



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Smith  
**Respondent:** Saxton 4 x 4 Limited  
**Heard at:** East London Hearing Centre  
**On:** 22 June 2018  
**Before:** Employment Judge Russell

**Representation**  
**Claimant:** In Person  
**Respondent:** Did not attend

## JUDGMENT

It is the judgment of the Employment Tribunal that:-

1. It is just and equitable to extend time and the claim can proceed.

## REASONS

1. By a claim form presented on 4 April 2018, the Claimant brings complaints of harassment related to sexual orientation and/or victimisation. The Respondent defends the complaints on grounds that the claim was presented out of time and also on the merits. Essentially, the Claimant alleges that he was subjected to homophobic abuse and unwelcome comments about his sexual orientation by a number of employees over a period from 30 May to 6 June 2015, that he raised a grievance about this conduct which was investigated in a manner which was not fair and which then resulted in him facing disciplinary action as the alleged instigator of inappropriate sexual comment and conduct in the workplace (which he strongly denies) which led him to resign. The Respondent's case is that the Claimant raised a complaint about inoffensive language related to sexuality, that it was investigated extensively but was not upheld; its case is that in the course of investigation it became aware of the alleged misconduct of the Claimant, it instigated a disciplinary hearing which the Claimant did not attend following which he was summarily dismissed on 3 September 2015.

2. When the claim was accepted, it was listed for a Preliminary Hearing today to determine the time point given that the claims arise out of employment which terminated in August 2015. The Notice of Hearing was sent on the same day and to

the same address as the Claim Form. The Respondent filed a Response under a covering letter which enclosed a payslip relevant to the application to extend time. The Claimant attended today but nobody attended from the Respondent. The clerk telephoned the Respondent at 10 am and spoke to a manager called Neil. The manager was aware of the claim, but not of today's hearing. Mr Alan Austin, who has been dealing with the matter on behalf of the Respondent, is on holiday and does not return until tomorrow. I was satisfied that the Respondent had proper notice of the hearing and that it was just to proceed in their absence.

3. This is a fee's case. The Claimant says that he was not able to bring a claim in the Employment Tribunal at the time that his employment ended as the fees regime in place at the time required him to pay £250 upon issue and a further fee of £950 for hearing. The Claimant today provided evidence which I accept that in the summer of 2015 he sought advice as to his legal position through Stonewall, the Mary Ward Centre and tried to find other free representation. I accept his evidence that he engaged in initial discussions with ACAS in an attempt to resolve his concerns. The Claimant explained that he was believed that the Respondent would not mediate or engage in settlement. The Claimant was aware of the need to pay fees and knew that he would not be able to afford to do so. He did not want to waste the Tribunal's time and believed that he may get into trouble if he started a claim but was not able then to pay a hearing fee.

4. The Claimant has produced his current account bank statements for the period 1 June to 30 November 2015. These show that even before employment terminated, the Claimant was a man of very modest means. In late July 2015, he had to take out a loan to help with ordinary monthly expenditure. Following the termination of his employment, his financial situation worsened and by 31 November 2015 he was in overdraft and having direct debits returned. The Claimant also produced his savings account annual summaries which showed a nil balance for the year 16 June 2015 to 13 June 2016. At the time that his employment terminated, the Claimant thought that he had secured another job but this did not proceed possibly because he did not receive a reference from the Respondent. The Claimant eventually started a new job on 5 December 2015, by which date the time for commencing early conciliation and bringing a claim had already expired. Moreover, his new salary was about £1,700 per month after tax; enough to mean that he would not qualify for remission.

5. The Respondent has produced a payslip in support of its contention that the Claimant was not unable to pay the fees. The payslip was issued in respect of pay for November 2014. This was some 9 months before the employment ended and a year before the time when fees would have had to be paid. I did not find it persuasive evidence of means.

## Law

6. 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. Before a claim can be brought, the Claimant must obtain a certificate from ACAS to confirm that early conciliation has been attempted and concluded. The time limit for starting early conciliation is also three months from the date of the act to which the complaint relates.

7. The Claimant's case has clearly been presented out of time. 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:

- Time limits in employment cases should be observed strictly and an extension is the exception not the rule, see **Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576.
- 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** [1977] IRLR 336.

8. On 26 July 2017, in **R (on the application of Unison) v Lord Chancellor** [2017] UKSC 51, the Supreme Court decided that Employment Tribunal fees were unlawful and struck down the legislation which introduced them. Lord Reed held that the fees regime put people off making or continuing claims not only where fees were unaffordable but also where the fees may render it futile or irrational to bring a claim. In his opinion, no sensible person will bring a claim unless he can be virtually certain of success, that the award will include reimbursement of fees and that the award would be paid in full, and that "if those conditions are not met, the fee will in reality prevent the claim from being pursued, whether or not it can be afforded."

## Conclusion

9. Having regard to the Supreme Court judgment about the effect of fees and the Claimant's finances, I am satisfied that this is a case where the fees regime prevented the claim from being brought at the time. The fees were not affordable for the Claimant when the time limit expired. His relatively modest salary from December 2015 and the fact that even then he would have had to persuade a Tribunal to extend time rendered it futile or irrational (within the context envisaged by Lord Reed) to bring a claim then.

10. The effect of fees is a relevant factor but it is not the only factor which I must consider when deciding whether or not to extend time. I had regard to the

Respondent's contention the Claimant's case is weak and the documents relied upon in support of that contention. The Claimant strongly contests the content of the documents and the fairness of the very process which the Respondent relies upon also forms part of the Claimant's case. I am satisfied that there is a significant dispute of fact between the parties which requires the evidence to be tested at a hearing. At this early stage, I cannot say that the claim is either weak or strong, it could go either way.

11. It is common ground that the Claimant's complaints were raised at the time, they were investigated and a large number of witnesses interviewed. The Respondent says that it has 21 statements from employees which can be supplied. There are notes of the relevant meetings with the Claimant. There are therefore contemporaneous documents which will be available to the Tribunal hearing the claim. The Respondent has not asserted that any of its principal witnesses are no longer available to give evidence. In the circumstances, I am satisfied that a fair trial is still possible despite the delay.

12. For all of these reasons, it is just and equitable that the claim be permitted to proceed and I extend time accordingly.

Employment Judge Russell

22 June 2018