



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms J Newby

**Respondent:** Sheppee International Ltd

**Heard at:** Bristol **On:** 10 January 2019

**Before:** Employment Judge Hargrove sitting alone

**Representation**

**Claimant:** In Person

**Respondent:** Mr G Bealey, Employment Consultant

## JUDGMENT

1. The claimant's claims are dismissed as having been presented to the Employment Tribunal outside the relevant time limits and, in the case of the unfair dismissal claim the Tribunal is not satisfied that it was not reasonably practicable for her to have presented her claim within time; and in the case of the sex discrimination claims, it would not be just and equitable to extend time.

## REASONS

1. The claimant was employed as an Export Administrator by the respondent based in York, from 6 May 2014 and resigned with immediate effect on 6 November 2017 whilst she was on sick. She did not bring any claim to the Employment Tribunal until 27 March 2018 having sought and obtained an early conciliation certificate from ACAS on that day. The respondent took the point in its ET3 response dated 10 May that the claims were out of time and at a telephone preliminary hearing on 27 September 2018, Regional

Employment Judge Pirani directed that this public preliminary hearing should be listed to consider the time points. He ordered the claimant to provide further particulars of her claims and for the parties to exchange witness statements by 3 December.

2. The claimant provided further details of her claims on 3 October and witness statements were exchanged on 3 December. The claimant gave evidence to the Employment Tribunal at this hearing and was cross examined. The respondent did not call its witness.
3. I have carefully considered the claimant's evidence and also the following documents handed in today by the claimant:
  - (a) Her resignation letter of 6 November, which gives details of her reasons for resignation and which I have accepted for the purposes of this hearing.
  - (b) Her grievance letter of the same date which confines itself to complaints of sex discrimination/harassment relating to the way in which she was treated in relation to time keeping; and documents C, D and E being communications with ACAS concerning her early conciliation certificate on 27 March and between 12 and 15 May concerning her allegation that she was told by ACAS to complete the grievance process before returning to ACAS for conciliation certificate.
4. The first task which the Employment Tribunal had to undertake was to identify precisely what heads of claim the claimant was bringing to the Tribunal; and when time started to run in respect of each of those claims. The telephone preliminary hearing orders had identified the heads of claim as being of sex discrimination – direct under Section 13, and harassment under Section 27 of the Equality Act on grounds of sex in relation to the claimant's complaint that she was repeatedly criticised by the respondent's managers about time keeping issues and, more particularly, that she was accused of logging out of her computer and stopping work sometime before clocking out on each day at 5.15pm. In addition, the claimant was bringing a claim of what may be described as ordinary unfair dismissal under Section 94 of the Employment Rights Act. It is common ground that the last occasion on which she was criticised over time keeping issues was 21 July 2017. After that date, the claimant recorded at work times at which male employees of the respondent clocked in and out in order to establish that she had been treated completely differently from men, who were not criticised in respect of similar failings. That record was not however a ground of complaint which she was making, but evidence to support her claims up to 21 July 2017.
5. Section 111(2) of the Employment Rights Act provides that the Employment Tribunal shall not consider a complaint under this Section unless it is presented to the tribunal:
  - (a) Before the end of the period of three months beginning with the effective date of termination.
  - (b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

6. That time limit is to be compared with the time limit for the bringing of discrimination claims, including sex discrimination, which is contained within Section 123 of the Equality Act 2010. Subsection (1) provides that proceedings on a complaint of that kind 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.
  - (b) Such other period as the Employment tribunal thinks just and equitable.
7. Subsection (3) provides for the purposes of that Section that:
  - (a) Conduct extending over a period is to be treated as done at the end of the period.

Thus, in respect of the claimant's claims of being criticised in respect of clocking out, the period ended on 21 July 2017 and the time limit for the presentation of the claims would have expired on 20 October 2017, subject to the Employment Tribunal's power to extend time on just and equitable grounds. The three months in respect of the unfair dismissal claim started to run on 6 November 2017 and expired on 5 February 2018 subject to the Employment Tribunal's power to extend time if the claimant satisfies the Tribunal on the balance of probabilities that it was not reasonably practicable to bring that claim within that period.

