

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4106053/2017**

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**Heard in Glasgow on 30 April 2018**

**Employment Judge: Lucy Wiseman**

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**Miss Theresa Abraham**

**Claimant**  
**Represented by:**  
**Mr S Wilson**  
**Solicitor**

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**Westguard Security Ltd**

**Respondent**  
**Represented by:**  
**Mr I Maclean**  
**Consultant**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Tribunal decided the claim (of sexual harassment in terms of section 26 Equality Act and unfair dismissal in terms of section 98 Employment Rights Act) was not time-barred. A Tribunal has jurisdiction to determine the claim, and the claim will now proceed to be listed for a final Hearing.

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**REASONS**

1. The claimant presented a claim to the Employment Tribunal alleging she had been unfairly dismissed and sexually harassed.

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2. The respondent entered a response denying the claims and asserting the claim was time-barred.

**E.T. Z4 (WR)**

3. The Preliminary Hearing today was arranged to determine the issue of timebar.

5 4. I heard evidence from the claimant, and I was referred to a medical report from her GP dated 19 February 2018. I, on the basis of the evidence before me, made the following material findings of fact.

**Findings of fact**

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5. The claimant commenced employment with the respondent on 10 May 2012. She was employed as a Mobile Security Response Supervisor.

6. The claimant reported to Mr Steven McMahon, Operations Manager.

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7. The claimant was asked by Mr McMahon, in September 2016, to attend an event in Glasgow where extra security staff were required. The claimant agreed. Mr McMahon sent the claimant texts which she regarded as sexual advances. The claimant dealt with the situation by phoning in sick the night before the event.

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8. The claimant noticed a change in the way Mr McMahon treated her the following week at work.

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9. The claimant decided to resign in early October 2016 because she was unable to cope with the texts from Mr McMahon.

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10. The respondent's Managing Director, Mr James McMullan, met with the claimant to understand why she had resigned. The claimant told him Mr McMahon was "hassling" her, but she did not go into detail. Mr McMullan informed the claimant Mr McMahon was on holiday for three weeks, and he would speak to him. The claimant withdrew her resignation.

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11. Mr McMahon apologised to the claimant upon his return to work, but the unwanted texts started again shortly thereafter and continued on an almost daily basis.
12. Mr McMahon asked the claimant to attend an event in Perth in February 2017 because extra staff were needed. The claimant agreed because she knew there would be at least eight others present.
- 10 13. The claimant subsequently learned that it would only be Mr McMahon and herself at the event. The claimant told Mr McMahon that the trip was for work purposes only. The event was later cancelled.
- 15 14. The claimant subsequently noticed that changes were made to her shifts and duties and she believed Mr McMahon was deliberately doing this because she had rejected his advances.
- 15 15. The claimant felt she could no longer tolerate this and phoned in sick on 6 May.
- 20 16. The claimant met with Mr McMullan on the 8 May and told him Mr McMahon's behaviour and that it was unacceptable. Mr McMullan proposed a meeting between the claimant and Mr McMahon, with a third party present, to resolve matters. The claimant agreed, but left the meeting when Mr McMahon told the
- 25 third party to leave.
17. The claimant visited her GP on 9 May 2017 because she could not "deal with" what was happening. The GP noted the claimant was "significantly distressed" and signed her off work.
- 30 18. The claimant was absent from work and covered by a Fit Note until 14 June 2017.

19. The claimant met with Mr McMullan again on the 26 June and on that occasion the claimant told him, in detail, what had been happening with Mr McMahon. The claimant felt embarrassed and ashamed going through the details.
- 5 20. The claimant resigned on 8 July 2017 because she felt she could not return to the office.
21. The claimant did not return to see the GP again until December 2017. The claimant accepted the GP had asked her to return for a review, but the  
10 claimant struggled to do this.
22. The claimant was “tormented” by what had happened and relied wholly on the support of her family and friends.
- 15 23. The claimant was persuaded by family to speak to a Solicitor in mid-October. The claimant did so and understood she had to contact ACAS. The claimant did this on 19 October.
24. The claimant was informed by ACAS of the time limits and that a claim would  
20 be late. The early conciliation certificate was issued on 31 October, and the claim form presented on 15 November 2017.
25. The claimant obtained alternative employment at the end of August, but left  
25 this in December because of the impact on her of setting out details in the claim form.
26. The letter dated 19 February 2018 from the claimant’s GP noted she thought  
30 the claimant was presenting as clinically depressed when she saw the claimant in December. The GP stated “*It is difficult to give a definitive opinion for how she would have been during that time [i.e. May to December] other than to confirm that both in May and a review in December she presented as significantly distressed and I would extrapolate from this that this continued*

*throughout the time mentioned and may have contributed to the claim being lodged late”.*

