EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs E Knockton	**v**	Smith & Nephew PLC

PRELIMINARY HEARING

Heard at: Watford **On:** 17 October 2017

Before: Employment Judge Manley

Appearances
For the Claimant: Ms N Gyane (Counsel)
For the Respondent: Mr D Dyal (Counsel)

RESERVED JUDGMENT

1. It was reasonably practicable for the complaints of unfair dismissal and breach of contract to have been presented in time and the tribunal has no jurisdiction to hear those claims.

2. It is not just and equitable to extend time for the disability discrimination complaint to proceed and the tribunal has no jurisdiction to hear that complaint.

3. The claim is dismissed.

REASONS

Introduction and Issues

1. The claimant presented a claim which included complaints of constructive unfair dismissal, breach of contract and disability discrimination on 20 July 2017. The response was presented on 24 August 2017. It is agreed that the claimant had not begun the early conciliation process with ACAS before the three month time limit had expired on 22 May 2017. The claimant's effective date of termination was 23 February 2017.

2. The matter was therefore listed for this preliminary hearing to determine whether any of the claims could proceed or whether the tribunal lacked jurisdiction. At the commencement of this hearing, it was agreed that the

question for the unfair dismissal and breach of contract complaints was whether it was reasonably practicable for the claim to have been presented in time. For the disability discrimination complaint, the question was whether it was just and equitable to extend time to allow that complaint to proceed.

3. The claimant's representative had prepared a written argument with respect to these preliminary points and the respondent's representative had prepared a chronology which was agreed. The claimant had prepared a witness statement and was cross-examined. There was also a bundle of documents which included email correspondence between the claimant and the solicitors who she had instructed in February 2017 and who still represent her. When the claimant was giving evidence, it emerged that there might be other emails which might be relevant. The claimant had waived privilege with respect to these emails as her explanation for not having started the early conciliation process relied on something she had read and/or discussed with her solicitor. We therefore took a short break while the claimant looked on her phone for those emails and, after some agreed redaction, they were before the tribunal.

Facts

4. The claimant commenced employment with the respondent in 2013. During 2016, she had some time away from work due to stress and depression and there were meetings with the claimant and her manager about problems that she was having at work. The claimant worked as a Territory Manager and is a graduate. I have seen a number of letters that she wrote on her own behalf and these are detailed and the claimant accepts that she has a high level of literacy. She did mention in this tribunal hearing that she is dyslexic but I am not sure that that had been mentioned earlier.

5. In any event, matters continued to be discussed at work. This included the claimant's being concerned about the way in which her bonus had been calculated. Eventually, on 23 November 2015, the claimant resigned with notice. In that letter, she sets out the difficulties that she believed she faced at work. She also made reference to personal difficulties and said she felt that pressures upon her were too much. She said that she felt she had little choice but to "*walk away*". The respondent investigated what the claimant had raised in that letter during December and there were further discussions in January 2016 with respect to the commission scheme.

6. The claimant told me that she went to contacted solicitors in early February. By 22 February, a formal letter before action had been agreed with the claimant and was sent to the respondent by that firm of solicitors. That is a detailed three and a half page letter raising issues of alleged constructive unfair dismissal with reference to disability-related discrimination. That letter contains this paragraph:

> *"As you will no doubt be aware, limitation deadlines for presenting Employment Tribunals in this respect are very restrictful. There is therefore only a small opportunity for us to explore alternative dispute resolution".*

7. The claimant said that she had seen that letter before it was sent. As indicated, the claimant's effective date of termination was 23 February.

8. The claimant continued to communicate with those solicitors and she told me that she was aware that there was a three month time limit to take proceedings and that she also needed to refer the matter to ACAS.

9. There was no response to the letter and the respondent was chased for an answer in March. The respondent replied to say they had not received the letter and there was, at that point, no substantive reply.

10. On 19 April, the solicitor with conduct of the case at the solicitors' firm sent an email to the claimant. He apologised for the delay and then said this:

> *"In light of your termination date being 23 February (please check the P45 you should have received from the company) the next step would be to contact ACAS (the conciliatory body I discussed with you) as a pre-condition to commencing tribunal proceedings. We need to do this no later than 22 May but I suggest we do so earlier to follow on from the threat below.*
>
> *The hope will be that we can negotiate some form of settlement with the company without the need to enter into formal proceedings. However, their lack of response at this time may be indicative of their view towards your claims."*

11. The claimant replied on the same day asking as follows:

> *"Please could you clarify exactly what I need to speak to ACAS about and I will get on and contact them tomorrow."*

12. The solicitor responded by email to the claimant and said:

> *"I can advise you on the ACAS early conciliation procedure but you may wish to wait for the 7 days we have given them, if you prefer. If not, the initial step is to complete the form contained within the link below to the ACAS website (bottom of the page "individuals" option). ACAS will then call you to discuss your claims and (if you wish) assist you in negotiations with your former employer."*

13. There was then a link to the ACAS website.

14. Again, on the same day, 20 April, the claimant replied:

> *"I will hold off as you have suggested and wait to see the outcome of the next email, if they get around to responding. Once thats received, I will have a better idea of the situation and we can go from there."*

15. There was then a substantive response from solicitors acting for the respondent. This is a detailed letter setting out some of the background as the respondent saw it. It is a four and a half page letter *but it concludes that they see "very* little substance to your client's alleged claims" and concludes *"our*

client denies any liability to your client and will strongly defend any claims brought". The claimant's solicitor forwarded that letter to the claimant on the same day and suggested that she should arrange a mutually convenient time to advise next steps. He indicated that he would be on annual leave until 11 May.

