EMPLOYMENT TRIBUNALS

Claimant: **Mr R Pattern**

Respondent: **Mr N Sassow**

Heard at: **Southampton** **On: 30/5/2019**

Before: **Employment Judge Wright**

Representation:
Claimant: **Ms C Kelly of Counsel**
Respondent: **Miss C Hadfield of Counsel**

RESERVED JUDGMENT

The Judgment of the Tribunal is that the claimant's claim to extend the time limit under s. 123 (1)(b) of the Equality Act 2010 fails. The claim is dismissed as being presented out of time.

REASONS

1. This hearing was to determine if the claimant's claim was presented within such other period as the employment tribunal thinks just and equitable in accordance with s. 123 (1)(b) EqA. It is accepted the claimant's claim was presented outside of the primary time limit of three months as provided for under s. 123 (1)(a) EqA. S. 123 (1) of the EqA provides:

   a complaint within section 120 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

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

2. The Tribunal head evidence from Mr Kenealy, the claimant's solicitor and had before it a bundle of documents running to 31-pages. The facts were undisputed and the outcome relied upon the legal submissions made and whether or not the claimant could persuade the Tribunal to exercise its discretion in favour of the claimant.

3. It is not disputed that the alleged act of harassment took place on 9/5/2018 and that the primary time limit (subject to Acas Early Conciliation) expired on 8/8/2018. In any event an extension of time as a result of Acas Early Conciliation is not relevant as Acas was contacted on 14/5/2018 and the certificate was provided on the same day. The allegation is presented as a one-off act and there is no case made that it was conduct extending over a period of time.

4. On the same day, the claimant completed a solicitor's enquiry details form. That form asks:

    a. 'On what dates did the discrimination take place? 09/05'

    (pages 1-3)

5. The referral to that firm of solicitors was then passed onto Mr Kenealy's firm on 15/5/2018.

6. It is clear from that referral form, that the incident occurred on 9/5/2018 and that the claim was one of harassment. Other potential difficulties were noted, such as the fact the claimant's employer was in financial difficulties and that administrators were involved. Under general comments, there is a reference to:

    '12/7/2018 - 09.45 LG [presumably the referrer's fee earner] replied and said the risk assessment fee is for LK [presumably Mr Kenealy] to fully assess the claim and advise if this is something he can take on …

    15/5 @ 11.24 … - LK e-mail to client - recording is just of being sworn at - locksmith will give evidence of mocking his PTSD Advised client: - co being in administration is an issue - but as harassment claim can go after individual…'

(pages 2-3)

7. Mr Kenealy said he had not heard from the claimant by 4/6/2018 and so his assistant made a call to chase this up. The claimant indicated he was struggling to find the money to pay for the risk assessment.

8. On 12/7/2018 the claimant paid to Mr Kenealy's firm the required payment, a file was set up and Mr Kenealy's firm's terms of business were sent to the claimant on 13/7/2018. The claimant signed and returned the terms of business the same day.

9. Mr Kenealy then said he was unable to look at the matter due to his workload, until the 20/8/2018. It is accepted that by that point in time, the claim was out of time.

10. Pausing there, Mr Kenealy said he qualified as a solicitor in 2007 and had practised employment law ever since; he also said he was head of the employment law department and his team consisted of a paralegal and administrative assistant.

11. The claimant's employment ended on 4/7/2018,

12. The claimant emailed Mr Kenealy on 3/8/2018 chasing him and said he (the claimant) thought the limitation period expired in 11-days' time (of course he was incorrect about this, however, 11-days would be 14/8/2018); even so, Mr Kenealy did not review the file until 20/8/2018. The review was after the primary time limit had expired and the time limit which the claimant thought applied. The claimant also said he had received the Acas Early Conciliation Certificate on 14/5/2018. It may not have been clear to Mr Kenealy whether the Certificate had been issued against the respondent, the employer, or both; hence him asking for it. He received it on 20/8/2018.

