EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Mabrouk	**v**	**New College Leicester**

Heard: in Nottingham

On: 28 November 2022

Before: Employment Judge Ayre (sitting alone)

Representatives:

Claimant: Mr E Brown, trade union representative
Respondent: Mr R Scuplak, consultant

JUDGMENT AT OPEN PRELIMINARY HEARING

All of the claims brought by the claimant are out of time and the Tribunal does not have jurisdiction to hear them.

REASONS

Background

1. The claimant was employed by the respondent from 25 August 2016 as a Teacher of Modern Foreign Languages. She was dismissed by the respondent in 2021. There is a dispute between the parties as to when her employment terminated. The claimant says her employment terminated on 31 August 2021. The respondent says it terminated on 31 May 2021.

2. On 16 December 2021 the claimant presented a claim to the Employment Tribunal, following a period of Early Conciliation which started on 8 November 2021 and finished on 18 November 2021.

3. A Telephone Preliminary Hearing took place before Employment Judge Ahmed on 10 May 2022. At that hearing it was identified that the claimant was bringing claims of:

    a. Discrimination arising from disability;
    b. Failure to make reasonable adjustments;
    c. Indirect race discrimination;
    d. Unfair dismissal; and
    e. Failure to deal with a flexible working application (section 80H of the Employment Rights Act 1996).

4. It was clarified that the disabilities relied upon by the claimant are Type 2 Diabetes, Long Covid and Hypertension. The respondent did not, at that stage, concede that the claimant was disabled.

5. The claimant was ordered to provide further information about her discrimination claims and about the disabilities relied upon. The case was listed for an Open Preliminary Hearing to consider the following:

    a. Whether the claims have been presented out of time and, if so, whether time should be extended;
    b. Whether the claimant was disabled;
    c. To identify the issues and make case management orders.

6. On 15 September 2022, having received the claimant's disability impact statement, the respondent conceded that the claimant was, at the relevant time, disabled and that the respondent had constructive knowledge of the disability from 3 May 2017 onwards. It was therefore not necessary for me to determine the question of disability today.

The Proceedings

7. There was an agreed bundle of documents running to 112 pages. Neither party called any witnesses to give evidence at the preliminary hearing.

8. At the start of the hearing I asked Mr Brown whether he wanted to call the claimant to give evidence. I explained that in cases involving time limits it is unusual not to have any evidence from the claimant, and that such evidence can be helpful in deciding questions of reasonable practicability and whether it would be just and equitable to extend time. Mr Brown told me that he did not want to call the claimant to give evidence, and it is of course a matter for the claimant to present her case as she sees fit.

9. I therefore heard oral submissions from both parties and considered the documents in the bundle that I was referred to.

The Issues

10. The issues for determination at today's preliminary hearing were as follows:

a. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010 ("**the EQA**")? This involves deciding:

    i. Were the discrimination claims to the Tribunal made within three months (plus early conciliation extension if appropriate) of the act to which the complaint relates?

    ii. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

        1. Why were the complaints not made to the Tribunal in time?
        2. In any event, is it just and equitable in all the circumstances to extend time?

b. Were the complaints of unfair dismissal and for breach of section 80H of the Employment Rights Act 1996 ("**the ERA**") made to the Tribunal within three months (plus early conciliation extension if appropriate) of the effective date of termination and of the 'relevant date'?

c. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

d. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

11. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 9 August 2021 may not have been brought in time.

12. At the beginning of the hearing, we discussed the dates from which time runs in relation to the different complaints that are being made. Mr Brown said, on behalf of the claimant, that time for all of the complaints that are being made runs from 31 August 2021, which he says is the effective date of termination of the claimant's employment.

13. Mr Scuplak submitted, on behalf of the respondent, that time runs from the following dates:

    a. Unfair dismissal: 31 May 2021, which he says is the effective date of termination of the claimant's employment;

    b. S80H claim: 29 April 2021, when the claimant was notified of the outcome of her appeal;

    c. Discrimination claims: Last act of alleged discrimination referred to in the further particulars – 22 March 2021.

