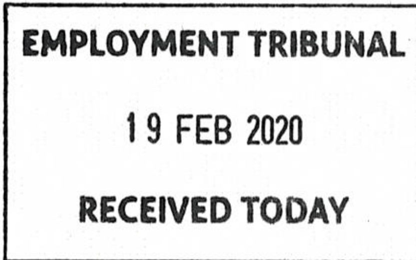
**IN THE EMPLOYMENT TRIBUNAL**

**Claim Number: 4/2019**

**BETWEEN:**

**MERCEDES VILLA**

**Claimant**




**-AND-**

**THE CARE AGENCY**

**Respondent**

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**JUDGMENT**

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**Chairperson: Gabrielle O'Hagan**

**For the Claimant: not in attendance and not represented**
**For the Respondent: Mr Damian Conroy, Crown Counsel**

The Decision of the Tribunal is that the Claimant's Claim be dismissed.

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1. The Respondent is the statutory body responsible for providing social services for the community. The Claimant was employed by the Respondent from 2002 (the exact date is not agreed) until 1 December 2016, latterly as a permanent Care Worker in Disability Services.

2. The Claimant filed a Claim Form on 23 January 2019 expressly claiming unfair dismissal, discrimination, bullying, harassment and victimisation. The Claimant's Details of Claim referred to a number of employment-related complaints, including breach of a duty of care, breach of trust, unlawful suspension, defamation, but did not give any details in support of any of the complaints. The Details of Claim also claimed that the Respondent's conduct had caused the Claimant stress which resulted in "physical damage", but again no details were provided.

3. The Respondent filed a Response Form on 25 February 2019 stating that it defended the Claim and making a preliminary application for the Tribunal to reject the claim on the grounds that it was made out of time (and for an extension of time to file its Details of Response pending the preliminary application being decided).

4. A Preliminary Hearing took place on 10 June 2019 and a Case Management Order was made that the issue of whether the Claim Form was presented in time under the Employment Act and under the Equal Opportunities Act 2006 be determined as a Preliminary Issue and included case management provisions, including the listing of a pre-trial review Hearing. This took place on 3 October 2019. The Claimant had not complied with any of the procedural steps set down in the

Case Management Order including the filing of documentary or witness evidence, and I warned her of the perils of this course of action. For the Respondent, a Witness Statement had been filed by Ms Patricia Brooks, the Respondent's Human Resources Manager, and Ms Brooks subsequently gave evidence at the Preliminary Issue Hearing.

5. The Preliminary Issue Hearing took place on 7 November 2019. On 5 November 2019, the Secretary of the Tribunal had telephoned the Claimant (this was the only contact information the Claimant had provided) to confirm her attendance at the Hearing and whether she again wished the Tribunal to arrange for an interpreter for her (as at the first Preliminary Hearing and the Pre-Trial Review Hearing). The Claimant told the Secretary of the Tribunal that she would not be attending the Preliminary Issue Hearing, despite the Secretary explaining to her the importance of doing so, and said "*this stops here*". This telephone communication did not satisfy the requirements of Rule 45 of the Employment Tribunal (Constitution and Procedure) Rules 2016 on withdrawal of Claims (a withdrawal must be in writing or made in the course of a hearing). Under Rule 47, it was then open to me to dismiss the Claim or proceed with the Hearing in the absence of the Claimant, having considered the information available to me about the reasons for the Claimant's absence. It was also open to me to order an adjournment of the Preliminary Issue Hearing. In the light of the fact that the Respondent had prepared for and was present at the Preliminary Issue Hearing (not a hearing of the Claim itself) and the Claimant's statement "*this stops here*", I concluded that it was in the interests of justice to both parties to proceed with the Preliminary Issue Hearing, in the voluntary absence of the Claimant.

**The facts**

6. Prior to the Claimant's dismissal on 1 December 2016, the Claimant had been on sick leave for anxiety and depression since 24 July 2012, for more than 4 years. According to the Respondent, the Claimant's paid sick leave and annual leave had been exhausted in November 2012 and in her final medical certificate dated 22 May 2013, the doctor stated that the Claimant was "*suffering from severe stress & anxiety & insomnia & depression. This all stems from problems at work. I therefore feel it is unlikely that she will be able to return to this employment for the foreseeable future a possible never* [sic]".