13. Mr Kenealy said this was the point at which he realised the claim was out of time. When asked why he did not present a claim form on behalf of the claimant (in order to protect the claimant's position) he said that he was not aware s. 123 (1)(b) EqA could be relied upon in respect of an error by a legal adviser.

14. Mr Kenealy then emailed the claimant and said there appeared to be an issue over limitation on 21/8/2018. The claimant replied:

> 'That is exactly what I had said in my earlier emails, thus highlighting the fact I thought there was a looming deadline. When I eventually managed to speak to you over the phone, you told me there was no concern over a deadline…' [page 18]

15. Mr Kenealy then made an attendance note dated 23/8/2018 which acknowledged the issue over limitation and the fact he had referred the matter to his managing director and compliance manager.

16. What happened next chronologically was that a decision was taken by Mr Kenealy's firm to take counsel's advice. It seems this course of action was proposed in order to establish the extent of the firm's potential liability to the claimant. The details were not disclosed, however, the advice must have partly concerned the claimant as his permission to approach counsel was requested on 3/9/2018. Had the advice been purely concerned with Mr Kenealy's firm's liability, then it is not clear why the claimant's permission would have been sought.

17. The claimant raised some queries on 7/9/2018 and eventually gave his permission on 3/10/2018.

18. Quotations were then obtained from three barristers. Mr Kenealy confirmed his firm met the cost of the barrister's advice. Instructions were sent on 25/10/2018 and the opinion was received on 23/11/2018. Mr Kenealy said that as he was not aware that s. 123 (1)(b) EqA potentially applied, he did not see any need for any urgency.

19. It appears the advice (to the extent privilege was waived) was to present an ET1 and to rely upon s. 123 (1)(b) EqA and to seek to persuade the Tribunal that it was just and equitable to extend the time limit.

20. Mr Kenealy said that the advice was received on the 23/11/2018 and the ET1 was presented on the 26/11/2018. The 23rd being a Friday, so the 26th was the next working day.

21. All that was said in this respect in the ET1 (the details of claim ran to 15-paragraphs) was:

> 'The claimant acknowledges that the claim is being submitted outside the three month limitation period prescribed by s. 123 (1)(a) EqA.
>
> The claimant requests that the Employment Tribunal exercises its discretion under s.123 (3) EqA to allow the claim to proceed on the grounds that it would be just and equitable to do so.
>
> The fault for the claim not being submitted by the correct limitation date lays not with the claimant, but his solicitor. The Employment Tribunal is asked to consider the case of *Chohan v Derby law*

Centre UKEAT/0851/03/ILB when determining whether it would be just and equitable to allow the claimant's claim to proceed.

Additionally, the claimant's claims has [sic] reasonable prospects of success and as such it is submitted that in all the circumstances it would be just and equitable to allow the claimant's claim to proceed.'

22. Clearly, no information was provided as to what the solicitor's error was provided in the ET1.

23. There was another issue with the claim being rejected due to the Acas Early Conciliation number; however that was resolved and did not impact upon the matter to be determined at this hearing.

Submissions

24. In legal submissions, Miss Hadfield said she did not disagree with the claimant's skeleton argument that just and equitable in s. 123 (1)(b) was wider than the test for extending time under the Employment Rights Act 1996; of was it reasonably practicable to present the claim within the primary time limit?

25. That said, Miss Hadfield said that an extension of time was an exception, rather than the rule. Once the limitation date had passed, the claim was time barred unless there was good reason for that delay and for any subsequent delay. The cases Ms Kelly quoted in her skeleton argument referenced a much shorter delay after the limitation date had passed. She accepted the original reason was Mr Kenealy's mistake, however any liability to the claimant would be covered by his professional indemnity insurance and the claimant would not be denied a remedy as he has a clear cut claim against his solicitors. What is relevant for this Tribunal in the exercised of its discretion is what happened after Mr Kenealy realised a mistake had been made.

