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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss J McCrystal London and South Eastern and

Respondent

Railways Ltd

Held at Ashford on 29 October 2018

Representation

Claimant:

Miss R Dorfman-Mohajer,
Counsel

Respondent:

Miss N Conner, Counsel

Employment Judge Kurrein

JUDGMENT

1 The Employment Tribunal has no jurisdiction to hear the Claimant's claims and they are struck out as having no reasonable prospect of success.

REASONS

The Issues

1 This matter came before me at an Open Preliminary Hearing to consider whether to extend time, it being accepted that the claims alleging disability discrimination and unfair dismissal had been presented out of time.

The Evidence

2 I heard the evidence of the Claimant and heard the submissions of the parties. I read the documents to which I was referred. I make the following principal findings of fact.

Findings of Fact

2.1 The Claimant was born on 29 May 1972 and started her employment with the Respondent on 13 March 2010 and became a Conductor. She became fully qualified as a Train Driver on 6 October 2014, earning about £50,000 gross.

2.2 Shortly before this the Claimant had been absent from 16 December 2013 to 15 June 2014 because of a growth.

2.3 The Claimant was then absent from 11 January 2015 to 9 April 2015 when she was caring for her partner, who had lung cancer. At a Stage 1 meeting on

26 January 2015 the Respondent took no formal action regarding that absence.

- 2.4 The Claimant was then absent from 18 November 2015 to 21 January 2016, when she was again caring for her partner, and was signed off with stress. On 5 February 2016, at a second Stage 1 meeting, the Claimant was moved to Stage 1 of the Respondent's sickness absence procedure. She did not appeal.
- 2.5 I accepted that by this time the Claimant, who was being treated for anxiety and stress, was diagnosed with Fibromyalgia, which I accept can be a disabling condition.
- 2.6 The Claimant was absent with that condition from 11 April to 11 August 2016. Following her return to work, on 28 August, she attended a Stage 2 meeting at which she was given a final written warning for absence. Her appeal against that warning was rejected.
- 2.7 Sadly, the Claimant's partner then died and the Claimant was absent from 5 to 28 November 2016, in respect of which absence the Respondent took no action.
- 2.8 The Claimant was absent from 13 to 23 February 2017: it appears a tooth extraction had triggered her fibromyalgia. At a Stage 3 meeting on 16 March 2017 she was dismissed with PILON so that was her EDT.
- 2.9 The Claimant was represented by ASLEF throughout the internal proceedings. At their conclusion she and her representative discussed an unfair dismissal claim that the representative said should be taken forward with ASLEF's solicitors. She told me ASLEF did not give her any advice on time limits or tell her she could bring a claim by herself. The Claimant believed she had a disability and that she had been dismissed because of it, but did not know what specific claims existed.
- 2.10 That representative later reported to the Claimant that ASLEF's solicitors had said they would not take the Claimant's claim further but she received no further advice. The Claimant had no legal knowledge or experience.
- 2.11 For any claim relating to that dismissal to be in time the Claimant should have started early conciliation by no later than 15 June 2017.
- 2.12 The Claimant now seeks to allege that the appeal hearing, which was not mentioned at all in her claim form, also amounted to some form of disability discrimination. The outcome is dated 17 May 2017, so for any claim relating to that appeal to be in time the Claimant should have started early conciliation by no later than 16 August 2017. She will have to seek leave to amend to pursue any such claim.
- 2.13 The Claimant in fact started early conciliation on 18 January 2018. She did so having seen something about an unfair dismissal claim on Facebook and, having Googled it, she came across ACAS and telephoned the advice line.