16. The claimant replied to that email from the solicitor on 5 May with a detailed response to the letter from the solicitors for the respondent and indicated she would speak to him on his return from holiday. When the claimant gave evidence she accepted that she knew that the referral to ACAS was a mandatory step and that it was a step she was going to take. When it was suggested by the solicitor that she might wait for a response se decided to do that as she wanted to avoid litigation. She did follow the link to the ACAS website and agreed that the information there was very clear. She agreed that there was no information from anyone that suggested, if the respondent did reply, the ACAS step was unnecessary. Her evidence was that she misunderstood that she did still need to refer to ACAS and she did not speak to or try to contact the solicitor before the deadline had passed.

17. There appears to have been no communication until 23 May when the claimant emailed the solicitor and she followed that up with a chasing email on 31 May.

18. The response came from the solicitor on 1 June. That indicated that he had been out of the office "*heavily engaged in two large pieces of litigation*". It was indicated that they would then speak. The claimant's witness statement indicated that she was told that that solicitor left the practice unexpectedly and had had problems with a seriously ill child, although that is not something that he had told her.

19. The claimant referred the matter to ACAS on 6 June 2016 and received an early conciliation certificate on 6 July 2016. In the meantime there had been an exchange of correspondence between the claimant's and respondent's solicitors about the time limit. In a letter of 21 June 2016 the respondent's solicitors stated that they believed the claimant's claim would be out of time.

20. The claimant told me that she had heard from a friend who had used another solicitor in the same firm. That second solicitor was on leave but they spoke on the telephone and he returned from leave, as I understand it, on 10 July.

21. The claim form was presented on 20 July 2016 .

Law

22. The parties are agreed that the relevant time limits are set out in the primary legislation and are three months with an extension allowed if a prospective claimant has referred the matter to ACAS for early conciliation before the expiry of that three months.

23. Section 111 (2) Employment Rights Act 1996 (ERA) provides for the three month time period and adds at s111 (2) 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"

24. An identical provision applies to a complaint of breach of contract. In Palmer & Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 it was said by the Court of Appeal that the words "reasonably practicable" mean that the tribunal must ask if it was reasonably feasible to present the complaint to the employment tribunal within the relevant three-month period.

25. Section 123 Equality Act 2010 (EQA) also contains a three month time limit for most discrimination complaints and adds at s123 (1) b):-

"such other period as the tribunal thinks just and equitable"

26. There is a relatively significant body of case law about the time limits, some of which pre-dates the requirement to refer the matter to ACAS before bringing a claim and the possibilities of extensions of time once the matter has been referred. There was no dispute in this case that the claimant did not refer the matter to ACAS before the primary time limits expired and could not therefore derive the benefit of any extensions of time under s207B ERA.

27. The case of British Coal Corporation v Keeble [1997] IRLR 336 (see below) gives guidance on matters to be taken into account when considering whether it is just and equitable to extend time. However, it is said that there is no legal requirement for a tribunal to go through such a list in every case provided of course that no significant factor has been left out of account by the tribunal or judge in exercising its discretion. Robertson v Bexley Community Centre [2003] IRLR 434 reminds tribunals that the discretion to extend time should be exercised as an exception rather than the rule.

Submissions

28. The claimant's written application for the claim to be allowed to proceed out of time was relatively detailed. Her representative says that the misunderstanding which the claimant had outlined was a good reason for the matter not being referred to ACAS in time which led to the claim not being presented in time. She said that amounted to it not being reasonably practicable for the complaints of unfair dismissal and breach of contract to be presented in time because she was following a suggestion that she waited for a response from the respondent.

29. The respondent's representative submitted that the possibility of those unfair dismissal and breach of contract complaints being allowed to proceed was hopeless. He referred me to the case of Northampton County Council v Entwhistle [2010] IRLR 740 where the case law on reasonable practicability and the possibility of having received wrong or incorrect advice is usefully set out. There are cases where the legal adviser may well have misunderstood the time limit for good reasons. In this case, it is submitted, there was no misunderstanding of the time limit; it expired on 22 May and the claimant had to have referred the matter to ACAS on or before that date. It was submitted that the claimant was totally unjustified in her mistaken assumption that, the

respondent having responded to her solicitor's letter, meant that she did not need to follow the advice to go to ACAS. It was clearly reasonably practicable; there was nothing to prevent her going to ACAS before 22 May.

