EMPLOYMENT TRIBUNALS

London South Employment Tribunal on 10th November 2022

Claimant	**Between**	*Respondent*
Ms Marie-Claude Nekpe	**&**	**Ark Schools**

Before
Judge M Aspinall (Sitting as an Employment Judge)

Appearances
Ms C Wilson for the Respondent

OPEN PRELIMINARY HEARING
Judgment

1. **It is the judgment of the Tribunal, having read submissions from the parties and on hearing from the Respondent, that:**
    1. The claim for unfair dismissal was made out of time; and
    2. The Claimant has not demonstrated that it was made as soon as reasonably practicable after the expiry of the primary time limit; and
    3. The Tribunal does not find sufficient basis upon which to exercise its discretion to extend time; and
    4. The whole claim is dismissed because it was made out of time, the Tribunal does not find good cause to extend time and so has no jurisdiction to consider it.

2. **Attendance at this hearing**
Neither the Claimant nor those representing her appeared before the Tribunal today. On being contacted, the solicitors informed our Clerk that they had no instructions from the Claimant to appear and that she, herself, was working through her probationary period in a new job and would not attend. The Tribunal was satisfied that the Claimant and her representatives had received sufficient notice of this hearing and knew that this hearing may dispose of her claim, that her representatives had made submissions on the preliminary issues to be decided and that - despite her absence - it was reasonable and fair to proceed.

3. **Issues for determination today**
In correspondence from Employment Judge Ferguson (on 22 September 2022), it was clearly set out that this hearing would be an Open Preliminary Hearing to determine:
    1. whether the claim was presented in accordance with the time limits in sections 111(2)(a) & (b) of the Employment Rights Act 1996? and
    2. further, or in the alternative, whether because of those time limits (and not for any other reason), should the unfair dismissal complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should a deposit order be made under rule 39 based on little reasonable prospects of success?

4. It would follow that, if the Tribunal found that the claim could continue, this hearing would move on to consider appropriate case management orders for its further conduct.

5. **Was the claim presented in time?**
Section 111(1) of the Employment Rights Act 1996 (ERA1996) is the statutory basis for bringing a complaint of unfair dismissal to the Employment Tribunals (ET):
111 Complaints to employment tribunal
(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

6. Section 111(2)(a) stipulates the time limit for bringing such a claim:
(2) 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—
(a) before the end of the period of three months beginning with the effective date of termination.

7. Section 111(2)(b) provides a discretion to the Tribunal to extend time for the claim to be presented and provides statutory restrictions on that discretion:
(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 (my emphasis).

8. In submissions on the point around time, the Respondent states that the effective date of termination was 5 October 2021 when they sent notice of the internal appeal outcome to the Claimant. They say that this was sent to the same email address and home address as had been used previously and that neither was returned or 'bounced'. The Claimant's solicitors submitted that the Claimant had not received that notice of outcome by 4 January 2022 and chased it up - receiving a copy by email the following day.

9. In their ET3 response the Respondent noted the Claimant as having ended her employment on 16 July 2021 (having started it on 1 September 2016). This leaves two possible dates for the EDT - either 16 July 2021 (when her employment ended through redundancy) or 5 October 2021 (when the appeal process was completed, and notice was sent).

10. If the EDT was found to be 16 July 2021 - the day on which the Respondent says that the Claimant's employment ended in their ET3 - the claim should have been presented to the Tribunal by 15 October 2021. Taking the later date of 5 October 2021 - the day on which the Respondent says the employment terminated following the end of the appeal process - the claim should have been presented to the Tribunal by 4 January 2022.

11. If the Tribunal were to go even further and find that the correct date for the EDT should be the date on which the Claimant says she belated received notice of the appeal outcome - 5 January 2022 - then there is no time limit issue at all.

12. The Tribunal is not satisfied that the latter of those options is at all reasonable. The Respondent held an appeal hearing with the Claimant on 23 September 2021 and notified her of the outcome on 5 October 2021 using all means that they had previously used. Absent any evidence that the email and letter had gone undelivered, the Tribunal finds that the Respondent was entitled to consider that such notice had been properly delivered or served.