7. The Claimant retained legal representation (Attias & Levy) who sent a letter to the Respondent dated 11 June 2013 making allegations in respect of "*various events which transpired on or around 2004 and 2011*", pointing up that the Claimant had not been paid since November 2012 and requesting the Respondent to make an occupational health appointment for the Claimant.

8. The Respondent arranged the occupational health appointment for the Claimant on 11 October 2013 and a report was made to the Respondent dated 17 October 2013 in which the doctor concluded that the Claimant was suffering from severe generalised anxiety disorder associated with depression related to incidents that she had experienced at work; and that the doctor did "*not see a realistic likelihood that she will recover sufficiently in the near future to be able to return to work within the Care Agency*". The Respondent raised a number of queries on the report (by letter dated 27 January 2014) and a second report was issued dated 4 March 2014 substantively confirming the contents of the first report, including that the Claimant would "*always be susceptible to mental health illness. In my opinion this makes her unsuitable to work in the Care Agency...* ". The second report also referred to advice given by the doctor to the Clamant that:

*"legal action tends to prolong mental health symptoms and could delay her recovery. I would be pleased to think she might have followed my advice to avoid such action."*

9. 7 months later, on 17 October 2014, Ms Brooks wrote to Attias & Levy stating: *"Following a thorough examination of your client, the OH therapist is of the opinion that your client is permanently unfit to work within the Care Agency. In the light of this recommendation we are obliged to consider medical retirement. Prior to making any determination, however, I would like to invite your client to attend the Care Agency ... on 27 October 2014 ... for the purpose of making any representations with regard to the opinion of the OH therapist and upon any determination that may follow resulting therefrom."*

10. The meeting in the end took place on 29 October 2014 attended by the Claimant, her daughter and a legal representative from Attias & Levy. On 30 October 2014, Ms Brooks wrote a follow-up letter to Attias & Levy in which she said: *" I write to confirm that on behalf of your client you indicated that she did not have any representations to make upon the opinion of the OH therapist and the CEO's consideration of terminating her employment on medical grounds. In the circumstances, I can confirm that the matter will now be considered by the CEO who should revert to you with his final determination within the next few weeks."*

11. 2 months later, on 5 January 2015, the Respondent's CEO wrote to Attias & Levy: *"Having taken into consideration your client's existing medical condition which is confirmed by the report provided by the OH therapist I am satisfied that she is permanently unfit to discharge any duties within the agency and should be retired on medical grounds. Your client has previously been given an opportunity to make representations with regard to the finding that she was unfit and has declined to do so, thereby consenting to the termination of her employment on medical grounds. Please treat this letter as three months' notice of termination on medical grounds."*

12. Ms Brooks said in her Witness Statement: *"A further two months elapsed when we were informed by the solicitor that the Claimant would not sign her termination."* This letter was not disclosed by the Respondent. Ms Brooks goes on to say: *"On 27 November 2015, Care Agency's Crown Counsel contacted the Claimant's solicitor in order to chase this matter up. In turn the solicitor stated that he needed to take instructions and requested a few more weeks to settle the matter. On 23 December 2015, the Claimant's solicitors requested a letter confirming that the Claimant was on unpaid sick leave"* (for GHA registration purposes), which the Respondent arranged. None of these communications were disclosed by the Respondent. Ms Brooks goes on to say in her Witness Statement that the Claimant's solicitor confirmed that he would be meeting with the Claimant in January 2016 and that the Respondent remained "*adamant*" that if the Claimant wished to pursue her misconduct allegations against the Respondent, then she needed to provide a statement. *"In February 2016, the Claimant's solicitor contacted the Care Agency stating that he had new instructions"*, namely, that the Claimant would sign the ETB Termination Form if the Respondent paid her for accrued annual leave and issued an apology for victimisation and bullying. *"The Care Agency's response was that the termination was based on her incapacity and based on the recommendation of the OH report and that any allegations made by her had to be substantiated ... There is further correspondence up to 12 May 2016 between the Claimant's solicitor and the Care Agency's Crown Counsel to the effect that the Claimant was still refusing to sign the termination. Finally the termination was signed by the Claimant and processed by the ETB on 6 December 2017. ... In January 2017, I contacted Attias & Levy, advising termination was ready to be sent to the*

*Claimant and I was asked to serve this at their office. This was done and clearly shows that when the employment relationship came to an end, the Claimant had the benefit of what steps were open to her (including applying to the Employment Tribunal).*" None of these communications were disclosed by the Respondent.

