



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms P O'Neill

**Respondent:** Jaeger Retail Limited

**Heard at:** Manchester

**On:** 15 October 2018

**Before:** Employment Judge Franey  
(sitting alone)

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr S Hills, Solicitor

# WRITTEN REASONS

1. These are the written reasons for the judgment given orally with reasons at the conclusion of the hearing on 15 October 2018 and sent out to the parties in writing on 17 October 2018.

## Introduction

2. The claim form in this case was presented on 3 April 2018. It raised complaints of age discrimination, disability discrimination and sex discrimination contrary to the Equality Act 2010. It concerned events during the claimant's employment as a sales adviser between November 2016 and 2 September 2017, when her employment was terminated by the respondent.

3. It was identified upon receipt that the claim was potentially out of time. On 3 May 2018 the respondent filed a response form making that point, but also denying any discriminatory treatment of the claimant. It said that she had been dismissed because she had failed successfully to complete her extended probationary period.

4. The matter was listed for a preliminary hearing in public to decide whether the claim was presented within time.

5. The precise scope of the allegations of discriminatory treatment was not clear from the claim form itself or from some further documents which the claimant

subsequently supplied, but at the outset of the hearing the claimant confirmed that the last act of discrimination upon which she relied was the decision to dismiss her on 2 September 2017. For the purposes of this time limits hearing I assumed in her favour that if all the evidence were heard she would be able to show a discriminatory course of conduct extending over a period ending with that date. It therefore followed that I approached this issue on the basis that the primary three month limitation period expired on 1 December 2017.

## Evidence

6. Mr Hills had prepared a bundle of documents running to approximately 125 pages. A significant number of these documents were documents which the claimant had supplied. The claimant also provided four further sets of documents which were copied and distributed at the start of the hearing. Any reference to page numbers is a reference to the bundle; I will refer to the other documents individually as appropriate.

7. I also had the benefit of oral evidence from the claimant. She had not prepared a witness statement but I took her through her evidence about why the claim was not brought in time, and she answered questions from Mr Hills.

## The Law

8. The discrimination complaints were brought under the Equality Act 2010. The time limit for such complaints is found in section 123 as follows:-

**“(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 three 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.”**

9. The case law on the application of the “just and equitable” extension includes **British Coal Corporation –v- Keeble [1997] IRLR 336**, in which the Employment Appeal Tribunal (“EAT”) confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in **Keeble**:-

**“that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –**

- (a) the length of and reasons for the delay;**
- (b) the extent to which the cogency of the evidence is likely to be affected by the delay;**
- (c) the extent to which the party sued had cooperated with any request for information;**

- (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
- (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.”

10. In **Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]** the Court of Appeal considered the extent of the discretion. The Employment Tribunal has a “wide ambit”. At paragraph 25 of the judgment Auld LJ said:-

“it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

11. Subsequently in **Chief Constable of Lincolnshire –v- Caston [2010] IRLR 327** the Court of Appeal in confirming the **Robertson** approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

12. In **Department of Constitutional Affairs –v- Jones [2008] IRLR 128** the Court emphasised that the guidelines expressed in **Keeble** are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case. Other factors may be relevant too. At paragraph 50 Hill LJ said:-

“The factors which have to be taken into account depend on the facts, and the self-directions which need to be given must be tailored to the facts of the case as found”.

### **Relevant Findings of Fact**

13. Based on the witness evidence and documents I found the relevant facts to be as follows.

### Dismissal

14. The claimant was employed as a part-time sales adviser at the respondent’s store at Cheshire Oaks retail park until 2 September 2017 when her employment was terminated in the course of a meeting about her probationary period. She was shocked to be dismissed. She was not given any formal letter of dismissal and believed that the real reasons had not been explained to her.

15. The claimant had not previously been involved in an Employment Tribunal case and had no idea about Employment Tribunals and time limits. She had, however, heard of ACAS, and telephoned ACAS within a few days of dismissal. The claimant was still upset and did not present herself properly or explain what she wanted, and ACAS suggested that she contact the Citizens Advice Bureau (“CAB”). She made an appointment to see the CAB in Chester in September 2017.

16. As well as the CAB, the claimant contacted the Equality Advisory & Support Service (“EASS”) which she believed was a Government agency. They gave her general advice but nothing about Employment Tribunals or time limits.

17. The claimant was also applying for other work. She expected to be able to get other retail jobs at the Cheshire Oaks site without difficulty, but she had an unhappy experience at an interview at the retailer All Saints on 21 September 2017. Her application was unsuccessful.

18. The claimant is an internet user. She explained that she does not use the internet for shopping but does use it for research and pursuing her interests.

