EMPLOYMENT TRIBUNALS

Claimant: Miss J Lowe

Respondent: Marks and Spencer PLC

HELD AT: Manchester **ON:** 24 January 2018
In Chambers 28 March 2018

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Ms J Shepherd, Counsel

JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that:

1. The claimant's specific claims of sex discrimination in the form of harassment at the hands of a male colleague, and victimisation, which pre – date 7 June 2017 were presented out of time, but may form part of the series of acts which constitute conduct extending over a period of time for the purposes of s.123(3) of the Equality Act 2010, so as to entitle the Tribunal to hear them.

2. The determination of whether such claims do fall within s.123(3) of the Equality Act 2010, and, if not, whether It would be just and equitable to extend time for the presentation of any of the said claims shall be made at the final hearing, and after consideration of all the evidence.

3. The Tribunal proposes to make case management orders in relation to the claims. The parties are invited to liaise and attempt agreement on what orders are to be made, and to inform the Tribunal by **13 April 2018** of the proposed orders that they jointly seek, or if agreement is not achieved, whether a further preliminary hearing is required.

REASONS

1. By a claim form presented on 20 November 2017 the claimant brings claims of unfair dismissal, sex discrimination and for equal pay. The claimant resigned from

her employment with the respondent on 19 June 2017, began early conciliation on 18 September 2017, and obtained a certificate dated 26 October 2017. It is conceded that her unfair dismissal claim was presented within the relevant time limit. It is similarly conceded that the claimant's claims for equal pay were presented within time.

2. By the response filed on 22 December 2017, however, the respondent contends that various aspects of the claimant's sex discrimination claim are out of time, and accordingly the respondent sought, and the Tribunal granted, a preliminary hearing to determine whether any of the claimant's claims were out of time, and, if so, whether the Tribunal should exercise its discretion to extend time for their presentation.

3. The respondent's skeleton argument did go further, and made submissions in relation to the merits, and prospects of success of the equal pay and unfair dismissal claims, but Ms Shepherd of counsel, who appeared for the respondent, conceded that the Tribunal had not listed any application for a deposit order or strike out of these claims, and did not pursue any such applications.

4. The claimant appeared in person, and gave evidence. No witnesses were called by the respondent. The evidence was given, the documents provided to the Tribunal were considered, and the parties' submissions were heard. As the hearing took most of the day, the Employment Judge reserved his judgment, which has been considered in Chambers on 8 March 2018. Whilst no anonymisation order has been sought, the Employment Judge will in this judgment refer to persons involved in the case by their initials.

The claims.

5. In her claim form presented on 20 November 2017 the claimant claims unfair dismissal, sex discrimination and equal pay. The claimant submitted her claim form herself, without legal assistance, and has remained self – representing. The details of her claims are set out in box 8 of the claim form, and continue into a 5 page document attached to the claim form. The claimant subsequently, pursuant to an order of the Tribunal, submitted further information, a 12 page document dated 18 January 2018. This document incorporates (rather unnecessarily) extracts from the response, and the claimant's responses thereto.

6. The types of sex discrimination claim made by the claimant are victimisation, and harassment. In the narrative attached to the claim from the claimant alleges that she was sexually harassed by a male colleague ("AR") over two years, between 2014 and 2017. She alleges that she reported this to the respondent, who then failed to take any or any adequate steps to protect the claimant.

7. In terms of dates on which specific acts of harassment are alleged to have occurred, the claimant has specified January 2014, various unspecified dates in 2014, a date before November 2014, 9 January 2015, 23 June 2015 and December 2015. She has also claimed that until she left in June 2017 AR would continue to find any excuse to stand uncomfortably close to her and unnecessarily touch her back and shoulders.

8. The claimant alleges that she raised complaints about the behaviour of AR with her line manager, JJ, at some point, probably in 2014/2015, which the respondent accepts, although there is a dispute about the terms of that complaint and whether it would fall within the Equality Act 2010 as a protected act.

9. In relation to the victimisation claims in 2017, the claimant had originally alleged that she was threatened that she would get into serious trouble by her manager LM on 31 March 2017 for having raised concerns about equal pay in an e-mail of 24 March 2017. In her further information, the claimant also alleges that n March 2017 JR spoke to her in an aggressive manner in a group training session, because, the claimant alleges she had made JR aware of the harassment she had been subjected to.

The claimant's evidence.