13. At the Preliminary Hearing on 10 June 2019, the Claimant had said that the reason for the delay in her filing the Claim Form was because she had been (and still was) suffering from severe stress and anxiety resulting from the Respondent's treatment of her, and for which she had been and still was receiving medical care. She also said, amongst other things, that she had received no medical retirement benefits and was most anxious about the fact that she had no pension entitlement.

**The law**

Employment Act

14. Section 70(4) provides: "The tribunal shall not entertain a complaint [for unfair dismissal] unless it is presented before the end of the period of three months beginning with the effective date of termination unless the tribunal is satisfied that in the circumstances it was not practicable for the complaint to be presented within that period."

15. The burden of proof of establishing that it was not practicable to present a Claim for unfair dismissal in time is on the Claimant.

16. The factors distilled from case law relevant to this case which the Tribunal may take into account when assessing practicability may include the substantial cause of a claimant's failure to comply with the time limit, whether the failure was due to a physical impediment, such as illness, whether and when the claimant knew of their rights, whether the claimant had been advised by anyone and the nature of the advice given and whether there was any substantial fault on the part of the claimant or their adviser which led to the failure to present the complaint in time.

17. In *Marks & Spencer Plc-v-Williams-Ryan* [2005] EWCA Civ 470, the Court of Appeal set out applicable legal principles derived from case law, firstly, that the wording "reasonably practicable": *"20. ... should be given a liberal interpretation in favour of the employee. ... 21. In accordance with that approach it has repeatedly been held that, when deciding whether it was reasonably practicable for an employee to make a complaint to an employment tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and of the time limit for making such a complaint. Ignorance of either does not necessarily render it not reasonably practicable to bring a complaint in time. It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances. So far as that question is concerned, there is a typically lucid passage in the judgment of Brandon LJ in* Wall's Meat Co Ltd-v-Khan [1979] ICR 52 *at page 61 which I would commend:*

> *"With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of three months from the date of dismissal, an industrial tribunal*

*could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned. ...*

*While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such inquiries."*

*...if an employee takes advice about his or her rights and is given incorrect or inadequate advice, the employee cannot rely upon that fact to excuse a failure to make a complaint to the employment tribunal in due time. The fault on the part of the adviser is attributed to the employee. There is a certain amount of authority relevant to this proposition. In Dedman ... Scarman LJ at page 64 concluded his judgment as follows:*

*"When one turns from the general to the particular. Mr Dedman's case is hopeless. He knew he had rights and he was being advised by solicitors well before the expiry of the time limit. There was no reason why he could not present his complaint in time. It was practicable to do so; the fact, if it be so, that his solicitors overlooked the time limit did not make it impracticable, though it may give him a right to damages against them."*

*26. In Wall's Meat Co Ltd -v-Khan [1979] ICR 52 at page 56 Lord Denning returned to this theme:*

*"I would venture to take the simple test given by the majority in Dedman's case [1974] I.C.R. 53, 61. It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights - or ignorance of the time limit - is not just cause or excuse, unless it appears that he or his advisers could not have been so expected, it was his or their fault, and he must take the consequences.""*

Equal Opportunities Act 2006 / Employment (Bullying at Work) Act 2014

18. Section 68 ("Time limits for bringing proceedings in the Tribunal or Supreme Court") of the Equal Opportunities Act 2006 provides:

    (1) "The Tribunal shall not consider a complaint– (a) under section 69 [complaints of unlawful discrimination (including by way of victimisation) or harassment in employment] ... unless the complaint is presented to the Tribunal within the period of three months beginning when the act complained of is alleged to have been done."....

    (3) The Supreme Court or the Tribunal may nevertheless consider any such complaint or claim which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so."

Section 8 of the Employment (Bullying at Work) Act 2014 is in identical terms as regards claims for bulling and victimisation under that Act.

19. The burden is on the Claimant to persuade the Tribunal that it would be just and equitable to consider an out of time discrimination, harassment or bullying claim to proceed. To permit an extension of time is the exception rather than the rule. The Tribunal is entitled to take into account anything that it deems to be relevant (*Hutchinson v Westward Television Ltd* [1977] IRLR 69) and the Tribunal's discretion is as wide as that of the civil courts under the Limitation Act (*British Coal Corporation v Keeble* [1997] IRLR 336 and *DPP v Marshall* [1998] IRLR 494).