26. Miss Hadfield said that disclosure in this case had been selective. The Tribunal did not have the documents Mr Kenealy referred to, such as counsel's advice. The relevance of that is the onus is on the claimant to give an explanation for the failure to present the claim within the original time limit. Besides the ordinary prejudice when a limitation date is not complied with, if the time limit is extended, there is the forensic prejudice, due to memories fading. As the employer company has been wound up, it should be taken into account this this is now a claim against an individual respondent, not a corporate entity.

27. The authorities make it very clear that there the Tribunal should not cover the gaps in the claimant's favour without any evidence. It is obvious that once the original deadline passed, any further action should be taken quickly. There is no evidence from the claimant as to what he was told or what he thought was going on. For those reasons the respondent submits that the balance of prejudice for an individual respondent facing a discrimination claim should result in time not being extended. That result does not leave the claimant without a remedy as he has a claim against his solicitors. All the factors should be considered, in particular the amount of time it took to present the claim once the error was discovered. The claim was presented on 26/11/2018, when the alleged act of harassment was on the 9/5/2018. That is more than six-months from the date of the incident.

28. Ms Kelly on behalf of the claimant submitted she would rely upon her skeleton argument. She relied upon Chohan v Derby law Centre [2004] IRLR 685 and said that the Court of Appeal held that the failure of the legal adviser should not be visited upon the claimant. The fact the claimant has a remedy elsewhere was not a factor for this hearing. She agreed the claimant had missed the primary time limit by just shy of four months, sadly he had negligent solicitors and not in intending any disrespect; compounded by further negligence.

29. The claimant specifically asked about the limitation date, which he thought was expiring and he was wrongly advised it had not. The claimant then left his claim to his solicitor and once the file was reviewed in full and the Acas Early Conciliation Certificate had been seen, the error was realised. Then Counsel's advice was taken; in reality the firm was looking at what it could do to remedy the situation and that was why advice was sought from Counsel.

30. It seems advice was taken in terms of potential loss and the firm's liability, not in terms of pursuing a claim in the Tribunal.

31. The respondent referred to the disclosure, which was said to be selective and referred to waiver of privilege. Ms Kelly urged caution and said there was a difference between privilege between the solicitors and Counsel and between the claimant and the solicitors. Mr Kenealy believed he had disclosed all of the relevant documents, save those that were covered by privilege.

32. Ms Kelly agreed there was no presumption in favour of the claimant. That was despite the claimant calling and emailing and specifically asking about the limitation period. Not only was there a failure to present the claim in time, but then the claimant was incorrectly informed limitation had not expired.

33. Mr Kenearly did not have knowledge of the relevant case law in August 2018 and he did not realise until Counsel's advice was received that it was possible to as the Tribunal to exercise its discretion under s. 123 (1)(b) EqA. Once that advice was received the ET1 was presented the next working day.

34. It is accepted by the claimant that there was a delay from August to November; that cannot be disputed. What happened in the meantime was the firm complied with its internal compliance and in reality, the matter was going back and forth with Counsel; as the firm was seeking to protect itself for further liability.

35. It was submitted the allegation concerns one set of comments made by one individual on one day. The delay is due to the solicitor, not the claimant. The claimant had acted promptly as the allegation arose on 9/5/2018 and he contacted Acas on the 15/5/2018. He then sought advice, agreed to the firm's terms and conditions and even chased his solicitor.

36. The prejudice to the claimant in not now being able to pursue his claim, should outweigh any to the respondent. The claimant will be time-barred based solely on the negligence of his solicitor. The claimant acted promptly.

37. The respondent has separated out ordinary prejudice and forensic prejudice and referred to the reasonable expectation of the respondent not facing a claim. The Early Conciliation Certificate however put the respondent on notice of a claim and the respondent has provided full grounds of resistance. The prejudice to the respondent is minimal if indeed he did consider from August to November that the claimant was not pursuing his claim. The prejudice is only extended by the period of four months and both parties have indicated that there is video evidence of the allegations.