14. Mr Brown submitted that the dismissal itself was an act of discrimination, although accepted that there was no suggestion in either the claim form or the further particulars that the dismissal itself was discriminatory.

15. In order to pursue such an argument, Mr Brown would need to make a successful application to amend the claim. For the purposes of today's hearing, I have taken the claimant's case at its highest and considered time as running in all of the discrimination complaints from the date of termination of her employment.

Findings of Fact

16. The following findings of fact are made on the basis of the documents that were before me. I did not hear oral evidence as neither party called any witnesses.

17. The claimant was employed by the respondent as a teacher. She was employed on a contract of employment which provided for her employment to be terminable on notice, with notice to expire only on 31 December, 30 April or 31 August, except in cases of misconduct or "other urgent cause".

18. Her employment was also governed by the Conditions of Service for School Teachers in England and Wales ("**the Burgundy Book**") which contained similar termination provisions.

19. Neither the claimant's contract of employment nor the Burgundy Book contain a payment in lieu of notice provision.

20. The claimant had a high level of sickness absence. She was invited to a Stage Three Absence Management Hearing to take place via Zoom on 26 March 2021. The claimant did not attend the meeting, but her trade union representative, Mr Brown of the NASUWT, attended and represented her. The outcome of the meeting was that the claimant was dismissed.

21. On 1 April 2021 the respondent wrote to the claimant to confirm the decision in writing. The letter contained the following words:

"*Therefore, as you have already been informed, you are entitled to receive notice of termination of employment. That notice commenced on 26th March 2021 and expires on 31st August 2021…The College reserves the right to pay you in lieu of that notice or any part of that notice…"*

22. The claimant appealed against the decision to dismiss her, and the appeal was heard at a meeting of a panel of governors on 28 April 2021. Neither the claimant nor her trade union representative attended the appeal hearing.

23. On 29 April 2021 the respondent wrote to the claimant informing her of the outcome of the appeal. The appeal was not successful, and the letter confirmed that the claimant's employment would terminate, "*Your*

notice of Termination will expire on the 31st August 2021 as already explained to you."

24. On 5 May 2021 the respondent sent an email to the claimant and Mr Brown in which it wrote:

"*I refer to your notice of termination letter dated 1st April 2021 in which we advised that we reserve the right to pay you in lieu of notice which would have been from 26th March through to 31st August 2021. We are now invoking that right and you will receive your final payment on Thursday 27th May 2021, therefore, your effective date of termination of employment with New College Leicester will be Monday 31st May 2021 and not 31st August 2021."*

25. The claimant collected her personal belongings from the College on 18th May 2021. The respondent paid her a payment in lieu of notice on 27th May 2021. From that date on there was no contact between the parties at all until the start of early conciliation in November 2021.

26. In advance of the meeting on 26 March 2021 the claimant had submitted a formal flexible working request, asking to reduce her hours from five days a week to four days a week. The flexible working request was dated 19 March 2021 and sent by email to the respondent on 22 March. The respondent acknowledged receipt of the request on the same day and wrote to the claimant "*We have received your email today (22nd March 2021) for a flexible working request. As we have 28 days to respond to your request, you will be hearing from us in due course."*

27. There was no evidence before me of the respondent having formally considered the claimant's flexible working request. The dismissal letter made the following passing reference to it: "*We were made aware of a very recent request by you to reduce your hours, but we failed to see how that might assist…*"

28. There was no mention of the flexible working request or of a payment in lieu of notice in the appeal outcome letter.

29. The claimant is represented by her trade union, the NASUWT. They supported and advised her during the process leading up to her dismissal, during her appeal, and in the Employment Tribunal proceedings. The claim form appears to have been submitted by the NASUWT and they are named as the claimant's representative on the form.

30. The claimant started Early Conciliation on 8 November 2021. The Early Conciliation Certificate was issued on 18 November 2021 and the claimant presented her claim to the Employment Tribunal on 16 December 2021.

The Law

Time limits – unfair dismissal

31. The time limit for bringing a complaint of unfair dismissal is set out in section 111 of the ERA which states that:

"*(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, or
(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.