20. The civil courts and so the Tribunal must consider factors relevant to the prejudice that each party would suffer if an extension were refused, including (of relevance to this case): the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the promptness with which the claimant acted once they knew of the possibility of taking action; and the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

**Decision**

1. 3 months from the effective date of termination of the Claimant's employment (1 December 2016) was 28 February 2017. The Claimant presented her Claim Form on 23 January 2019, just less than 2 years later.

2. In respect of the Claimant's discrimination, harassment and bullying claims, the delay of 22 months in the presentation of the Claim Form is considerable. It would likely affect the cogency of any witness evidence. The Claimant did not at any stage explain why she had finally submitted her Claim, so it is not possible to assess how promptly she acted.

3. The only reason for the delay given by the Claimant at any stage of these proceedings was her statement at the Preliminary Hearing on 10 June 2019 that she had been (and still was) suffering from severe stress and anxiety resulting from the Respondent's alleged treatment of her, for which she had been and still was receiving medical care. The occupational health reports disclosed by the Respondent clearly evidence the Claimant's mental health as quite poor in the period prior to the termination. However, no evidence, medical or otherwise, was submitted by the Claimant as to her state of health in the period after the termination of her employment, since the Claimant did not attend the Preliminary Issue Hearing or submit any evidence beforehand, which might have persuaded me that her state of health was an impediment to the Claimant filing her Claim Form either in the 3 months after the termination of her employment or at any point in the 22 months which followed. I therefore find that given the length of the delay, in the absence of any evidenced reasons for the same, it would not be just and equitable to extend the time for the Claimant to have presented her Claim for discrimination, harassment and bullying.

4. By reference to the factors which the Tribunal may take into account when assessing the practicability for a claimant of presenting an unfair dismissal Claim within the prescribed time, again, the Claimant's mental health could have been the substantial cause of her failure to comply with the time limit. However, again, the Claimant presented no evidence, medical or otherwise, as to her state of health in the period after the termination.

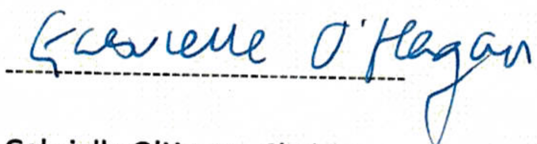
5. It also appeared from the documentation disclosed by the Respondent that the Claimant was receiving legal advice in relation to her employment throughout the pre-termination period right up to the point of the finalising of her ETB Termination Form. According to Ms Brooks' evidence, the Respondent sent to Attias & Levy the Claimant's signed and stamped ETB Termination Form in

January 2017. This was unsupported by any documentary evidence, but there was no reason to disbelieve Ms Brooks, who presented as genuine and credible, albeit not cross-examined due to the Claimant's non-appearance.

6. Although neither party presented evidence from Attias & Levy, I cannot see any reason why they would not have advised their client, the Claimant, on any potential claims arising out of her employment or the termination of the same, during their retainer and certainly on receipt of the Claimant's ETB Termination Form from the Respondent. Such advice would inevitably have included advice on the applicable time limits. As regards the Claimant's unfair dismissal Claim, if the advice did not do so or if the advice given was inadequate or incorrect, the Claimant could not rely upon that fact "*to excuse a failure to make a complaint to the employment tribunal in due time. The fault on the part of the adviser is attributed to the employee*" (Marks & Spencer Plc-v-Williams-*Ryan* [2005] EWCA Civ 470).

7. Taking such matters into account, and in the absence of any case or evidence being advanced by the Claimant in respect of the Preliminary Issue, my only possible finding is that the Claimant has not succeeded in discharging the burden of proving that it was not reasonably practicable for her to present her Claim for unfair dismissal within 3 months of her termination of employment by the Respondent, or of persuading the Tribunal that it would be just and equitable to consider her Claim for discrimination, harassment and bullying out of time.

8. The Claimant's Claim No. 4 2019 is therefore dismissed in its entirety.



**Gabrielle O'Hagan, Chairperson**

**18 February 2020**