- 2.14 Early conciliation was completed on 18 February 2018 but her claim form was not presented until 16 March 2018. It contains very little detail of the basis on which she brings her claims.
- 3 Based on the evidence before me I find it likely: -
- 3.1 the Claimant will establish she is a disabled person
 - 3.2 the claim form is sufficient to form the basis of an allegation that her dismissal arose from her impairment;
 - 3.3 that allegation is reasonably arguable;
 - 3.4 the Respondent has a reasonable argument that it is likely to succeed in showing dismissal was a proportionate means of achieving a legitimate aim
- 4 It was the Claimant's case that throughout the period of delay, in effect from 16 March 2017 to 18 January 2018, she was so incapacitated she was unable to take the steps necessary to start early conciliation. That incapacity arose principally from: -
- 4.1 the effects of her anxiety and depression and fibromyalgia;
 - 4.2 an excessive consumption of alcohol that arose from her conditions.
- 5 However, the Claimant also sought to rely on having received poor advice from ASLEF/its solicitors.
- 6 I accept that the Claimant's condition deteriorated after her dismissal. In particular: -
- 6.1 Her pain got worse.
 - 6.2 She neglected her personal hygiene.
 - 6.3 Her mobility worsened such that she used her former partner's mobility scooter if she took her dog for a walk.
 - 6.4 There were some days when she couldn't get out of bed.
 - 6.5 On some occasions she could not leave the house except for medical appointments.
 - 6.6 She was "binge drinking" 3 to 5 times a week.
 - 6.7 She was on high doses of some of her medication, and did not sleep well.
- 7 The Claimant received a great deal of assistance from her parents during this period. They stayed with her to help for up to three weeks at a time before returning home and then returning to help her.
- 8 She signed up for and was able to attend a locksmithing course in Warrington for 5 days in mid-June, and subsequently appears to have set herself up in business, although it "was slow, I was only getting one or two jobs a month." It is clear that she was able to and did use the internet. She claimed and was

awarded a PIP. She attended medical appointments at her GP's surgery and at hospital.

Submissions

9 I heard the submissions of the parties. It is neither necessary nor proportionate to set them out here.

The Law

10 The applicable law is set out in S.123 Equality Act 2010 and S.111 Employment Rights Act 1996.

11 I have also had regard to the authorities cited to me, including: -

Wall's Meat Co Ltd v Khan [1978] IRLR 499

Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119

British Coal Corp v. Keeble [1997] IRLR 336

Robertson v Bexley Community Centre [2003] IRLR 434

Bowden v. Ministry of Justice UKEAT/0018/17

University Hospitals Bristol NHS Foundation v Williams UKEAT/0291/12

Marks & Spencer plc v. Williams-Ryan (2005) EWCA Civ 470

Further Findings and Conclusions

Disability Discrimination

12 I accept that I have a wide discretion under S.123. However, the granting of an extension of time is the exception, not the rule.

13 The delay in this case is, at the very minimum (and then only if an amendment is granted), a period of 5 months. That is a long delay when set against the limitation period of 3 months.

14 I was not impressed with the Claimant's evidence as to the reasons for the delay. I did not accept, as was submitted, that she was effectively bedridden throughout: clearly, she was not.

15 She knew she had potential claims for unfair dismissal and disability discrimination from an early stage. She knew the Employment Tribunal was the place to take them.

16 I cannot accept that her claimed ignorance of the applicable time limits was reasonable. Even if ASLEF did not advise her of them, which I think unusual, she failed to take any steps at all to enquire as to her rights and how to enforce them until January 2018, nearly 10 months after her dismissal. Whilst I accept that she may have been a disabled person during this period, and have regard to that, she was not so debilitated by the matters she relies on as to be unable to make such enquiries: the fact she was able to register for and attend the

- locksmithing course, set up in business and work as a locksmith, and claim a PIP is indicative of that.
- 17 The Claimant failed to take any steps at all to seek advice. She did no on-line research. She made no attempt to contact a CAB or legal advice centre or solicitor. I could not accept a lack of means justified that.
- 18 I was also perturbed by the fact that even when the Claimant was aware of the time limits and was lawfully able to present a claim, having received her EC Certificate on 18 February 2018, she failed to do so promptly, delaying until 16 March 2018.
- 19 In any case involving delay there is bound to be some adverse effect on the cogency of the evidence. In addition, I: -
- 19.1 take into account there are no allegations of any impropriety against the Respondent as to the manner in which it has conducted itself; and
- 19.2 note that Mr S Collins, who became the Claimant's line manager toward the end of her employment, and who the Claimant alleges took an instant dislike to her, is no longer employed by the Respondent.
- 20 In all the circumstances of the case I have concluded that the Claimant has failed to establish on the balance of probabilities that it would be just and equitable to extend time in her favour.

Unfair Dismissal

- 21 In light of my above findings of fact I have concluded that the Claimant has failed to establish on the balance of probabilities: -
- 21.1 It was not reasonably practicable for her to present her claim within the 3 month limit; or
- 21.2 That she did so within a reasonable time after its expiry.
- 22 There is no jurisdiction to hear the Claimant's claims and they must be dismissed.

Employment Judge Kurrein
30 October 2018