10. No witness statement from the claimant had been directed, but as she was likely to be asking the Tribunal to exercise its discretion in relation to the claims that were conceded to be out of time, the claimant was invited, and agreed, to give evidence. She relied upon her claim form and the further information she had provided in her document dated 18 January 2018 as her evidence in chief.

11. In explaining why she had not brought the claims any earlier, and whilst still employed by the respondent, she said she felt she could not do so. She suffered from severe anxiety and panic attacks, and not felt able to tackle the issues. If she had known at the time what she knew now, she might have done so. Whilst some of the claims pre – dated three months before she left the employment of the respondent, some of the claims did not, she experienced the type of behaviour she was complaining about up until the day she left in June 2017.

12. In cross examination, the claimant accepted that the last specific date that she had referred to in her claims was December 2015, and that she had not included any dates of any incidents at all in 2016 and 2017. She agreed she had not been sworn at since June 2015. In relation to AR standing uncomfortably close to her , she had not given any dates but this was a daily occurrence, she could not think of a day when it did not happen.

13. The claimant accepted that she had raised a grievance in 2015, but had not referred to any inappropriate touching. This was because she had been told only to refer to the swearing, and she could then raise a further grievance. She believed the other issues would be investigated, but they were not, and she never got a response. She then had no faith in the process, and was unwell, so she had not raised any further grievance. She appreciated that these were serious allegations, and that the person accused should have the opportunity to respond. She agreed that standing next to someone and putting a hand on their should would not, in isolation be memorable, or a problem, but she maintained that in the context of the office environment where everyone knew about it, it would be.

14. The claimant accepted that the "elephant impression" incident was not repeated. She agreed that the alleged comment about AR missing her face whilst she was on holiday could depend on the context, but could not say if he would be likely to be able to remember it now.

15. The claimant was asked if she had taken any advice before presenting the claim, and said she had spoken with ACAS, but no one else. She had not taken any advice in 2015. She had been wary of going to an external body as a manager had threatened a colleague about what could happen when he left if he did such a thing. She also felt she was not capable of raising a complaint. She was unwell, but there was no reason why she could not contact ACAS.

16. The claimant had applied for her current job before she resigned, and had been looking for another post. She saw that as light at the end of the tunnel, continually talking about what had happened was not helping her.

17. She refuted the suggestion that she had given no dates for incidents in 2016 and 2017 because there were none, and that she had said this to get round her claims being out f time. Her manager had suggested that she keep a log, but she had not done so.

18. In relation to her victimisation claims she was relying upon complaints to JR and LM, the latest of which was March 2017.

19. The claimant said she may have e-mails which record these matters, but she did not have them with her. She accepted that she had not referred to any documents in her further information document.

20. In answer to questions from the Employment Judge the claimant agreed that she had not gone to ACAS for early conciliation until 18 September 2017. She said she needed to ensure she was well enough to bring a claim, and she was not sure of the timescales. She agreed that she should have issued the claims sooner.

The respondent's submissions.

21. Ms Shepherd had prepared a Skeleton Argument, which formed the basis of her submissions. She took the Tribunal through the principles in ***British Coal v Keeble*** (see below). She submitted that the claimant could not found her claims on vague assertions. She had made specific allegations about AR, but had sought to add to them by further allegations of touching, which she accepted were not inherently sexual, relying upon "context" heavily. The respondent and AR were entitled to know the case against them and could not be expected to respond to such claims now. 18 months of broad allegations without details cannot properly found a claim. The claimant had been given a very full opportunity to be more specific, and she had done this in some instances, but these are all in 2015, none are in 2016 or 2017.

22. Looking at the length of the delay criterion, it was significant, being up to two years, and the reasons for it were not adequately explained. There was likely to be an effect on the cogency of the evidence, with witnesses having to remember back to January 2015.

23. The claimant had not acted promptly once aware of the matters giving rise to the claim. There had not been, as sometimes occurs, a grievance about these

maters in which the participants would be asked to recall the relevant events. He only grievance had been about the swearing incident in 2015.

24. In relation to the steps taken to obtain advice, the claimant knew about ACAS, and there was nothing stopping her ringing that organisation once her employer was not taking the appropriate action. The claimant did not contact ACAS until three months after she resigned. The claimant had produced no medical evidence to support her application. She had worked alongside the alleged discriminator, save for 3 months between July and October 2016. She had been able, before she resigned, to search for and obtain new employment.

25. The Tribunal should weigh the prejudice to the respondent of having to respond to these claims which are now over 3 years old.

26. Turning to the victimisation claims, these were not free – standing. There was originally only one, on 31 March 2017, when the claimant alleges that she was threatened for discussing salaries. The early conciliation should have been started by 30 June 2017, but was not until September 2017. The claimant was by then better, and off medication. The same prejudice arguments apply as those in relation to the other claims.

27. The Employment Judge did interpose that the respondent had been able to plead to this allegation at para. 57 and on of the response, which Ms Shepherd accepted, but said that the witnesses would be likely to have to recall these events at the final hearing long after they had occurred.

28. The three month time limit was there for good reason, and the claimant had not provided adequate reasons for the delay. The respondent's witnesses would have to respond to alleged omissions to act, when their ability to recollect would be affected.

29. At this point the Employment Judge invited Ms Shepherd to address a issue that had not thus far had been addressed, namely, the possibility that the claims could be found to be in time by virtue of s.123(3) as conduct extending over a period of time. Ms Shepherd submitted that this was not arguable, without full details of what this alleged conduct was, which was missing. The respondent was left guessing, and such a claim could not be founded without details. The claimant had not alleged that any specific acts, such as the swearing or the "elephant impression" had been repeated. AR should not have to give evidence to answer such vague and old allegations. The claimant should not be allowed to proceed on the basis that "something may turn up", the claims should have a proper foundation.

30. Finally, the respondent would argue that there was a break in any conduct between July and October 2016, when the claimant was off work ill. The 2015 claims are clearly very out of time, the claimant should have made her claims about them within three months. Alternatively, any course of conduct should be limited to the period from October 2016 to June 2017.

The claimant's submissions.

31. After a period to time to prepare, the claimant made her submissions in reply. She is not, of course, a lawyer, and was not expected to raise any legal points, or to respond fully to Ms Shepherd's submissions on the law, in particular.

32. the claimant did, however, explain how she did indeed rely upon the context of the conduct to which she was subjected. This had not been innocent contact. Ar was her co – worker, and they did not have a relationship which justified him touching her. There was an inherent bullying culture in the respondent, and staff could not speak to managers. She had focussed on those clams where she had some supporting evidence, such as e-mails, and she may be able to provide more details. It had taken her a long time to recover, she could not just "switch" back on, and this had stopped her bringing the claims sooner, as she should have done. She believed that the respondent's witnesses would be able to remember events once prompted.

The Law.

The relevant time limits : s.123 of the Equality Act 2010.

33. The relevant provisions of the Equality Act 2010 are these:

123 Time limits

(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of—

> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

> *(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*

(3) For the purposes of this section—

> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

> *(a) when P does an act inconsistent with doing it, or*

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

The just and equitable extension.

34. This hearing raises the issue of whether it would be just and equitable to extend the time for presentation of these claims. In deciding whether to exercise its discretion , the Tribunal takes into account the guidance upon how it should approach this task set out in ***British Coal Corporation v.Keeble [1997] IRLR 336*** , In the event that either the existing claims as presented, are out of time, the Tribunal has to consider whether to extend time under Para. 3(3) of Schedule 3 above, on the basis that it would be just and equitable to do so. This discretion, of course, is the same as conferred by several other discrimination statutes, and caselaw has evolved as to how a Tribunal should approach the exercise of its discretion. One of the leading cases is ***Robertson v. Bexley Community Centre t/a Leisure Link 2003 [IRLR] 434*** ,a judgment of the Court of Appeal. Of particular note is the judgment of Auld L J, who made it clear that there was no presumption of extension, but rather the converse was the case, extension was the exception, not the rule, and an out of time claimant had to convince a Tribunal why an extension should be granted. In terms of the principles upon which a Tribunal should approach the exercise of the discretion, the EAT in ***Chohan v. Derby Law Centre [2004] IRLR 685*** endorsed the approach taken in ***British Coal Corporation v. Keeble*** to the effect that Tribunals should consider the factors listed in s.33 of the Limitation Act 1980, which applies to the exercise of discretion to extend time in personal injury claims before the civil courts. Those factors are:

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 extent to which the party sued had co-operated with any requests for information;

The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and

The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

Those factors, whilst useful, must not, however, be regarded as a checklist, or exhaustive. In ***London Borough of Southwark v. Afolabi [2003] ICR 800*** the Court of Appeal held that the s.33 factors were of utility, but that as long as no significant factor was left out of consideration, a failure to follow the express provisions of s.33 would not be a error of law. In that case, delay of 9 years was, exceptionally, not fatal to the application to extend time.