38. The employer at the time was in administration and it is clear the claim was brought against an individual respondent, not the employer. The claimant was the sole employee at the relevant time. Although the respondent suggested it was obvious that the claimant should have acted quickly once the limitation date passed, Mr Kenealy said he did not believe the matter was time sensitive as he did not believe there was an opportunity to correct his mistake.

39. Based upon the evidence heard, the skeleton argument and the authorities quoted the Tribunal is invited to exercise its discretion under s. 123 EqA.

40. Miss Hadfield responded that her point about privilege being waived was in respect of it being contended Counsel's advice was sought on the claimant's, as well as that of Mr Kenealy's firm. Secondly she said that there is no determinative factor to take into account when exercising discretion. The fact there is an alternative remedy and the negligence are neither of their own account determinative, all relevant matters need to be taken into account.

Conclusions

41. In respect of Mr Kenealy's admitted error, he is to be commended that he has always been open and honest about his error. He has not sought to deflect from it. He was candid when giving evidence, which must have been embarrassing for him. Both counsel acknowledged that and confirmed they did not seek to add to his embarrassment; indeed it was acknowledged that it is human to err and this was the reason for professional liability insurance. Despite his error, Mr Kenealy has behaved quite properly and attended to give his evidence in person and with integrity.

42. The Tribunal is required to consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

    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 co-operated with any requests for information.

    d. The promptness with which the claimant acted once they knew of the possibility of taking action.

    e. The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

43. While this may serve as a useful checklist, there is no legal obligation to go through the list, providing that no significant factor is left out (London Borough of Southwark v Afolabi [2003] IRLR 220). The emphasis should be on whether the delay has affected the ability of the tribunal to conduct a fair hearing (DPP v Marshall [1998] IRLR 494).

44. Time limits are applied strictly in employment cases, and there is no presumption in favour of extending time. In fact, tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so. The burden is on the claimant, and the exercise of discretion to extend time should be the exception, not the rule.

45. In this case, there is no issue in respect of paragraph 42 (c) and (e). Furthermore, (d) is also not relevant as the claimant acted promptly in contacting Acas and then instructing Mr Kenearly.

46. The two remaining issues are therefore the length and reasons for the delay and the extent to which the cogency of the evidence is likely to be affected by the delay.

47. There is no general principle that a failure by a legal adviser of itself leads to the Tribunal concluding that it is just and equitable to extend time under s. 123 EqA. That is just one factor to take into account and as Miss Hadfield said, there is a reason why solicitors carry professional indemnity insurance. Why should the respondent have to defend a claim brought outside of the limitation period just to right the wrong of Mr Kenealy? Besides memory recall, that is a further prejudice for the respondent. Despite the ACAS Early Conciliation Certificate, the respondent was entitled to conclude, after more than six months had passed since the incident, that the claim was not being pursued.

48. Furthermore, although there was reference to the claimant's claim being a strong one and to recordings made of the harassment; that was not advance at this hearing. Other than a fleeting reference to it, there was no submission made as to the strength of the claimant's case. It may well be that the recording only evidences swearing by the respondent to the claimant, which does not amount to harassment based upon the protected characteristic of disability. The Tribunal will however never know as the strength of the claimant's case was not put before it.