30. As far as the discrimination claims are concerned, the claimant's representative asked me to consider case law on this and particularly British Coal Corporation v Keeble (referred to above) which contains the factors which should be part of the consideration on justice and equity. These are, it is agreed, as follows:-

    (a) The length of and reasons for the delay;
    (b) The extent to which the cogency of the evidence is likely to be affected by the delay;
    (c) The extent to which the party sued had cooperated with any requests for information;
    (d) The promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
    (e) The steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

31. The claimant's representative also asked me to consider the merits of the case and the fact that this was said to be an important case involving discrimination where the claimant had felt forced to give up her job. The claimant's representative commented that the respondent would suffer very little prejudice as the delay was not substantial and that there was confusion about the advice. I was referred to Chohan v Derby Law Centre [2004] IRLR 685 where it is said that it would not be right to confer a "*windfall*" on the respondent. Finally, she asked me to consider DPP v Marshall [1998] IRLR 494 where it is stated that one consideration should be whether it was possible to have a fair trial. It was submitted that it was still possible in this case.

32. For the respondent, the representative submitted that the most important of the factors as set out in British Coal Corporation v Keeble were the length of and reasons for the delay which ties in with the promptness with which the claimant acted. In summary, it is submitted that the claimant's reasons being that she misunderstood were not reasonable. There was culpability which attached to the claimant even if some culpability may lie with the solicitors. The respondent's representative referred me to Virdi v The Commissioner of Police for the Metropolis [2007] IRLR 224 which makes it clear that "*the fault of the claimant is plainly relevant*". It was submitted that this case was the opposite of what occurred in Virdi in that the claimant had had very clear advice from the solicitor of the deadline and told what was necessary for the claim to proceed. As far as the length of the delay is concerned, this claim was two months out of time as the primary deadline was 22 May and it was presented on 20 July.

33. The respondent's representative agreed that he could not say that there was any prejudice beyond that of having to defend a case and he could not suggest that a fair trial was no longer possible. Although there had been reference to the claimant's ill health, there was no evidence with respect to any particular mental health issues she had around the time when the time limit expired and there was no other evidence about the dyslexia. It had not

been said that that was a material factor in why she had not pursued her claim timeously. It was submitted that it would not be just and equitable to allow this claim to proceed.

Conclusions

34. It is quite clear to me that it cannot be said that it was not reasonably practicable for the unfair dismissal and breach of contract claim to have been presented in time. The claimant was aware of the facts which led her to belive she had a case. Indeed, she had that information when she took the decision to resign in November. There was then a three month period before the resignation took effect and then a period of time before she needed to take matters further. Whilst there was some delay before the respondent replied to the letter before action, the substantive reply was on 26 April, which meant there was a four week period for matters to be taken further by the claimant. She was in no doubt as to the process to be followed. Whilst she has given an explanation for her failure to do that, I cannot understand why she thought that a clear rejection of the offer to negotiate a settlement would lead her to think that she did not need to take the steps that she needed to take to progress this claim. The tribunal has no jurisdiction to hear that claim.

35. Whilst I appreciate, of course, that the test for discrimination complaints to be allowed to proceed is somewhat more generous for claimants, the same facts are relevant to this consideration as well. In my view, I must take the whole period of time into account starting with the time at which the claimant took the decision to resign. She must have been clear that this matter was not going to be resolved in any other way and if she was in any doubt about that, it was made entirely clear by the respondent on 26 April, allowing her at least four weeks to pursue her claim. I do accept that it was unfortunate that she appears not to have been able to contact the solicitors at what might have been a critical time but the solicitor had given her a clear instruction as to the date and had mentioned on a number of occasions the importance of the deadline for pursuing claims and the necessity of referring the matter to ACAS first.

36. The reason for the delay is not a good reason. The claimant had appropriate professional advice and was well aware of the possibility of taking action in good time.

37. What is more, I have some concerns about the delay even after the solicitors and the claimant were aware that the deadline for going to ACAS had been missed. For reasons which are not entirely clear, there was still a delay before the claim was presented. It is possible that it was thought to be necessary for there to be a wait after the date of the certificate but that was 6 July. Even if the solicitor was on leave until 10 July, there was then a ten day delay before the claim was finally presented. This further delayed matters. There is no doubt that the solicitors and the claimant were well aware that at this point the respondent was saying the claim was out of time and it was incumbent upon them to present the claim as soon as possible.

38. I do not think that the merits of the case can be assessed at this time. There is a clear dispute about what is said to have amounted to disability discrimination

as well as whether the claimant would be protected by the Equality Act. Nor can it be said that the respondent is particularly prejudiced beyond the prejudice of having to defend the claim and a fair trial would probably be possible.

39. However, there are strict time limits in the employment tribunal. It is only in unusual or exceptional circumstances that it would be just and equitable to extend time and having considered what the claimant has said and all the information before me, I take the view that this is not a case where it is just and equitable for time to be extended. I appreciate that that might cause the claimant some disappointment but it was up to her to litigate this claim if that is what she wanted to do and she is required to present a claim in time.

40. The tribunal has no jurisdiction to hear any of the complaints and the claim is dismissed.

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Employment Judge Manley

Date: …24 October 2017……..

Sent to the parties on: .....