



## EMPLOYMENT TRIBUNALS

**Claimant**  
Ms Kirsty J Lynch

v

**Respondent**  
Mears New Homes Ltd

## PRELIMINARY HEARING

**Heard at:** Leeds

**On:** 21 December 2018

**Before:** Employment Judge R S Drake

### **Appearances**

**For the Claimant:** In Person

**For the Respondent:** Mr T Sheppard (Counsel)

## JUDGEMENT

1. The sex discrimination and harassment complaints were not presented in time.
2. In this particular case, the complaints were presented outside the primary limitation period and not within such period as this Tribunal finds just and equitable so as to extend time.
3. These proceedings are therefore dismissed.

## REASONS

- 1 Reasons for the decision having been given orally at the hearing, these written Reasons are being provided pursuant to the Claimant's request and thus in accordance with Rule 62(2) and (3) of Schedule 1 to the ETs (Constitution & Rules) Regs 2013 (The "Rules") and thus take precedence over those given orally.
- 2 On the basis of what was recorded at paragraph 9 of the Annex to the Orders promulgated by EJ Davies at a case Management Discussion on 15 November 2018, it was common ground that the last date on which the Claimant asserted an act of discrimination occurred was 17 May 2018. She sought Early Conciliation via ACAS on 26 August 2018 and presented her claim to Tribunal on 23 September 2018. She complains of direct sex discrimination as defined by Sections 6 and 13 of the Equality Act 2010 ("EqA") and harassment as defined in Section 26 EqA. These are the only claims extant as at today's date in these proceedings which are presented under the enabling provision in Section 120 EqA. The Respondents denied that they acted contrary to Sections 13 or 26 EqA, and that in any event, as a significant and potentially determinative preliminary point, the claims are out of time to the extent that they should be dismissed and not be allowed to proceed to substantive hearing.
- 3 The law to be considered is at Section 123 EqA and is as follows:

“ ... Proceedings on a complaint within Section 120 may not (*my emphasis*) be brought after the end of -

  - (a) the period of three months starting with the date of the act to which the complaint relates (*in this case I find as based on common ground that was 17 May 2018*) (the "Primary Period") – or
  - (b) such period as the Employment Tribunal thinks just and equitable (the "Extended Period") ... “
- 4 I had a bundle of agreed documents to consider plus a written skeleton argument from the Respondent's Counsel to which the Claimant also spoke. I record gratitude to both sides for the detail, cogency and high level of advocacy throughout the hearing and preparation for it.
- 5 The case law to which I was directed (and of which I was aware) included the following:-
  - 5.1 **Robertson v Bexley Community Centre [2003] IRLR 434** from which I note that application of S123(b) involves the exercise of a discretion which is an exception rather than the rule;
  - 5.2 **Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379** from which I note that the time limit for issue of proceedings “ ... is a jurisdictional and not a procedural issue ... “ which means that if a case is out of time and time is not extendable, the Tribunal simply has no power or jurisdiction to hear the claim;

5.3 **British Coal v Keeble [1997] IRLR 336** from which I note inter alia that I am to consider the length and reasons given for delay, the extent to which delay may affect cogency and recollection of evidence, any promptness of action by the Claimant once, after the Primary Period had expired, she became aware of the alleged facts which gave rise to his cause of action, the steps she took once she knew of the possibility of taking action, and lastly the balance of prejudice to the Claimant of not allowing the claim to proceed and to the Respondent in allowing it to do so;

5.4 **Palmer & Saunders v Southend BC [1984] IRLR 119** from which I note inter alia that I am to consider the substantial cause (if shown) of the Claimant's failure to issue within the Primary Period, whether there was any impediment preventing issuing in time, whether or not the Claimant was aware of her right to issue a claim, whether the Respondent has done anything to mislead or impede the Claimant issuing her claim, whether the Claimant had access to advice, and lastly whether delay was in any way attributable to that advice.

6 I noted the evidential burden rested with the Claimant and heard her evidence given by written statement and oral testimony and similarly that of her witnesses Mr Anthony Pickup and Ms Sarah Wilkinson. They both gave witness testimony in the form of written statements which I considered in deliberations but were not cross examined as their statements were restricted to matters not relevant to the issues before me. I was also aware that statements were presented from employees of the Respondent but in light of the limited issues to be canvassed by me, they did not present their evidence or face cross examination.

7 I am satisfied that all witnesses gave their evidence sincerely and believing themselves to be stating the truth. However, I find that the Claimant failed to give me clear evidence of her medical condition upon which she sought to rely to explain her delays and that by her own admission she had falsified an entry on her LinkedIn profile suggesting she had been actively employed since leaving the Respondents in May 2018 and August 2018, when on evidence before the Tribunal she had been signed off work and by her own admission had not been in the employment she dated in the profile. This caused me to conclude that in the case of the Claimant in particular, her evidence of why he didn't issue within the Primary Period was in any event scant but more importantly was equivocal and not probative to the level required to enable me to conclude I could exercise discretion in her favour.

8 In particular my findings on the evidence significant to the guidance set out above by statute and case law are as follows:

8.1 The Claimant agrees that the last date on which anything happened giving her cause for complaint was 17 May 2018;

8.2 She is a sophisticated and knowledgeable person who clearly felt with vehemence that she had been discriminated against and harassed unlawfully thus signifying that she already had in mind at a stage in May 2018 she had the right to pursue a claim if she thought she had been unlawfully discriminated against;

8.3 The Claimant was aware she needed to act promptly and though having to undertake surgery in late May 2018 had the presence of mind to know to research her rights and how to prosecute/pursue them;

8.4 She took no action after she left the Respondent's employ at all until 26 August 2018 when she approached ACAS as part of the Early Conciliation pre-claim procedure, and I find that there is no evidence of any explanation for not issuing until fully 37 days after expiry of the Primary Period;

8.5 I find this absence of explanation or evidence to support it troubling and not sufficiently satisfying to enable me to exercise discretion as it is clear that from an early stage the Claimant knew she could issue proceedings but didn't; she simply waited until after expiry of her Fitness Notes on 24 August without explaining why;

8.6 The Claimant says the first time she realised she could issue proceedings was when she sought involvement of ACAS but she had had sufficient presence of mind to make enquiries about procedure and even to maintain her LinkedIn profile and even falsify part of it;

8.7 There was no evidence before me of any obstacle preventing the Claimant from issuing her claim within the Primary Period and certainly none erected/caused by the Respondent;

8.8 The Claimant didn't give me any further explanation for her delay or for why it was so long;

8.9 When considering what is equitable, I have to take account that the Claimant's credibility is at issue given her falsification of her profile at a time when she says she was not able to consider time limits effectively which I find unconvincing to the extent that I am not convinced that it issuing when she did was within a period I consider just and equitable;

8 Applying the law to these findings and taking account of the guidance referred to above I find that the Claimant's decision, conscious or otherwise, not to issue her claim before she did, was the only reason for delay in issuing in the Primary period and no cause was attributable to the Respondent. I further find that the Claimant was aware she could issue at the time she approached ACAS.

9 Therefore, a delay as long as 37 days beyond the Primary Period is such that it would not be just or equitable to extend the Primary Period at all. I have considered the balance of prejudice and though I recognise that a Claimant whose claim is struck out at this stage is disadvantaged substantially, I also recognise that a Respondent which is put to the time, trouble and cost of defending a claim based only on an assumption of nexus between things said and done and a person's gender is also substantial disadvantage which outweighs the disadvantage to the Claimant.

10 Accordingly I find that the claim was issued out of time for not being issued within the Primary Period and that in the circumstances as found in this case, and bearing in mind the principal guidance that extending time is the exercise of a discretion which should be exceptional, it would not be just and equitable to extend time beyond the Primary Period. Thus, the claim is dismissed as the Tribunal has no jurisdiction to hear it.

Employment Judge **R S Drake**

Date: 21 December 2018