**Claimant’s Submissions**

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27. Mr Wilson referred to section 123 Equality Act and invited the Tribunal to exercise its discretion to allow the claim to proceed. He referred to **British Coal Corporation v Keeble EAT/413/94** and the factors it may be helpful to consider when deciding whether it would be just and equitable to extend the time limit. The factors include the length of and reasons for the delay on the part of the claimant. Mr Wilson noted the claimant resigned on 8 July. The last date for presentation of the claim was 7 October. The claimant commenced early conciliation on the 19<sup>th</sup> October and presented her claim on the 15 November. Mr Wilson submitted the reason for the delay was due to the claimant’s medical condition. The GP confirmed the claimant had been struggling to put things in writing: she was embarrassed recounting the details of what had happened, and had been significantly distressed when seen by the GP in May and December. The GP had also diagnosed clinical depression in December.

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28. The second factor to consider was the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the claimant or the respondent is or is likely to be less cogent than if the action had been brought within the time limit allowed. Mr Wilson submitted the claimant’s memory of events remained strong, and the respondent had conducted a very thorough and well documented investigation. Accordingly there would be little, if any, impact on the evidence to be adduced.

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29. The third factor related to the conduct of the respondent after the claim arose, including the extent to which they responded to requests reasonably made by the claimant for information and documentation. Mr Wilson submitted the claimant’s complaint of sexual harassment had not been dealt with

appropriately and it had not been until 26 June 2017 that Mr McMullan took it seriously.

- 5 30. The fourth factor is the duration of any disability of the claimant arising after the date of the cause of action. Mr Wilson invited the tribunal to have regard to the medical report dated 19 February 2018 from the claimant's GP. The GP had noted that in May 2017 the claimant "was struggling with putting things in writing", and that "both in May and review in December she presented as significantly distressed and I would extrapolate from this that this continued throughout the time mentioned and may have contributed to the claim being lodged late."
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31. The fifth factor is the extent to which the claimant acted promptly and reasonably once she knew whether the acts of the respondent may be capable of giving rise to a claim. The claimant's evidence was that she took legal advice in mid-October and contacted ACAS one or two days later for an early conciliation certificate.
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32. The final factor relates to the steps taken by the claimant to obtain medical, legal or other expert advice and the nature of the advice received. The claimant attended her GP on 9 May 2017. She presented as clinically depressed and was not given any advice regarding making a claim. The claimant had an informal chat with a solicitor in mid-October and was advised to contact ACAS. The claimant did so within a day or so. The claim was presented on 15 November. The claimant struggled to put the details of what had happened in writing and was suffering ongoing distress and embarrassment.
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33. Mr Wilson referred to **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 EWCA Civ 640; London Borough of Southwark v Afolabi 2003 EWCA Civ 15** and **Rabone v Pennine Care NHS Foundation Trust 2012 UKSC 2**. Mr Wilson submitted the cases were authority for the Tribunal having a wide discretion in this matter and for the short delay
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resulting in no prejudice to the respondent in terms of the cogency of the evidence.

5 34. Mr Wilson invited the Tribunal to find it just and equitable to allow the claim of sexual harassment to proceed. He further relied on the same points in respect of the unfair dismissal claim.

10 35. Mr Wilson, in response to Mr Maclean's submission, noted the last alleged act was the claimant's resignation in July 2017. Further embarrassment was not the sole reason for not lodging the claim: the claimant was unable to do so and weight should be placed on the medical report.

### **Respondent's Submissions**

15 36. Mr Maclean invited the Tribunal to find both claims had been presented late and could not proceed. He submitted there had not been any real evidence to explain why it had not been reasonably practicable for the claim to have been presented in time. The claimant had been able to start a new job, seek legal advice and contact ACAS.

20 37. Mr Maclean acknowledged the "just and equitable" gave the Tribunal more scope for discretion. He submitted the last alleged act of harassment had been in May 2017 (although there had been mention today, for the first time, of subsequently being paired with an inexperienced operative) and the claimant had thereafter gone off sick and not returned to work. The  
25 respondent had tried to resolve matters, but the claimant did not want to make a formal complaint.

30 38. Mr Maclean submitted the medical evidence did not support the claimant's position. She saw her GP on 9 May, but did not return until 13 December. The claimant obtained alternative employment in October and also approached a solicitor for advice and contacted ACAS. The claim was not presented until 15 November. Mr Maclean acknowledged the claimant's embarrassment

regarding these (alleged) matters, but submitted this was not a strong enough basis to justify an extension of time.

- 5 39. Mr Maclean invited the Tribunal to find both claims were late and should not proceed.