(2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection 2(a).

32. The effective date of termination of an employee's employment is defined in section 97 of the ERA as:

"(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires.
(b) In relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect…"

33. Time limits for presenting claims are a jurisdictional issue (***Rodgers v Bodfari (Transport) Ltd 1973 325 NIRC***) and if a claim is out of time, the Tribunal must not hear it. The parties cannot agree to waive a time limit, so even if a respondent does not seek to argue that a claim is out of time, the Tribunal still has no jurisdiction to hear the claim if it is in fact out of time.

34. The principle that a Tribunal cannot hear a claim that is out of time applies even where the respondent admits that the claim has merit (***Bewick v SGA Forecourts Ltd ET Case No.2501693/2014***).

35. In cases, such as this one, in which a question arises as to whether it was reasonably practicable for the claimant to present his claim on time, there are three general principles that fall to be considered –

    a. The question of reasonable practicability should be interpreted liberally in favour of the claimant;
    b. It is a question of fact as to whether it was reasonably practicable for the claimant to present her claim on time; and
    c. It is for the claimant to prove that it was not reasonably practicable for her to present hers claim on time.

36. In ***Palmer and another v Southend-on-Sea Borough Council [1984] ICR 372***, the Court of Appeal concluded that 'reasonably practicable'

does not mean 'reasonable' or 'physically possible', but rather 'reasonably feasible'.

37. It is a well-established principle that where a claim is presented late due to the negligence or other fault of a professional advisor, a Tribunal is unlikely to find that it was not reasonably practicable for the claim to have been presented on time, and the delay will normally be a matter for the claimant to raise with the advisor. In ***Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53, CA*****,** Lord Denning held that: "*If a man engages skilled advisers to act for him – and they mistake the time limit and present [the claim] too late – he is out. His remedy is against them.*"

38. The 'Dedman principle' applies not just to legal advisors such as solicitors and barristers, but also to trade union representatives who are presumed to be aware of the time limits for presenting claims and to understand the importance of filing claims on time. The EAT held, in ***Times Newspapers Ltd v O'Regan [1977] IRLR 101***, that a claimant who was aware of her rights and of the time limits, could not claim that it was not reasonably practicable to present her claim in time where a union official incorrectly advised her that time limits did not run whilst negotiations about possible reinstatement were ongoing.

39. In ***Friend v Institution of Professional managers and Specialists [1999] IRLR 173, QBD****,* the High Court held that where a claimant relies upon the advice of a trade union and his claim is out of time as a result, the claimant's remedy lies in a claim of negligence against the union.

Time limits – complaints under section 80H ERA

40. Under section 80H of the ERA, complaints about flexible working requests made under section 80F of the ERA can be made to an Employment Tribunal.

41. Complaints must be made within three months of the "relevant date". Section 80H contains the following relevant provisions:

"*(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal –*
(a) That his employer has failed in relation to the application to comply with section 80G(1)
(b) That a decision by his employer to reject the application was based on incorrect facts, or
(c) That the employer's notification under section 80G (1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b)….

(3) In the case of an application which has not been disposed of by agreement or withdrawn, no complaint under subsection (1)(a) or (b) may be made until –
(a) the employer notifies the employee of the employer's decision on the application, or

(b) if the decision period applicable to the application…comes to an end without the employer notifying the employee of the employer's decision on the application, the end of the decision period….

"*(5) An employment tribunal shall not consider a complaint under this section unless it is presented –*
(a) Before the end of the period of three months beginning with the relevant date, or
(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.

(6) In subsection (5)(a), the reference to the relevant date is a reference to the first date on which the employee may make a complaint under subsection (1)(a), (b) or (c), as the case may be…"

42. Section 80G (1B) of the ERA provides that:

"*For the purposes of subsection (1)(aa)* [the obligation on an employer to notify the employee of the decision on the flexible working application within the decision period] *the decision period applicable to an employee's application under section 80F is –*
(a) The period of three months beginning with the date on which the application is made, or
(b) Such longer period as may be agreed by the employer and the employee."

