

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105339/17

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Held in Glasgow on 29 March 2018

Employment Judge Lucy Wiseman

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Miss Syrah Khan

**Claimant
In Person**

Energy Prices Direct Ltd

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**First Respondent
Represented by:
Ms V Rae -
Trainee Solicitor**

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Mr Usman Sikander

**Second Respondent
Represented by:
Ms V Rae -
Trainee Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided:-

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(i) to allow the claimant's application to amend the claim to include a complaint of discrimination because of race;

(ii) the claim was presented in time and

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(iii) the claim will now proceed to a Full Hearing.

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REASONS

E.T. Z4 (WR)

1. The claimant presented a claim to the Employment Tribunal on 21 October 2017 alleging she had been discriminated against because of the protected characteristic of sex. The claimant set out a number of allegations of sexual harassment in the claim form.
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2. The respondents entered a response denying the allegations and raising a preliminary issue of time bar.
3. A Preliminary Hearing took place on 22 December 2017. The Note issued following that Hearing noted the claimant had, in the Agenda completed prior to the Hearing, made reference to an incident which occurred on 28 July 2017 and which appeared to relate to a complaint of race discrimination. The claimant confirmed she wished to have this complaint included as part of her claim.
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4. The claimant subsequently, on 14 January 2018, made an application to amend the claim to include a complaint of race discrimination.
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5. This was a Preliminary Hearing to determine (1) the claimant's application to amend the claim to introduce a complaint of race discrimination and (2) whether the claim (and if allowed, the amended claim) was presented on time and if not, to consider whether it would be just and equitable to allow the claim to proceed.
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6. I heard evidence from the claimant and I was referred to a jointly produced folder of documents. I made the following findings of fact.
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Findings of fact

7. The claimant was employed by the first respondent from 2 May 2016 until she resigned on 29 September 2017.
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8. The second respondent, Mr Usman Sikander, is a Director of the respondent and Mr Puneet Sabarwal, is a Senior Business Manager.

9. The claimant obtained an ACAS Early Conciliation Certificate on 9 October 2017, and presented a claim to the Employment Tribunal on 21 October 2017.
- 5 10. The claimant, in the claim form, set out a series of alleged instances of sexual harassment spanning a period from April 2017 to September 2017. The claimant considered a number of the allegations were connected because they (allegedly) referred to a text message where the first respondent made reference to having had a dream about the claimant. The connected incidents
10 occurred in the period 4 April to 14 September.
11. The claimant considered that in addition to the above three further incidents had occurred on the 14 June, when she had allegedly been asked to make Mr Sikander's lunch; in June/July when he had (allegedly) told her to "*stop being a pain in the ass*" and to go home and not return until he told her and
15 in late September when Mr Sikander (allegedly) gave her £200.
12. The claimant, who completed the claim form herself, understood it was important to include all instances of sexual harassment. She considered the
20 allegation of race discrimination to be a separate matter and so did not include it.
13. The claimant sought advice from the Citizens Advice Bureau (CAB) after completing her claim form. She understood from that advice she could include
25 the allegation of race discrimination. The claimant accordingly included it on the Agenda she completed for the Preliminary Hearing on 22 December.
14. The claimant made an application to amend the claim form on 14 January 2018, to include the alleged incident of race discrimination which occurred on
30 28 July 2017.

Respondent's submissions

15. Ms Rae noted the allegations of sexual harassment set out in the claim form covered the period from 31 March 2017 to 14 September 2017. Ms Rae referred to Section 123 Equality Act which set out time limit for complaints, which must normally be submitted before the end of the period of three months starting with the date of the act to which the complaint relates.
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16. The claimant obtained the early conciliation certificate on 6 October and presented her claim on 21 October. Ms Rae submitted the only allegations made by the claimant which could be considered by an Employment Tribunal were those occurring on or after 7 July 2017.
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17. Ms Rae acknowledged the Tribunal could extend the time limit by such period as it considered just and equitable, but submitted this should not be done unless the claimant convinced the Tribunal that it was just and equitable to do so. Ms Rae acknowledged the Tribunal's discretion was wide, and in terms of Section 33 Limitation Act 1980, the Tribunal should consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:
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- 20 • 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;
 - 25 • the extent to which the party sued had co-operated with any requests for information;
 - the promptness with which the claimant had acted once they knew of the possibility of taking action;
 - 30 • the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

18. Ms Rae submitted the burden was on the claimant, and the exercise of discretion was the exception rather than the rule. Ms Rae invited the Tribunal to find the claimant had not proven it was just and equitable to extend the time limit for allowing the allegations that occurred on or before 7 July 2017 to be considered.

19. Ms Rae submitted the various allegations of sexual harassment were discrete events and not a continuing course of conduct. The only allegation within time was the allegation concerning correspondence on 14 September. However, this was a private conversation between Mr Sikander and Mr Sabarwal. The claimant was not a party to the correspondence. The correspondence should not be viewed as discriminatory conduct and accordingly the correspondence on 14 September should not be used to allow earlier allegations to be considered.