13. Turning to the 5 October 2021 as a possible EDT, the Tribunal was bound to consider the judgment of the Court of Appeal in *Palmer and Saunders v Southend-on-Sea Borough Council* which held that waiting for the result of an internal appeal does not extend the time limit for a claim to the ET. A claimant should present a claim beforehand to protect their position should they wish to proceed with a claim once the outcome of the appeal is known.

14. Ms Nekpe was legally represented at all stages from prior to her internal appeal up until today. Even if she did not know the legal position, those representing her ought to have done so.

15. The Tribunal found that the EDT in this case was 16 July 2021. The primary time limit expired on 15 October 2021 and the Claimant did not apply to ACAS until 24 January 2022 more than three months after the primary time limit expired. It followed that there was no extension to the primary time limit which could be applied because of the ACAS EC process. Her claim to the ET was not filed until 26 January 2022 some 104 days after the expiry of the primary time limit.

16. Even had the Tribunal found that 5 October 2021 was the correct EDT, the primary time limit would have expired on 4 January 2022 - 20 days before ACAS was contacted and 22 days before the claim was presented to the ET.

17. **Was the claim, nonetheless, presented as soon as reasonably practicable after the expiry of the time limit?**
The written submissions (8 November 2022) made on behalf of the Claimant in response to EJ Ferguson's letter of September 2022, focused on the basis that the Tribunal has discretion and should exercise that discretion by not leaving out of account any relevant factors and information. They cited paragraph 18 of *Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 (28 March 2018)* which differentiates between section 33 of the Limitation Act 1980 and section 123(1) of the Equality Act 2010 (EqA2010) with reference to the phrase "…such other period as the employment tribunal thinks just and equitable" which is contained in the provisions of EqA2010.

18. Whilst affording that submission due respect, the Tribunal found that it was not on point relating as it does to matters arising in respect of extending time for bringing claims pursuant to the EqA2010 and not ERA1996. The discretion to extend time afforded in respect of EqA2010 claims is far broader and less statutorily fettered than the discretion under s111(2)(b) ERA1996 as set out above.

19. Properly, the Tribunal should consider:
    1. what steps the Claimant took to present her claim in time;
    2. what steps the Claimant took to present her claim as soon as reasonably practicable after that time had elapsed.

20. It was clear from the submissions that the Claimant had been waiting on the outcome of her internal appeal. It was also clear that she did not believe herself to have received a notice of that outcome until she chased it on 4 January 2022. The Tribunal found that awaiting an internal appeal was insufficient on its own to form a properly lawful basis to extend time. The Tribunal was also concerned that the Claimant, having been involved in her own appeal process on 23 September 2021 then left a further 3 months, or so, before enquiring of the Respondent for its outcome.

21. The Claimant's submissions urge the Tribunal to consider that the delay in receiving that appeal outcome notice is sufficient basis to extend time. We disagree. The appeal process in and of itself cannot be a basis to extend time. The Tribunal was satisfied that the Respondent had properly communicated the outcome on 5 Octobersand that the Claimant waited until January to follow up when she had not, apparently, received their letter and email. In any event, the Tribunal found that the EDT was not - despite what was said in submissions by both parties - any date other than that on which the Claimant actually ceased her employment. That was 16 July 2021 when her redundancy came into effect (it is not said that the Claimant was not properly paid what was due in redundancy or other post-termination payments).

22. The submissions made by the Claimant as to time limits do not provide any illumination as to why her claim was presented more than 14 weeks after the end of the primary time limit. Therefore, in the absence of such, the Tribunal could not find that it was presented as soon as reasonably practicable after the time limit expired (per s.111(2)(b) ERA1996) and so refuses to extend time.

23. **Victimisation**
In their submission letter (8 November 2022), it was said by those who represent Ms Nekpe, that she had also claimed victimization. On a fair reading of the ET1 pleadings and the submissions made, the Tribunal could not see that such a claim was made nor that acts of victimization were suggested or raised.

24. The Tribunal initially considered whether it would be fair - in the absence of the Claimant and her representatives - to simply make case management orders for a final hearing of the claim with the issue of time limits to be left as a preliminary issue for that hearing. On reviewing all the material, however, the Tribunal was satisfied that to leave this decision for another day would not be in accordance Rule 2(d) *avoiding delay, so far as compatible with proper consideration of the issues,* or (e) *saving expense* of The Employment Tribunals Rules of Procedure 2013.

Judge M Aspinall
Date: 10th November 2022

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