Time limits – discrimination claims

43. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination 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…*
> *(a) Such other period as the employment tribunal thinks just and equitable.*

44. Section 123 (3) states that:

> "*(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(a) Failure to do something is to be treated as occurring when the person in question decided on it.*"

45. In discrimination cases the Tribunal normally has to consider whether the respondent did unlawfully discriminate against the claimant and, if so, the dates of the unlawful acts of discrimination. If some of those acts occurred more than three months before the claimant started early conciliation the Tribunal must consider whether there was discriminatory conduct extending over a period of time (i.e. an ongoing act of discrimination) and / or whether it is just and equitable to extend time. Tribunals have a discretion as to whether to extend time but

exercising that discretion should still not be the general rule. There is no presumption that the Tribunal should exercise its discretion to extend time: ***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434***.

46. Factors that are relevant when considering whether to extend time include:

    a. The length of and reasons for the delay in presenting the claim;
    b. The extent to which the cogency of the evidence is likely to be affected by the delay;
    c. The extent to which the respondent cooperated with any requests for information;
    d. How quickly the claimant acted when she knew of the facts giving rise to the claim; and
    e. The steps taken by the claimant to obtain professional advice once she knew of the possibility of taking action.

Discussion and Conclusions

47. In reaching the following conclusions I have carefully considered the evidence before me, the legal principles summarised above, and the submissions of both parties.

48. Mr Brown submitted, on behalf of the claimant that the termination date, based upon the contract of employment and the Burgundy Book, could only be 31 August 2021, as 31 May is not a date included in either. He also submitted that there was no contractual right to make a payment in lieu of notice.

49. The appeal decision was, Mr Brown submitted, the final decision of the employer on the termination date and made no mention of 31 May or a payment in lieu of notice.

50. Mr Brown also submitted that it would be just and equitable to extend time in relation to the discrimination claims because the claimant had raised disability issues throughout her employment and the respondent has now conceded that the claimant was disabled.

51. He referred me to the case of ***Benjamin Cole v Great Ormond Street Hospital for Sick Children NHS Trust UKEAT/0356/09*** in which the EAT held an Employment Judge was wrong, when refusing an application for an extension of time, to have placed upon the claimant responsibility for the faults of an experienced but unqualified legal adviser, and to have placed too much reliance on the fact that the claimant had a remedy against the adviser.

52. Mr Scuplak accepted that Mr Brown's analysis of the contractual position was correct but submitted that the contractual position was irrelevant. It was, he says, what actually happened that is important, and the focus should be on what actually happened rather than the contractual position.

53. The claimant had delayed in presenting her claim by months, not days. The claimant was advised at the time by professional advisors and it would therefore have been reasonably practicable for her to submit her unfair dismissal and section 80H claims on time.

54. No evidence or arguments had, he said, been put forward as to why the claims weren't presented on time, other than an implied argument that the trade union may have been at mistake.

55. Nothing had happened for months between May and November 2021 and, whilst he accepted that the Tribunal has a greater discretion to extend time in discrimination claims, there has to be a good reason put forward for the delay. No reason has been put forward.

Unfair dismissal

56. The time limit for presenting a claim of unfair dismissal runs from the effective date of termination of the claimant's employment. I find, on the evidence before me, that the effective date of termination of the claimant's employment was 31 May 2021. I accept Mr Scuplak's submission that the contractual position is, in this case, irrelevant to the effective date of termination of the claimant's employment. The effective date of termination is a statutory concept, not a contractual one.

57. I have taken account of the authority I was referred to by Mr Sculpak, ***Robert Cort & Son Ltd v Charman [1981] IRLR 427***

58. The effective date of termination of an employee's employment is the date when the notice comes to an end, as specified by the employer. The email of 5 May 2021 makes clear that this will be 31 May 2021. The email is unambiguous, post dates the letter of appeal and makes clear what the new termination date will be. Neither party conducted themselves after 31 May in a way that was consistent with the employment relationship continuing until August – there was quite simply no contact between them.