49. The reason for the delay in presenting the claim was Mr Kenealy's mistake. Not only that, he then compounded that mistake by making another error, which was his assumption that s. 123 EqA could not be relied upon. Whilst the first mistake is understandable, the second is not. Mr Kenearly said that he was 'unaware of the case law on the issue of a solicitor's negligence being a ground on which the Tribunal could exercise their discretion to extend the time limit otherwise I would have submitted the claim earlier…' Even if that evidence is accepted, it still does not explain why Mr Kenealy's firm did not act sooner. Mr Keneraly says the decision was made to take Counsel's advice on 3/9/2018 and the claimant agreed to that on 3/10/2018. As Miss Hadfield stated, the advice appears to have been joint advice, partly as to the firm's potential liability to the

claimant and partly advice for the claimant. Had the firm simply sought its own advice, it would not have needed to wait for the claimant to give permission before doing so. In addition no explanation for the detail between the claimant giving his permission, instructions being sent to Counsel and then the period of time which it took Counsel to respond with the advice have been provided. It is accepted that Mr Kenearly acted quickly once he was in receipt of Counsel's advice, but by then, the delay had already been too long. Also, this was a case where it would have been prudent for the firm to take its own advice from Counsel and then, if necessary to fund advice on behalf of the claimant.

50. Any solicitor practising employment law knows of the short time-limits in the Tribunal. Mr Kenearly said he realised the claim was out of time on 20/8/2018. At that stage it the claim was 12 days out of time. Mr Kenearly said that he was aware of the discretion under s. 123 EqA; but that he did not appreciate it applied in this scenario. That explanation is not satisfactory. S. 123 EqA makes no reference to the discretion only applying to certain errors. Furthermore, that does not explain why a short piece of research by Mr Kenearly or one of his team, would not have uncovered the fact that the claim could be presented (even as suggested a holding claim (in any event the grounds of complaint were succinct when eventually presented)) shortly after the 20/8/2018.

51. As it was, the claim was eventually presented on 26/11/2018. The argument the respondent was on notice of the claim via Acas is not accepted. All the respondent knew was of the possibility of a claim. He was entitled to conclude, some six months later, that the claimant had decided not to pursue the claim.

52. The claim form was presented more than six months after the incident. Twice the amount of time in respect of the normal time limit was taken. If Mr Kenearly was confused once the claimant's employment terminated as to the correct limitation date, the employment had not ended (it did not end until 4/7/2018) at the time the referral was made to Mr Kenearly and when terms and conditions were signed by the claimant. Also, Mr Kenearly appears to have been alive to the fact that the claimant could only bring a claim against the respondent, if he had engaged in Acas Early Conciliation in respect of him (Mr Sassow), which the claimant had. That level of understanding of the legislation does not accord with Mr Kenealy's misunderstanding of s. 123 EqA.

53. The respondent is therefore prejudiced by the extra delay from when the time limit expired, to when the claim was eventually presented.

54. For those reasons, it is concluded that a the prejudice to the respondent outweighs exercising discretion in the claimant's favour and leads to the conclusion that the delay is such, that a fair trial is no longer possible.

55. It is not accepted the issue of the Acas Early Conciliation Certificate number has compounded matters. The claim form was presented on 26/11/2018. The apparently incorrect certificate number was identified on the 27/11/2018. That caused the claim to be rejected on 30/11/2018. Mr Keneraly applied for a reconsideration of that decision on 13/12/2018. That application was referred to an Employment Judge on 18/12/2018. The ET3 was presented on 31/1/2019.

56. Granted an extension of time under s. 123 EqA is accepted by both parties to be an exception, rather than a rule. There is an explanation for some of the delay, but not for all of it. Even if what Mr Kenearly says is correct, there is no explanation as to why a short piece of research would not have revealed that the claim then needed to be presented without any further delay; as in exercising discretion, the Tribunal would look at the length of the delay and the reasons for it.

57. Ignorance is not a reason for exercising discretion and the prejudice to the respondent needs to be balanced.

58. For those reasons, the Tribunal declines to exercise its discretion to extend the time limit to present the claim to 26/11/2018. Accordingly, the claim is dismissed as it was not presented within the time limit provided for in s. 123 (1)(a) EqA and it is not just and equitable to extend the time limit under s. 123 (1)(b).

Employment Judge Wright

Dated: 5 June 2019

Judgment sent to parties: 17 June 2019

FOR THE EMPLOYMENT TRIBUNALS