Discussion and Findings.

35. The first issue to be addressed is whether the Tribunal should find in this preliminary hearing that some of the sex discrimination claims the claimant makes are out of time, and that there is no reasonable prospect of them being found to

constitute conduct extending over a period of time, so as to fall within s.123(3) of the Act. If there is such a prospect, this Tribunal should not embark upon a factual enquiry, but should leave the matter to be determined in the final hearing. Issues as to discretion, of course, do not then arise, as the claims are not found to be out of time, and may well not be. If, on the other hand, this Tribunal can say on the material before it that there is no reasonable prospect of the claimant establishing at the final hearing the there was conduct extending over a period of time, which encompasses all, or even some, of the period during which specific individual claims would be out of time if not saved by s.123(3), it should not hesitate to do so, and should then go on to consider whether to exercise its discretion to extend time on the principles set out above.

36. With respect to Ms Shepherd, her submissions rather addressed the issues in reverse order. The Tribunal notes, however, her submission that the claimant cannot show a triable issue in relation to conduct extending over a period of time.

Is there arguably conduct extending over a period within s.123(3) of the Act?

37. In the view of the Tribunal there is. Whilst the claimant has not been specific, if her case is, as she has repeatedly said, that the conduct on the part of AR was a daily occurrence, right up until the day she left, it seems irrelevant to the Tribunal that she cannot specify any particular dates. The respondent is perfectly free to test that evidence , but there is nothing in the assertion that is so inherently improbable , or any other evidence that has been produced to refute it, that the Tribunal could safely at this stage reject the allegations as having no reasonable prospect of success. If established, the conduct could , of course , amount to conduct which satisfies s.123(3) of the Act. The Tribunal cannot agree, either, with respect, with Ms Shepherd's assertion that any such conduct could not go back further than October 2016, because the claimant was off sick from July to October 2016 . A course of harassing conduct does not cease to be a course of such conduct simply because the victim is unavailable to be harassed. In any event, if successful, that argument would still not prevent the claims going back to October 2016. These are, however, issues for the final hearing, when the factual basis can be established.

38. In reaching this judgment, the Tribunal, of course, is not ruling that any of the claims are in time, or that they will in fact be found to constitute conduct extending over a period of time, or, if so, how far back they can go. Nor, of course, equally, is the Tribunal ruling whether, in respect of any claims found to be out of time, the claimant should be granted an extension of time on the just and equitable basis. All the Tribunal is doing is considering whether to exercise its discretion to strike the claims out under rule 37, on the basis that they have no reasonable prospect of success because they are out of time. As ever with fact - sensitive discrimination claims, a Tribunal should tread with great care, and only consider striking out in the clearest of cases. This is not such a case. There may be great force in the respondent's contentions as to time. The respondent is not deprived of its limitation defences by this Tribunal's ruling. .Further, though this is a lesser consideration, given that the claimant's equal pay and unfair constructive dismissal claims are proceeding, and the claimant is likely to rely on much of the same evidence in support of the latter as she would in her discrimination claims, the extent to which the respondent would be put to lesser cost or preparation for the final hearing is perhaps, in any event, questionable.

39. For these reasons, the Tribunal declines the respondent's application to strike out the sex discrimination harassment and victimisation claims as being out of time, and having no reasonable prospect of success, and they will proceed to a full hearing.

Case Management.

40. This hearing had been listed as the first preliminary hearing on all the claims, for the purposes of issuing case management orders for the claims to proceed to a final hearing. This was not possible, given the application that the Tribunal has dealt with, but the parties should now proceed to seek to agree case management orders, using the Agenda provided for the preliminary hearing. The respondent may care to send a first draft of the orders it considers will be needed to the claimant for her to comment upon. If agreement is possible, the Tribunal will review the orders sought, and, if appropriate, approve them. If agreement cannot be achieved, or either part has further case management issues to raise, the Tribunal should be informed, and a further preliminary hearing (potentially by telephone) can be held.

41. If the claimant wishes for any further assistance as to how to prepare the case, it can be found in the Presidential Guidance- Case Management at www.justice.gov.uk/tribunals/employment/rules-and-legislation.

Employment Judge Holmes

Dated 28 March 2018

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

26 April 2018

FOR THE TRIBUNAL OFFICE