59. Although the respondent originally set the 31 August as the termination date, there is no general principle that an employer cannot bring forward a termination date, as the respondent did in this case.

60. I do not accept Mr Brown's submission that the claimant's contract of employment and Burgundy Book prevented the respondent from dismissing the claimant on dates other than 30 April, 31 August and 31 December. Mr Brown could not, when asked, identify any authorities to support this submission.

61. The claimant may have a potential claim that the respondent has breached her contract of employment by dismissing as it did, but that is not a complaint that is currently before the Tribunal, and would not affect either the effective date of termination or the reasonable practicability of presenting a claim for unfair dismissal in time.

62. The claimant did not produce any evidence whatsoever as to why it was not reasonably practicable for her to submit her claim on time. The burden of proof lies with her. She has not discharged it.

63. The claimant was professionally represented throughout by her trade union. No new facts came to light after 5 May 2021, the date upon which she and her trade union were notified that the termination date was being brought forward to 31 May. The claimant waited more than six months after the email of 5 May, and more than five months after the date her employment ended, before starting early conciliation.

64. As the claimant started early conciliation outside the primary limitation period she cannot rely upon an extension of time to take account of early conciliation. The primary time limit for presenting a claim of unfair dismissal expired on 30 August 2021. She presented her claim on 16 December 2021, some six and a half months after her employment terminated. This is a substantial delay, and no explanation has been provided for it.

65. In these circumstances it would have been reasonably practicable for the claimant to present her claim on time. She did not do so.

66. The claim for unfair dismissal is therefore out of time and the Tribunal does not have jurisdiction to hear it.

Flexible working request

67. The claimant made her flexible working request on 22 March 2021. The respondent did not give her a formal outcome to the request. The decision period is three months from the date the application was made (no extension of time having been agreed between the parties) in accordance with section 80G(1B)(a). This was a case, therefore, in which the decision period expired without the respondent having given the claimant a decision.

68. The relevant date for the purposes of the time limits in section 80H(5) of the ERA is, therefore, three months after the flexible working request was made – namely 21 June 2021. The primary time limit for issuing a claim under section 80H therefore ran out on 20 September 2021 (three months less one day after the relevant date of 21 June).

69. The claimant did not start early conciliation until 8 November 2021, and therefore cannot get an extension of time for early conciliation. The claim was presented on 16 December, almost three months out of time.

70. The claimant has not given any evidence as to why it was not reasonably practicable for her to present this claim in time. She was represented by the NASUWT throughout. For the same reasons as apply to the unfair dismissal claim, it would have been reasonably practicable for the claimant to submit this claim on time. She did not do so.

71. The claim under section 80H is out of time and the Tribunal does not have jurisdiction to hear it.

Discrimination complaints

72. Even if I were to allow the claimant to amend her claim to argue that the dismissal itself was discriminatory, the dismissal took effect on 31 May 2021. For the purposes of deciding whether the complaints of discrimination are out of time, I have taken the claimant's case at its highest, and assumed that there was a continuing act of discrimination running to 31 May 2021 when the claimant's employment terminated.

73. Early conciliation did not start until more than 5 months later, and the claimant did not present her claim until six and a half months after the last alleged act of discrimination. The primary time limit for a complaint of discrimination expired on 30 August 2021. The discrimination claims are therefore at least three and a half months' late.

74. The claimant has presented no evidence as to why she did not present her discrimination complaints sooner, or why it would be just and equitable to extend time limits. The delay was substantial, and the claimant has provided no explanation for it.

75. This is not a case in which more information came to light after the dismissal – the claimant was aware of the facts giving rise to the discrimination allegations well before her employment terminated on 31 May and had the benefit of professional advice and representation at the time.

76. Time limits exist for an important reason of public policy, that there should be finality of litigation. Extensions of time should be the exception rather than the rule, and a claimant can not assume that time will be extended.

77. The claimant has not persuaded me that it would be just and equitable to extend time for her to present her discrimination complaints.

78. All of the discrimination claims are therefore out of time and the Tribunal does not have jurisdiction to hear them.

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Employment Judge Ayre

28 November 2022

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JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE