

Reserved judgment



## EMPLOYMENT TRIBUNALS

Between

Claimant: K

Respondent: A Restaurant

Heard at London South Employment Tribunal on 18 October 2017

Before Employment Judge Baron

Representation:

Claimant: K's father

Respondent: Sarah Bowen - Counsel

### JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal as follows:

- 1 That the Tribunal has the jurisdiction to decide the claims brought by the Claimant;
- 2 That the claims be not struck out under rule 37 of the Employment Tribunals Rules of Procedure 2013.

### REASONS

- 1 On 8 May 2017 the Claimant a claim form ET1 was presented to the Tribunal on behalf of the Claimant. On the form the relevant boxes were ticked to indicate that claims of discrimination were being made based upon the protected characteristics of sex, sexual orientation and disability. The Claimant is a gay woman. The disability or disabilities relied upon are dyslexia and learning difficulties. The fact of disability is not conceded by the Respondent, but that is not relevant for present purposes.
- 2 There is an allegation of a sexual offence, and on 16 May 2017 I made an order under rule 50 of the Employment Tribunals Rules of Procedure 2013 for the purpose of ensuring that the Claimant was not identified.
- 3 This hearing was arranged to determine whether the Tribunal had the jurisdiction to consider some or all of the claims, taking into account the statutory time limit, and also to consider whether to make an order under either of rules 37 or 39 of the 2013 Rules. The Tribunal has the power

under rule 37 to strike out a claim, or part of a claim, if it has no reasonable prospect of success. Under rule 39 the Tribunal may make an order for payment of a deposit as a condition of the Claimant being allowed to pursue a claim or part of it if there is little reasonable prospect of success. Before such matters could be considered it was necessary to ascertain exactly what claims were being made.

- 4 I set out below my understanding of the allegations being made, and how they fit into the provisions of the Equality Act 2010. The details in the claim form were very sketchy, and in particular no dates were stated. Much information came from the Respondent's response, and also a small pack of documents provided by Miss Bowen. It is important that if the Claimant (or indeed the Respondent) does not accept my analysis summarising the factual allegations being made then the Tribunal is notified within 14 days of the date upon which this document is sent to the parties. It is no criticism of the Claimant, or her father, to say that there was no attempt to put the factual allegations into one or more of the categories of unlawful conduct within the Equality Act 2010. Indeed, it is part of the function of the Tribunal to assist claimants who are not professionally represented.
- 5 The Claimant has been employed by the Respondent from mid-2016 working in the kitchen. She was initially employed in the Respondent's branch 1 and moved to branch 2 in March 2017. Her complaints are as below.
  - 5.1 The first complaint is that the Claimant was touched by one of her colleagues (A) and verbally abused by him on or shortly before 23 August 2016. This is a claim of harassment and/or direct discrimination under the 2010 Act based on the protected characteristic(s) of sex and/or sexual orientation.
  - 5.2 Next the Claimant alleges that as a consequence of her having made a complaint about that incident her manager (B) reduced her weekly hours to between five and eight a week. That is a claim of victimisation within the meaning of the 2010 Act.
  - 5.3 The Claimant also alleges that a more senior manager (C) threatened to discipline her if she 'kept going on about the sexual assault'. That appears to be an allegation of victimisation.
  - 5.4 The fourth allegation is that another manager (D) made a joke about touching to A, which joke the Claimant alleges was aimed at her. Again this appears to be an allegation of victimisation, or harassment based on the protected characteristic(s) of sex and/or sexual orientation.
  - 5.5 The Claimant says that at her initial induction she informed the Respondent of her disability, but that that information was not conveyed to branch 1 until much later. After the branch had been informed of the impairment another manager (E) looked the Claimant up and down, and said words to the effect that she did not look disabled. That is an allegation of harassment based

on the protected characteristic of disability. The date of the alleged incident was August or September 2016.

- 5.6 The next alleged incident arose out of the Claimant not serving bacon which she considered was off on 28 October 2016. The first point is that the Claimant was suspended and then received a first written warning following disciplinary proceedings. During that process another manager (F) is alleged to have shaken her head, pointed at it, screamed at the Claimant, and said that she was dumb and stupid. The Claimant alleges that the disciplining of her and the issuing of the warning were acts of victimisation, and that the conduct of F was harassment based on the protected characteristic of disability.
  - 5.7 The Claimant was transferred to branch 2 in March 2017. She does not complain about the fact of the transfer, but she does complain that it was effected without any warning or consultation. That is said to be victimisation.
  - 5.8 The final factual allegation concerns her hours at branch 2. The Claimant had signed a contract when she commenced work at branch 1. The documentation is slightly odd, but the Claimant says that she wanted to work for 40 hours a week over the five weekdays, with a minimum of 16 hours. She then signed a further contract when she moved to branch 2 which was in the same standard form but was amended to refer to a minimum of 16 hours and a maximum of 18 hours over the entire week. As I understand it the Claimant's complaint is that she was only provided with the minimum 16 hours at branch 2. This is an allegation of victimisation.
- 6 Contact was made with ACAS under the early conciliation procedure on 10 March 2017, and the certificate was issued on 10 April 2017. The claim form ET1 was presented to the Tribunal on 8 May 2017. The primary time limit under the 2010 Act is three months from the act of which complaint is made. That is extended to allow for the early conciliation procedure. Counting backwards from 10 March 2017, it is only incidents on or after 11 December 2016 which are clearly in time.
  - 7 The apparent time limit of three months is effectively amended where the allegations together constitute 'conduct extending over a period'. The different incidents are treated for the purposes of the jurisdiction of the Tribunal as having been done when the last incident occurred. In this case it is agreed that the last matter about which the Claimant complains, being her hours at branch 2, occurred within the relevant limitation period. If I were to find that that matter, and the previous matters of which the Claimant complains, fall within the concept of 'conduct extending over a period' then the Tribunal will have the jurisdiction to hear all the complaints.
  - 8 If I were to find that the Tribunal did not have the jurisdiction to consider any one or more of the factual allegations after allowing for the point mentioned in the preceding paragraph then nevertheless the Tribunal