### Discussion and Decision

10 40. I had regard firstly to the terms of (section 123 Equality Act) which sets out the time limit for claims brought under that Act. The section provides that claims may not 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 Tribunal thinks just and equitable.

15 41. The claimant, in the claim of sexual harassment, set out a number of alleged acts of harassment and alleged acts said to have occurred because the claimant rejected Mr McMahon's advances (section 26(2) and (3) Equality Act). The last act in the series of acts was said to be the claimant's resignation which occurred on 8 July 2017.

20 42. The claimant had a period of three months in which to present her claim: that is, on or by 7 October.

25 43. The claimant contacted ACAS on 19 October for an early conciliation certificate and presented her claim on 15 November 2017. The claim is late and accordingly I must decide whether it would be just and equitable to extend the time limit.

30 44. Mr Wilson referred me to the case of **British Coal Corporation v Keeble 1997 IRLR 336** where the EAT suggested Tribunals would be assisted by considering the factors listed in section 33 of the Limitation Act 1980. I noted the checklist is a useful guide, but consideration of it is not mandatory.



45. I had regard to the length of the delay in the case, and the reasons for it. The delay is 5 weeks in duration and was caused by the following factors: (i) the claimant was “significantly distressed” about what had happened to her; (ii) she was embarrassed about what had happened; (iii) she struggled to put things in writing; (iv) she was ignorant of the time limit for bringing a claim and (v) it was likely the claimant was clinically depressed during this period of time.

46. I acknowledged the claimant was sufficiently fit to find alternative employment in August, and that she held down that job until December. Mr Maclean submitted this was a strong indicator the claimant was fit enough to present her claim. I balanced this submission with the fact the claimant’s GP, who saw her in May and December, confirmed the claimant was significantly distressed on these occasions. Further, the GP extrapolated from this that the clinical depression diagnosed in December, had continued prior to this in the period May to December. I acknowledged the GP did not see the claimant in the period between May and December, but I considered weight had to be attached to the GP’s opinion regarding the mental health of the claimant during this time.

47. I next had regard to the extent to which the cogency of the evidence to be adduced was likely to be impacted by the delay. I noted Mr Maclean did not suggest the cogency of the evidence was likely to be impacted. Furthermore, there is documentary evidence to be relied upon in terms of text messages, photographs and the respondent’s investigation, all of which will assist with giving evidence.

48. I noted there have been no requests for information or documentation and no suggestion the respondent has delayed in co-operating once the claim was presented.

49. I had regard to the fact the claimant was supported by her family following her dismissal, and it was through that support that the claimant was motivated to contact a solicitor in mid-October, for advice. I accepted the claimant’s

evidence that she understood from that telephone call, that she had to make contact with ACAS. The claimant did so within a day or so and obtained an early conciliation certificate on 19 October.

5 50. The claimant did not present her claim until 15 November. I accepted the claimant delayed because of her mental health. I had regard to the GP's opinion the claimant was suffering from clinical depression at this time, and also to the fact the GP had noted the claimant was "struggling" to put things in writing. I considered the fact the claimant had a relapse after submitting the  
10 ET1 and receiving the ET3, to support her evidence regarding how hard she had found it to go over the events again and commit the details to writing.

15 51. I next had regard to the prejudice each party would suffer if an extension of time was allowed, or refused. I acknowledged that if an extension is granted, the respondent will have to defend the claim. If an extension is refused, the claimant will lose the opportunity to have her claim determined. I considered the balance of prejudice in this case rested with the claimant.

20 52. I decided, having had regard to the above points and being satisfied (i) the claimant's mental health was impaired during the period July – December and (ii) the cogency of the evidence will not be impacted that it would be just and equitable to extend the time limit and allow the claim to proceed.

25 53. I next considered the terms of section 111 Employment Rights Act which sets out the time limit for claims of unfair dismissal. The section provides that an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was  
30 not reasonably practicable for the complaint to be presented before the end of that period of three months.

54. Mr Maclean submitted the claimant's medical evidence did not support her position that she had been unable to make a claim earlier. I acknowledged the medical report from the claimant's GP was incomplete insofar as the GP did not see the claimant in the period between May and December. However, as set out above, I considered weight had to be attached to the GP's opinion that having seen the claimant in May and December, and noting how she presented on those occasions, that it was likely the claimant was clinically depressed in that period.

55. I considered the GP's view, together with the claimant's difficulty in setting out the events in writing and her embarrassment at doing so, meant it was not reasonably practicable for the claim to be presented in time.

56. I was satisfied the claimant had presented the claim within such further period as was reasonable. I decided the claim could proceed.

57. I, in conclusion, decided the claim was not time barred and may proceed to a final Hearing.

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Employment Judge: L Wiseman  
Date of Judgment: 09 May 2018  
Entered in register: 15 May 2018  
and copied to parties

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