#### CAB Advice and Early Conciliation

19. The claimant visited the CAB in Chester in late September 2017. No advice could be given unless she could see their employment law adviser. It took several weeks to sort this out.

20. She eventually had an appointment with him on 30 November 2017. She recalled his first name was Brian. He advised her of her right to bring a claim in the Employment Tribunal, but explained to her that she needed to go to ACAS first and that she was almost at the end of the time limit for doing so. In his presence she telephoned ACAS and initiated early conciliation. She gave full details to ACAS of how she had been treated. The fact that early conciliation began that day was confirmed by ACAS in a certificate at page 54. The early conciliation period lasted until 30 December when the certificate was issued by email to the claimant.

#### December 2017

21. The claimant had had a very difficult December. Another job interview at Cheshire Oaks was unsuccessful. This setback affected her confidence. She had an incident in a car park where her car was damaged and she had to pursue a claim following that. This was very difficult to deal with. She also suffered from a bout of flu during December 2017, as later confirmed by her GP in a letter of 11 June 2018 (page 35). This left her feeling extremely debilitated.

22. Perhaps most significantly, the claimant sadly suffered three family bereavements in a short period around this time. The last was particularly traumatic: her aunt unexpectedly choked on some food on New Year’s Eve. She was badly affected by these experiences. She was unable to see her family as usual over Christmas. The funerals were very difficult for her.

#### January – April 2018

23. Accordingly, although the claimant received the ACAS certificate by email on 30 December 2017, she did not consider it until a few days into January 2018. The effect of the ACAS certificate was that the last date for lodging her claim within time was extended to 30 January 2018.<sup>1</sup> However, I accepted her evidence and found as a fact that she thought that by contacting ACAS she had done all she needed to.

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<sup>1</sup> Section 140B(4) Equality Act 2010.

24. As a result the claimant was expecting to hear from the Tribunal about the progress of her case. Her friend, Karen, would ask her what was happening with the case from time to time. Eventually the claimant became concerned enough to contact ACAS again in mid-February 2018. She spoke to the conciliation officer, Mr Murphy. It became apparent that there was a form she should have filled in and that there was now a time limit problem.

25. She escalated the matter to his manager, David, and managed to speak to him at the very end of March 2018. He talked her through the procedure and explained how she would have to lodge her Tribunal claim online. She had problems doing the form online and it took most of a day to get it done with some help from ACAS. That was on 3 April 2018.

### Submissions

26. At the conclusion of the oral evidence Mr Hills submitted that the claimant had failed to show any grounds on which it would be just and equitable to extend time. He emphasised that even the effect of the bereavements and the flu over Christmas should still have enabled the claimant to have lodged her claim by the end of January, within a month of the early conciliation certificate. He said it must have been the case that the employment law adviser at the CAB told the claimant that after the ACAS form was issued she would have to take a further step, even if this had not registered with her. The delay would have an adverse impact on the cogency of the evidence. Even if the claimant could reasonably be allowed a bit more time than the end of January, she was still a further two months late in getting her claim lodged. She was able to use the internet and could have ascertained her legal rights.

27. In reply the claimant said that it would be just and equitable to extend time. She emphasised the impact on her of the dismissal, the struggles she had to find work, the awful period she had over Christmas with her illness and the three family bereavements, and said she was not in a fit state to deal with matters properly until getting back in touch with ACAS in late February or early March. She emphasised that she understood that going to ACAS for early conciliation was all she had to do, and it came as a shock when ACAS explained that she needed to lodge the Tribunal form herself. She reminded me of the medical evidence from her doctor at page 35 which confirmed that she had been “down and depressed”, unable to carry out normal duties and had a lot of difficulty dealing with forms and communicating with people.

### Discussions and Conclusions

28. I considered the factors identified in **Keeble** and other factors of relevance here.

#### Length of Delay

29. The early conciliation provisions meant that the primary time limit expired on 30 January 2018. The claim form was not presented until over two months later on 3 April 2018. The primary time limit, ignoring early conciliation, is only three months so

a delay of a further two months is a significant period. This was not a case where the claim was just a few days late.

#### Reason for the Delay

30. I accepted the claimant's evidence that she was not aware of her legal rights until she saw the employment law adviser at the CAB who explained the position and made sure she rang ACAS whilst she was in a meeting with him. Initiating early conciliation "stopped the clock".

31. After the certificate was issued on 30 December 2017, and time started to run again, the claimant was struggling with her loss of confidence following two unsuccessful job applications, a period of illness due to flu, and most significantly three bereavements in her family in a short space of time. The letter from her GP in June 2018 confirmed that she was suffering from depression and not able to function properly or to deal with filling in forms, although the letter was silent as to when that began and how long it lasted.

