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EMPLOYMENT TRIBUNALS

Claimant: **Mr M Ameen**

Respondents: **(1) Bow School**
(2) London Borough of Tower Hamlets

Heard at: **East London Hearing Centre**

On: **9 October 2020**

Before: **Employment Judge Russell**

Representation
Claimant: **In person**
Respondent: **Ms N Ling (Counsel)**

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. **The claim of unfair dismissal was presented out of time. It was reasonably practicable to have presented it within time and/or it was not presented within a reasonably practicable time thereafter. The Tribunal does not have jurisdiction to hear the unfair dismissal claim.**

2. **The claims of race, sex and religion or belief discrimination were presented out of time it is not just and equitable to extend time and the Tribunal does not have jurisdiction to hear those complaints.**

REASONS

1 The Claimant was employed by the Respondent as a teacher from 1 September 2013 until his summary dismissal for gross misconduct on 8 July 2016. It is clear from the contents of the Claimant's complaint and the Respondent's reply, that there is a significant dispute between the parties as to whether or not complaints about the Claimant conduct were well-founded. This hearing is purely to consider time limits and I make no finding about whether or not the factual basis of the claim is, or is not, well-founded.

2 At the date of his dismissal on 8 July 2016, the Claimant was represented by a trade union. I accept that his trade union representative initially gave the Claimant incorrect advice when it told him that he lacked two years' service to bring an unfair dismissal claim and that he should await the outcome of an internal appeal against his

dismissal. There is no evidence that the Claimant was given incorrect advice about his ability to bring a discrimination claim.

3 The Claimant's appeal was not heard until 11 October 2016 and he was not told until 21 October 2016 that it was unsuccessful. If the Claimant had presented his claim at that point and sought an extension of time based upon erroneous advice, the Tribunal may have looked upon it sympathetically. The Claimant did not present a claim but, as he explained today, neither he nor his trade union took any further action until after he was contacted on 21 December 2016 by the Disclosure and Barring Service which was considering whether to include him on a list of individuals barred from working with children. This was a matter of significant concern to the Claimant as it affected his professional reputation and ability to gain employment. He again instructed his trade union to act on his behalf and, from 21 December 2016 until the summer of 2018, the Claimant focused upon the processes with DBS and the Department of Education TO clear his name and enable him to continue in his chosen profession of teaching. Given the importance of the issues, this is understandable but it is nevertheless the case that the Claimant took no steps to issue even a protective claim which could have been stayed pending resolution of the DBS process.

4 During this time, the Claimant changed representation and began receiving advice from a different trade union representative. In or about July 2018, the new trade union representative advised the Claimant that he was out of time to bring a Tribunal claim and advised him to contact his MP instead. The trade union representative also advised the Claimant that if he wanted to submit a Tribunal claim out of time, he would need to contact the London regional team for support. The Claimant followed the advice and I accept that he then spent a number of months chasing the trade union for legal support. Still, the Claimant did not present a complaint on his own behalf.

5 In October 2018, the Claimant was again advised by his trade union that he was out of time for a claim in the Employment Tribunal but that he could consider bringing a claim in the County Court which has a more generous six-year time limit. The Claimant was told that he would have to fund County Court litigation privately. The Claimant sought advice from a legal charity and in due course was put in contact with a solicitor based in Luton. The solicitor took some action on behalf of the Claimant, principally submitting a data subject access request to the school in February 2019. Unfortunately for the Claimant, as a result of internal difficulties at the firm of solicitors, the solicitor dealing with his case left before issuing proceedings in the County Court.

6 In the meantime, the Claimant contacted his MP and expressed a desire to lodge a complaint with the Parliamentary and Health Service Ombudsman. An individual cannot go straight to the PHSO and it was necessary for the Claimant's MP to become involved and pass the complaint to the PHSO on behalf of the Claimant. The Claimant says that again this took some time and it was not until 16 August 2019 that he received the response of the PHSO rejecting his complaint and telling him that this was an employment matter.

7 In or about February 2019, the Claimant approached a different firm of solicitors, Rahman & Lowe. Whilst not on the record in a formal sense, they provided some telephone advice, assistance and legal services to the Claimant between February 2019 and at least September 2019, as demonstrated by invoices rendered to him. The Claimant was advised by Rahman & Lowe to present a Tribunal claim on his own behalf. I

accept that this may have been the first time that the Claimant had been told explicitly that he could act "in person" and present his own claim. In September 2019, Rahman & Lowe provided the Claimant with a chronological draft of a potential complaint, making it clear that the Claimant must present it himself.

8 The claim form was not actually presented until 9 June 2020. The Claimant tells me today that the further delay between September 2019 and June 2020 was because the allegations made against him which led to the termination of his employment were particularly distressing. The Claimant says that his mental health was not sufficiently strong to be able to deal with the allegations in drafting his ET1 whilst simultaneously holding down a full-time job. He also says that he lacked family support; partly, because of the nature of the allegations he was ashamed or unwilling to speak to his family and friends; partly, because he is from a first-generation immigrant family without English as a first language. I found the Claimant to be an articulate and intelligent man, who set out the reasons for delay and the claims he seeks to bring clearly today. The test for extending time is not based upon sympathy but the application of the appropriate legal tests and the Tribunal only has jurisdiction to hear a claim if the relevant Statutes afford it.

Law

9 Section 111 of the Employment Rights Act 1996 provides that a Tribunal shall not consider a claim of unfair dismissal unless it is presented to the tribunal within three months of the effective date of termination or such further period as the tribunal shall consider reasonable where it is satisfied that it was not reasonably practicable to submit the claim within time. This period is extended by operation of the ACAS early conciliation scheme if entered within the primary time limit. The ACAS provisions do not assist the Claimant as early conciliation was not commenced within the primary three-month time limit in this case.

10 In deciding whether it was not reasonably practicable for the claim to be presented, the tribunal must consider whether there is just cause for not presenting the claim. The words "reasonably practicable" do not require the Tribunal to be satisfied that presentation was not physically possible, in the sense of a physical or mental bar, but should be read as being more a question of whether presentation within time was reasonably feasible, see **Palmer and Saunders v Southend on Sea Borough Council** [1984] IRLR 119, CA.

11 Generally, if a claimant is receiving advice from skilled advisers, such as a trade union representative or solicitor, it will be practicable to present the claim in time, see **Dedman v British Building & Engineering Appliances Limited** [1973] IRLR 379 Court of Appeal. However, the involvement of a solicitor (and by extension, a trade union) does not mean that an extension of time will automatically be refused, the Tribunal must look at all of the circumstances of the case, **North East London NHS Foundation Trust v Zhou** UKEAT/0066/18.

12 It is generally reasonably practicable for a claimant to present a claim to the Tribunal even when an internal appeal is pending, **Palmer**. However, regard should be had to what, if anything, the employee knew about the right to complain to the tribunal and of the time limit for making such a complaint. Ignorance of either, however, does not necessarily render it not reasonably practicable to bring the complaint in time and I should also have regard to what knowledge the employee should have had if he or she had acted

reasonably, see **John Lewis plc v Charman** UKEAT/0079/11/ZT.

13 Section 123 of the Equality Act 2010 provides that no complaint may be brought after the end of the period of three 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. For the purposes of this section conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

14 If the claim is presented outside the primary limitation period (that is, after the relevant three months), the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

- The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended;

- The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;

- This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues;

- There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, **British Coal Corporation v Keeble.** The section 33(3) matters are: length of and reasons for delay; effect upon the cogency of the evidence; the conduct of the defendant, including providing information to help ascertain facts relevant to the claim; any disability of the claimant during the relevant period; how promptly the claimant acted once aware of the ability to bring a claim, including obtaining relevant expert evidence).

Conclusions

15 The complaints presented by the Claimant are clearly considerably out of time. Starting with the unfair dismissal claim, I considered whether it was reasonably practicable to have presented the claim in time. The primary time limit expired at a date when the Claimant was represented by his trade union. Even if the Claimant is right and his trade union gave him incorrect advice, his primary remedy would lie against the trade union. Even giving the Claimant the benefit of the doubt, if I were to accept that he is not to be fixed with a representative's error, he has waited several years until finally presenting a claim. The Claimant has known since July 2018, at the very latest, that he could bring a complaint to the Employment Tribunal but that such complaint was already out of time.