has the jurisdiction to extend the time limit where it is just and equitable so to do.

- 9 Information was supplied to the Tribunal by the Claimant's father. Regrettably he was very unclear about dates. I was told that the Claimant delayed telling her parents about what she says occurred in August 2016, but I do not know when they were told. The Claimant's father said that he visited branch 1 to talk to manager B on several occasions after he had been informed by the Claimant of what she says occurred. He was not able to provide any dates. The Claimant's father also said that he contacted ACAS for advice. He initially said that this was in August 2016, but then said it was later and in November or December. The advice was to utilise the grievance procedure, and as a result a letter was written dated 12 January 2016. I note in that letter it is said that it was around July 2016 that the Claimant was sexually and verbally assaulted, and that all the Claimant wanted was to be provided with the working hours she was employed to do. The Claimant's father also said that he was not advised by ACAS about time limits until the certificate was issued on which occasion he was told that he had a month to present a claim. He also said that he had been trying to obtain affordable legal representation during that month but without success.
- 10 I now turn to the submissions of Miss Bowen and my conclusions. The first is that what occurred (or is alleged to have occurred) does not fall within the concept of conduct extending over a period. The Claimant complains of various different matters carried out by different people and falling into different legal categories. I accept that it is the Claimant's case that to a large extent they arise out of the first alleged incident in August 2016, but that is not sufficient to create a continuing act.
- 11 The next consideration is whether time should be extended on the basis that it is just and equitable to do so. It must be fair to both parties to extend the time, and not only to the Claimant. Miss Bowen correctly submitted that the burden is on a claimant to show that it is just and equitable to extend the time, and thus time should not be extended without justification. She submitted that it was not credible that the Claimant had delayed in informing her parents, and that they must have become aware of an investigation following the Claimant having made a report to the police. The overall difficulty I have with that point is simply the lack of information.
- 12 Miss Bowen submitted that the information as to the lack of advice from ACAS was not credible, and that the past and future delay before a hearing would necessarily affect the cogency of the evidence. She also submitted that the delay of almost a month between the issuing of the early conciliation certificate and the presentation of the claim form was not justifiable. Finally on this point Miss Bowen submitted that the Respondent would have to go to considerable expense if defending the claim.
- 13 I conclude that despite the lack of chronological detail from the Claimant's father he did make proper efforts to seek to resolve at least some of the issues, first of all direct with manager B and then by use of

the Respondent's grievance procedure. I do not consider that an existing employee ought to be criticised for taking that step rather than taking the contentious step of the issuing of a claim. This is not a case where a claimant simply did nothing for a considerable period and then pursued the matter.

- 14 I agree with Miss Bowen that it is difficult to believe that ACAS did not advise the Claimant's father of the statutory time limit at least to some extent. From having heard the Claimant's father I do accept that if he had been advised of the point then he did not fully understand it. His statement that ACAS advised using the grievance procedure certainly rings true.
- 15 There will be a delay in the hearing of this matter until May 2018. The reason is simply a lack of judicial resources. That delay is to be regretted, but I do not see that a claimant ought to be prejudiced by that lack of such resources.
- 16 The Tribunal must consider the balance of prejudice. Miss Bowen was not able to show that the Respondent had suffered any specific factor peculiar to the circumstances of the case that would disadvantage the Respondent in defending the claim. Miss Bowen referred to the costs of defending the claim. That factor is of course one which is relevant to any consideration as to whether to extend the time on a just and equitable basis, and forms part of the balancing exercise. The other factor to bear in mind is that if time were not to be extended the Claimant may be deprived of a determination of a valid claim.
- 17 On balance in these circumstances I am persuaded that time should be extended, and that accordingly the Tribunal has the jurisdiction to decide the complaints.
- 18 There was an application that the claims be struck out under rule 37 on the basis that they have no reasonable prospect of success. A consideration of this matter involves taking a relatively superficial overview of the information in the claim form ET1 and response form ET3, together with any other information provided, but without conducting a mini-trial. I am not satisfied on the information before me that there is no reasonable prospect of success in respect of any elements of the claims. They rely predominantly on oral evidence. The reference in the second contract of employment to maximum and minimum hours in my view also requires oral evidence.
- 19 Case management orders have been made separately.

**Employment Judge Baron**

**24 October 2017**