32. However, I was satisfied that the real reason she did not pursue her claim by the end of January 2018 was that she did not realise that once ACAS issued her certificate she still had to lodge a Tribunal claim herself. She was under the misapprehension that she had done everything she needed to do by contacting ACAS to start early conciliation and by giving ACAS all the information about how she had been treated at work. Even though her friend Karen asked her what was happening, it was not until late February or early March that she contacted the conciliation officer at ACAS, Mr Murphy. That was about two months after the early conciliation certificate was issued. The misapprehension was corrected, and following escalation to his manager, David, the claim was presented in early April 2018.

#### Impact of the Delay on the Evidence

33. This case turns on evidence about events in late 2016 and early to mid-2017. The details of the claim which the claimant has provided on the claim form and in subsequent correspondence raise a number of instances of what the claimant considers to be discriminatory treatment or harassment on the shop floor. It is unlikely there is any written record, as no formal grievances were pursued at the time. The claimant said in submissions that she does have a log of these matters but there is no basis for thinking the respondent's witnesses kept a log in the same way.

34. The claimant also says that where she was sent written records of meetings they were not accurate. There is therefore likely to be an important and substantial conflict of primary fact as to what happened. It follows that the fact that the claim has been delayed is likely to have a significant impact on the ability of witnesses to recall matters.

#### Promptness of Action

35. The claimant did act promptly by trying to get advice in September 2017 from the CAB, having spoken briefly to ACAS first of all, but her efforts were hampered in that period by the need to see the employment law adviser at the CAB who was

much in demand. Once she saw him she moved very promptly and initiated early conciliation the same day.

36. Similarly, once the claimant had the position about lodging a claim explained to her at the end of March by David from ACAS she acted very promptly at that stage.

37. Even so, there was a failure to act promptly, in my judgment, after the early conciliation certificate was issued at the end of December 2017. The claimant assumed (wrongly) she had done all she needed to do, but still did not take any steps to contact ACAS (or research its website) to check that for at least six weeks and possibly almost two months, despite queries from her friend, Karen, about what was happening.

#### Steps to Get Professional Advice

38. The claimant did seek advice from the CAB but did not get proper informed advice until 30 November 2017. Similarly, with ACAS it appeared that the position was clear to her only after she escalated matters to the manager David at the end of March 2018.

#### Medical Position

39. The GP letter from June 2018 (page 34) supported the claimant's case in that it confirmed the flu in December, the three bereavements at that time, and that the claimant was left down and depressed, unable to carry out normal duties and had a lot of difficulties dealing with forms and communicating with people. There were some physical problems which added to the stress overall.

40. Even so, during December the claimant was able (with difficulty) to take steps to sort out the consequences of the damage to her car in the car park and also to attend the interview for a job in December. The GP letter was not specific as to the period for which these difficulties lasted. It said nothing, for example, about how the claimant was by late January 2018.

#### Decision

41. Putting those matters together I accepted the claimant's evidence about how difficult December was. I accepted this was still affecting her into January, but I also accepted Mr Hills' argument that the claimant had not shown that she was unable to take action until late March. The medical evidence was not specific about when the claimant was affected, and there were other aspects of her life which she was able to deal with in that time.

42. In my judgment despite those medical issues there was delay in going to ACAS in the New Year once the certificate was issued. This was due to a misapprehension that the claimant had done all she could. However, I accepted Mr Hills' submission that the employment law adviser at the CAB ("Brian") must have advised her of the need to lodge a Tribunal claim after early conciliation ended. He was an employment law specialist. Unfortunately, it is clear that the claimant genuinely had not properly understood the position. That was an error, but her chance to correct it was missed in January 2018 when she could have made steps to

find out whether she needed to do anything further. To that extent the claimant bears responsibility for the fact this claim has been presented out of time.

43. In addition, this is a case where the delay will have an impact on the cogency of the evidence. If time is extended the witnesses will be asked to recall incidents that happened in late 2016/early 2017. I appreciate that by her delay in early 2018 the claimant has added only two months to the overall passage of time, but that is not an insignificant period. Consequently, the delay has had an adverse impact on the ability of the respondent to defend itself fairly.

44. Taking into account all these factors, and applying the test set out in the legislation, I decided the claimant had failed to show it would be just and equitable to extend time. Even acknowledging the very difficult circumstances affecting her in late 2017 and early January 2018, the claimant was responsible for the claim being lodged late, and the delay has adversely affected the respondent's chances of defending itself fairly against her allegations. As a consequence, the claims were dismissed.

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Employment Judge Franey

29 October 2018

REASONS SENT TO THE PARTIES ON

8 November 2018

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FOR THE TRIBUNAL OFFICE

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