20. Ms Rae noted, with regard to the application to amend the claim, that the alleged incident occurred on 28 July 2017, and any complaint regarding this matter should have been brought by 27 October 2017. Ms Rae referred to ***Selkent Bus Co Ltd v Moore [1996] ICR 836*** and submitted the Tribunal had, when considering the application to amend, to consider whether the complaint was out of time and if so whether the time limit should be extended.

21. The allegation of race discrimination was an entirely new claim; the claim was late and Ms Rae submitted the application to amend should not be allowed for that reason.

30 **Claimant's submissions**

22. Ms Khan referred to the evidence she had given which explained why the complaint of race discrimination had not been included in the initial claim. She

also referred to her evidence regarding her understanding that some of the instances of alleged harassment were connected.

Discussion and Decision

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23. I firstly considered whether the claim of discrimination because of the protected characteristic of sex had been presented in time. I had regard to the terms of Section 123 Equality Act which provides as follows:

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“(1) .. proceedings 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

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(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section –

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(a) conduct extending over a period is to be treated as done at the end of the period ..”

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24. The respondent’s primary position was that only acts occurring within three months of the date the claim was presented (21 October) should be regarded as being in time, and that there was no continuing course of conduct.

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25. I had regard to the case of ***Barclays Bank plc v Kapur [1991] ICR 208*** where the House of Lords drew a distinction between a continuing act and an act that has continuing consequences. Further, in ***Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548*** the Court of Appeal held that it was not appropriate for Tribunals to take too literal an approach to the

question of what amounts to “*continuing acts*” by focusing on whether the concepts of “*policy, rule, scheme, regime or practice*” fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of an act extending over a period. Tribunals should look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer.

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26. The alleged incidents set out in the claim form complain of sexual harassment: the alleged incidents are all examples of behaviour said to constitute sexual harassment. I acknowledge the claimant thought some of the allegations were connected, but I considered the situation was wider than this. I considered, having had regard to the above authorities and the substance of the complaints, that the allegations were all part of one continuing act by the employer. I say that because the allegations were all examples of alleged sexual harassment by the same person.

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27. I decided, for these reasons, and having had regard to the fact at least one of the alleged instances of harassment occurred within 3 months of the date the claim was presented, that the claim had been presented in time.

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28. I next considered whether to allow the claimant’s application to amend the claim to introduce a complaint of race discrimination. There was no dispute regarding the fact the alleged incident of race discrimination occurred on 28 July 2017. A complaint regarding this matter ought to have been presented on or before 27 October. The application to amend the claim was made on 14 January 2018.

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29. I was referred to the case of ***Selkent Bus Co Ltd v Moore*** (above) where the then President of the Employment Appeal Tribunal noted that in determining whether to grant an application to amend, an employment tribunal must always carry out a careful balancing exercise of all relevant factors, having

regard to the interests of justice and to take the relative hardship that would be caused to the parties by granting or refusing the amendment. The relevant factors to consider would include:

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- the nature of the amendment;
 - the applicability of time limits and
 - the timing and manner of the application.

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30. There was no dispute regarding the fact the application to amend sought to introduce a new head of claim. However, I had regard to the fact the new claim consisted of one alleged incident, the alleged facts of which were similar in nature to the incidents already referred to in the claim form. The allegations concern the claimant and Mr Sikander.

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31. I acknowledged, above, the claim was out of time. I must accordingly consider whether the time limit should be extended. I accepted the claimant knew of the alleged incident at the time she presented the claim form: it was a matter which could have been included in the claim form at the time it was presented.

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32. The claimant explained why the matter had not been included in the claim form, and I accepted her explanation. The claimant is a litigant in person and she completed the claim form herself. The claimant's focus was on the allegations of sexual harassment and the information to be included regarding those allegations. I accepted the claimant thought the complaint of race discrimination a separate matter and, for this reason, did not include it in the claim form.

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30 33. The claimant acted quickly to include the complaint of race discrimination on the Agenda she completed for the Preliminary Hearing on 22 December, once she had received advice that it would be appropriate to do so. I decided in all

of these circumstances that it would be just and equitable to allow the claim to proceed late.

5 34. I next had regard to the relative hardship of refusing or granting the application to amend. I had regard to the fact the complaint of race discrimination comprises one alleged incident involving the same person as the allegations of sexual harassment. I also had regard to the fact the cogency of the evidence will not be affected by the time which has elapsed since the alleged incident, and to the fact the addition of the complaint will not
10 add significantly to the time required for the Hearing.

35. I acknowledged that if the application is allowed, there will be a further alleged incident for the respondent to defend, but I considered the greater hardship, if the application is refused, to be on the claimant who will lose the opportunity
15 to argue the complaint of race discrimination.

36. I decided, having had regard to all of the above points, to allow the application to amend the claim to include the complaint of race discrimination.

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37. I decided, in conclusion:-

25 (i) to allow the claimant's application to amend the claim to include a complaint of race discrimination (it being just and equitable to allow the claim to proceed late) and

(ii) the initial claim has been presented in time and will now proceed to a full Hearing.

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Employment Judge: L Wiseman
Date of Judgment: 06 April 2018
Entered in register: 09 April 2018
and copied to parties

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