16 I considered the Claimant's alternative explanations that he had not been aware of the ability to submit a claim form on his own behalf. Even if this were the case, in June 2019 Rahman & Lowe solicitors told him that that is what he should do. The claim was not presented until 9 June 2020. I took into account whether the Claimant's health and personal circumstances were such as to render it not reasonable to present a claim during this time. Whilst I have sympathy for the Claimant and accept that these are not easy matters, there is no medical evidence to support a health impairment of a sort sufficient to provide a reasonable barrier to presentation of the claim. As for pressure of work during term time when the Claimant said that he could not work on drafting a claim, I accepted Ms Ling's submission that the Claimant benefited from half term and Easter holidays during this time. The task was rendered more manageable by the provision of a chronological draft claim by Rahman & Lowe in September 2019. For all of these reasons, even if it were not reasonably practicable to present the claim within time, it has not been presented within a reasonable time thereafter. The Tribunal lacks jurisdiction to hear the compliant of unfair dismissal.

17 Turning next to the discrimination claims, I reminded myself of the broader discretion afforded by the just and equitable test for an extension. Dealing first with the nature of the claims, I took into account the significant importance and public interest in discrimination claims being heard. However, it is equally important and in the public interest that a Respondent should be able fairly to defend itself against such serious allegations. The Respondent in this case did not know that it would be required to do so until June 2020, almost four years after the dismissal.

18 Despite the difficulties that the Claimant has experienced with obtaining legal advice, he knew or reasonably ought to have known that he could present a claim to the Tribunal even as a litigant in person by summer 2019 at the very latest, following the advice from Rahman & Lowe. The Claimant had a draft claim in his possession from September 2019 but still did not present his claim. For the reasons set out above, I have not accepted that his health, work or personal circumstances are reasonable excuses for such a lengthy period of delay in presenting a claim which was already out of time.

19 Furthermore, when looking at the balance of prejudice between the parties, I accept Ms Ling's submission that due to the passage of time, the Respondent is no longer able to call as witnesses most of the people directly involved in this case. Ms Acland Hood who chaired the disciplinary hearing resigned three years ago. Ms Linda Kaur, one of the governors involved, is no longer there. The HR representative, Ms Reilly, left the Respondent's employment approximately two years ago. The headteacher at the time, Ms Smith, is no longer employed and the current headteacher had no involvement in the disciplinary or appeal process. Ms Phillips who conducted the investigation and against whom some of the Claimant's most trenchant criticisms are made, was an external consultant and it is simply not known whether or not she could be contacted and even if she were, whether she would have any sufficient memory of the case given her role as an external consultant.

20 I also accept the point made by Ms Ling about the damaging effect of the passage of time upon the cogency of the evidence even if witnesses could be located. If this claim were allowed to proceed, the pressure on Tribunal resources is such that it could not be heard until early 2022. By that date, almost six years will have passed and I accept that the cogency of the evidence would be substantially diminished.

21 I took into account the Claimant's submission that many of the relevant evidence is contained in writing and that witnesses, if they were to attend, could effectively refresh their memory. At first glance, this was a powerful submission however upon closer reflection it does not address the harmful effect upon the evidence caused by such a long gap between the events and the trial. As is commonly observed in litigation, human memory is particularly prone to fallibility and evidence becomes less reliable as time passes. At nearly six years after the events, there is a very significant risk that witnesses would not be refreshing their memory from the documents so much as reading the document and interpreting it with hindsight. Moreover, it does not address the absence altogether of key witnesses. The effect of the passage of time I find is such that that would no longer be possible to have a fair trial.

22 For all of those reasons, I decline to exercise my discretion to extend time and the discrimination claims are also struck out as the Tribunal does not have jurisdiction to hear them.

23 I was grateful for the way in which the Claimant made his submissions today. It is clear that these are matters that have significantly affected him and continue to do so. He presented courteously and capably set out a cogent argument, albeit one which ultimately was not strong enough to persuade me. In deciding not to extend time on the claims, I repeat that I am making no findings on the substantive merit of the allegations which raise issues of great importance for both parties.

Employment Judge Russell

30 November 2020