 1/5/22 onwards, which suggestion conflicted with Mr F Neckles's other submission that it was he who had sent the email dated 31/5/22 from Mr J Neckles's email account. Furthermore, if Mr F Neckles was the one who sent the 31/5/22 email, then it follows that he had not handed over all responsibility for the Claimant case to Mr Steve Harvey at that time. Furthermore, not monitoring the Inbox of the person who had been conducting the litigation when that person had left the Union would itself be grossly negligent, especially when the address for that Inbox had been given to the Tribunal and the Respondent for purposes of all communications with the Claimant, with no change notified subsequently.

43. I am afraid that having listened carefully and at length to Mr F Neckles's varied and contradictory explanations, I am far from satisfied that a full, frank or acceptable account has been provided by him for the delays and failures on the part of him, his brother and his trade union in conducting the Claimant's case/s. The real explanation is incompetence, negligence and cavalier disregard for Tribunal directions by Messrs Neckles throughout.
44. Rule 37(1) provides that a claim can be struck out on inter alia the following grounds: (b) that the manner in which the proceedings have been conducted on behalf of a Claimant has been unreasonable (c) for non-compliance with any order of the Tribunal and (e) that it is no longer possible to have a fair hearing.
45. I find that all three of the circumstances referred to in the previous paragraph are fulfilled. There have been numerous protracted and repeated instances of unreasonable behaviour and non compliance.
46. As a direct result of the numerous delays and defaults it is in my view impossible to have a fair trial on the listed dates namely 10-14 October 22. The case is in disarray, with the Claimant's disclosure outstanding and resistance shown by Mr F Neckles in his submissions about this. The impact statement is defective, conflating the pleaded disabling impairments with numerous other ailments not previously relied on. It is not fair to expect the Respondent to defend claims when the Claimant remains in breach of her disclosure obligations. The (already rescheduled) date for finalising the bundle has passed weeks ago. It is unreasonable for the Respondent to be expected to prepare a bundle or prepare witness statements for exchange in early September as planned.
47. I have no confidence in any event and based on the prior history that if I allowed the Claimant further time and tried to recast the directions, that the Claimant would comply in any event.
48. Having regard to the scarcity of resources and the needs of other Tribunal users it is not reasonable or proportionate to vacate the trial and relist it.
49. Hence I strike out both claim numbers under Rule 37.
50. If I had not already struck out claim 2201310 22 ,I would have dismissed/struck it out as out of time in any event, for the following reasons:

51. Section 111 of the Employment Rights Act 1996 provides that: *'A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer. Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section 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.'*
52. Mr F Neckles submitted that the Claimant was dismissed only on 18/3/22, when she presented her second claim. This submission was contrary to the Claimant's position as discussed and confirmed by Mr J Neckles in the hearing on 18/2/22 and as pleaded by him in the unfair dismissal claim presented on 18/3/22. It is also contrary to the Claimant's own evidence as set out in her witness statement and in her oral evidence given today.
53. I have recorded in paragraphs 9-13 above the manner in which the Claimant's employment with the Respondent ended. Whether that termination was by means of dismissal, resignation or by mutual agreement is a matter I do not need to decide for present purposes, but it is clear that in any event the EDT was 8/10/21.
54. Hence time ran from then and expired on 7/1/22. The second claim when presented on 18/3/22 was 70 days late.
55. I do not find that it was not reasonably practicable for the unfair dismissal and like claims to be presented in time. The Claimant had the assistance of her union and Mr J Neckles, a trade unionist experienced in Employment Tribunal matters. The Claimant's mental ill-health did not prevent her communication with Mr J Neckles - I find that she reported the termination of her employment to him when it occurred and sent him the correspondence, trusting him to act for her in relation to her ET claims as was required for the protection of her interests. Mr J Neckles let her down. The reason for the non-presentation in time is Mr J Neckles not staying in touch with the Claimant and fulfilling the responsibilities that she had delegated to him. Had he stayed in touch with her and given attention to her case he could and should on her behalf have issued any unfair dismissal and related claims on her behalf before 7/1/22.
56. Having entrusted proposed claims to a professional advisor who turns out to be incompetent, ignorant or negligent does not make it not reasonably practicable to issue a claim in time. For example in Northamptonshire County Council v Entwhistle 2010 IRLR 740, EAT, an employment judge had erred in finding that it was not reasonably practicable for a claimant to present his unfair dismissal claim in time in circumstances where his solicitor had relied on incorrect information about the time limit provided by the employer. Once it had been accepted that the solicitor had been negligent, the tribunal was required to hold that it had been reasonably practicable for the claimant to present his claim in time; he could not rely on his adviser's mistake.
57. Similarly In Riley v Tesco Stores Ltd 1980 ICR 323 CA where the claimant received incorrect advice from an adviser from the CAB, this was treated as the fault of the claimant himself or herself. The claimant in Riley presented her claim out of time based on erroneous advice from

the CAB. It was found to have been reasonably practicable for her to present her claim within time because she had engaged a skilled adviser.

58. I see no reason not to apply these principles to a case where a claimant entrusts her affairs to an experienced TU advisor.
59. Furthermore, after the time limit had expired, the claim was not presented within a reasonable time thereafter - 70 days is not a reasonable period in the circumstances. It is notable that it is recorded that on 18/2/22 Mr J Neckles acknowledged that any unfair dismissal claim was already out of time but another month went by before the second claim was presented.
60. Section 123 of the Equality Act 2010 provides that: "*proceedings on a complaint within section 120 may not be brought after the end of— (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.*"
61. In Robertson v Bexley Community Centre 2003 IRLR 434 CA [25] per Auld LJ "*An employment tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However time limits are exercised strictly in employment cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. On the contrary, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. The exercise of discretion is thus the exception rather than the rule.*"
62. It is for the Claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule. The Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050 noted that "*factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).*"
63. In the instant case the delay was significant and wholly unjustified, and the second claim was presented some 23 weeks after the employment had ended. Furthermore, it was presented contrary to the agreed way forward discussed and accepted by J Neckles on the Claimant's behalf before EJ E Burns, on 18/2/22, in terms of which, if the Claimant was to bring new claims, she was to do so by serving a proposed amendment to the first claim by 18/3/22. Having agreed that way forward and having caused the EJ to issue directions accordingly in the first claim, J Neckles unreasonably disregarded this and adopted his own approach.

64. The second claim is poorly pleaded, overlaps with and repeats significant elements of the first claim and appears to re-introduce a section 44 claim which has already been dismissed. These matters have caused procedural delay and additional costs and in so doing has prejudiced the Respondent.

65. It would not be just and equitable to extend time for the discrimination claims.

J S Burns Employment Judge
London Central
18/08/2022
For Secretary of the Tribunals
Date sent to parties : 22/08/2022