8. I have considered the claimant's evidence as to her reasons for resignation and, corroborated by the contents of her grievance letter and the resignation letter, I accept that her reasons for resignation included the circumstances of her complaints of sex discrimination/harassment in relation to time-keeping, in addition to the threat of disciplinary proceedings being taken against her whilst she was on the sick on October 2017. Accordingly, I additionally identify a head of claim of a discriminatory constructive dismissal contrary to Section 39(2)(c) and 39(7)(b) of the Equality Act 2010 (which defines constructive dismissal). Thus the time limit in respect of this claim expired at the same time as that for the unfair dismissal claim – on or before 5 February 2018 - but the power to extend time is different: It is subject to the just and equitable extension.
9. As to the reasonably practicable extension, if someone is genuinely ignorant of their rights to bring a claim, or of any time limits for bringing it, that will not, of itself, render it not reasonably practicable to bring the claim. The ignorance must itself be reasonable and if someone fails to take reasonable steps to obtain advice as to their rights, including time limits, it will be difficult to argue that it was not reasonably practicable to comply with the time limits. By contrast, reasonable ignorance of essential facts concealed from the claimant by an employer which form the basis of a claim that a dismissal was unfair may well be an example of a case where it was not practicable to present a claim time, as may be wrongful advice given by a non lawyer. As to the just and equitable extension, there is a check list of factors to consider derived from Section 33 Limitation Act 1980, and set out in *British Coal v Keeble* 1997 IRLR page 336. The Tribunal has to have regard to all the circumstances of the case and in particular the length of, and the 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 parties cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

10. I have also considered the legal principle set out in the orders of the Tribunal of September 2018. There is no presumption that the Tribunal should exercise a discretion unless they can justify failure to exercise it. Quite the reverse, the Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. The exercise of the discretion is the exception rather than the rule. (see *Robertson v Bexley Community Centre trading as Leisure Link* 2003 IRLR page 434).

### **Conclusions**

11. The time limit for the claimant's claim of harassment/direct discrimination other than the claim in respect of dismissal expired on 20 October 2017. The claimant is thus asking in respect of that claim for an extension of time of over five months. In respect of the other claims of discriminatory dismissal she is asking for an extension of time from 6 February – 27 March, some seven weeks.
12. The claimant's sole reason for lateness in respect of all of her heads of claim is based on the proposition that she was misled by ACAS when, on or about the 7 November 2017, she claims she was told by the ACAS advisor that she needed to continue with her grievance before she could return to ACAS for the necessary early conciliation certificate. I do not accept in all the circumstances that made it not reasonably practicable to present her unfair dismissal in time. Nor do I consider it just and equitable to extend time for the period sought: The claimant has honestly conceded to the Tribunal that she approached a solicitor in York for advice in early November, at the time of her resignation, and was advised that there was a time limit of three months less one day to bring her claims. That was good and accurate advice. In fact, by the date the time limit had already expired for the harassment claims. She had not sought advice before then, and she should have done. The claimant was also told by her solicitor that she needed to contact ACAS, and this must have been in order to enable her to comply with the early conciliation requirements. I accept that she did contact ACAS, but she does not say that she was told that the time limits did not run until after her grievance was completed. I also find it impossible to believe that an ACAS officer would have told her that time did not begin to run until after she had completed the grievance procedure. It is completely contrary to the legal provisions which are relevant to this particular case, and ACAS officers are trained and know of these time limits. I accept that she may very well have been told that it was necessary to pursue a grievance, because Section 207A of the Employment Rights Act provides that compensation may be reduced if a claimant does not pursue a grievance, but I do not accept that she was told the time limit was extended for that purpose.
13. My reasons for these conclusions include, in addition to the fact that she had received correct advice from her solicitor as to the time limits, that the

claimant accepts that she did not raise with ACAS the advice as to the time limit that she had been given by her solicitors only within hours before; and she did not query what she had been told by ACAS with her solicitor. In fact she did nothing other than cooperate with the grievance process until 27 March 2018, even though the initial grievance had been rejected on 22 December, within the three months time limit. Instead she appealed without making any other enquiries of ACAS or anyone else for that matter. Even after the appeal was rejected, she delayed a further three days before re-contacting ACAS although that delay is within the scheme of things of lesser significance. While I accept that the claimant did contact ACAS in May 2018 to try to find a record of her telephone call of November 2017, without success because the tape recordings in fact been taped over after six months. She did not reveal that she had received advice on time limits from a solicitor.

14. For all of these reasons I do not accept that it was not reasonably practicable for her to have brought her unfair dismissal claim within time; and it would not be just and equitable to extend time in respect of her other claims, including her claims of discriminatory constructive dismissal, and for direct discrimination and harassment.
15. I note and record that the respondent does not pursue any claim for costs against the claimant in respect of these proceedings.

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Employment Judge Hargrove

Date 22 January 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

23 January 2019

FOR THE TRIBUNAL OFFICE