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# THE EMPLOYMENT TRIBUNALS

**Claimant:** Miss L Ponde Nkot  
**Respondent:** Ole and Steen  
**Heard at:** East London Hearing Centre  
**On:** Wednesday 3 July 2019  
**Before:** Employment Judge Russell (sitting alone)

**Representation**  
**Claimant:** Neither present nor represented  
**Respondent:** Ms K Aldred (Consultant)

## JUDGMENT

The judgment of the Employment Tribunal is that:-

1. The claim of unfair dismissal is struck out as the Claimant does not have two years' continuous service.
2. The claims of race and sex discrimination were presented out of time. It is not just and equitable to extend time. The Tribunal does not have jurisdiction to hear them.

## REASONS

1. By a claim form presented to the Employment Tribunal on 15 November 2018, the Claimant brings complaints of unfair dismissal, race and sex discrimination arising out of her employment with the Respondent. She was employed from 17 May 2018 until 13 June 2018 as a commis chef. The claim form alleges that timekeeping is not the real reason for her dismissal, instead it was aggressive and discriminatory behaviour towards her in the kitchen.

2. ACAS early conciliation lasted from 27 July 2018 and 22 August 2018. Early conciliation therefore started within three months of the date of dismissal on 13 June 2018 and its effect is to extend the primary time limit by 25 days. The

adjusted time limit therefore expired on 7 October 2018. The claim form was presented on 15 November 2018.

3. A Preliminary Hearing was listed on 23 April 2019 to determine the time issues. This was not effective as there was insufficient judicial resource and were sent away. The Preliminary Hearing was re-listed for today.

4. In preparation for today's hearing, the Respondent provided a small bundle of documents relevant to the circumstances of the Claimant's dismissal and her complaints of inappropriate behaviour in the kitchen. I had regard to its contents.

5. The Claimant attended the ineffective Preliminary Hearing on 23 April 2019 but did not attend today. The hearing was due to start at 10am, at 10.50am the Claimant was still not here and no message from her had been received. At my direction, the clerk then telephoned her mobile number and left a voicemail message. I put the hearing back a further hour to give the Claimant a chance to respond to the Tribunal's message. At 11.50am the clerk informed me that there had been no response and still no contact from the Claimant.

6. There was nothing on the file to indicate that the Claimant was not able to attend today. The Notice of Hearing for today had been sent to the address on file, previously used when listing the April hearing. I was satisfied that the Claimant had had notice of the hearing.

7. The Respondent attended today. The hearing had already been re-listed and to adjourn would cause further delay. An interpreter had been booked to support the Claimant today and would need to be booked again if the hearing were re-listed. The last correspondence with the Respondent and the Claimant was November 2018. The Claimant has not corresponded with the Tribunal in preparation for the hearing and has not submitted any evidence or representations to be considered. In the circumstances, I decided that it was in accordance with the overriding objective to proceed with the hearing today. To do otherwise would cause unnecessary expense and delay in circumstances where there is no evidence of any good reason for the Claimant's failure to attend the hearing or of any intention to continue with her claim.

#### Unfair Dismissal

8. Section 108 of the Employment Rights Act 1996 provides that a person may not bring a complaint of unfair dismissal unless they are continuously employed for two years or more. There are certain specific circumstances where the service requirement does not apply and the claim is of automatically unfair dismissal, these are specified in the Employment Rights Act 1996.

9. The Claimant was employed for a little under one month. Her claim form sets out no automatically unfair reason within the scope of the Employment Rights Act 1996. The Claimant asserts that her dismissal was discriminatory but discrimination is not one of the ERA grounds for automatically unfair dismissal.

10. The claim of unfair dismissal is struck out as the Claimant does not have

the required period of service and is not entitled to bring the claim.

Discrimination

11. Section 123 of the Equality Act provides that no complaint may 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 Employment Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of that period. Failure to do something is to be treated as occurring when the person in question decided on it.

12. This primary time limit is extended by section 140B of the Equality Act 2010 to take into account the period of time spent in ACAS early conciliation. In this case, the primary time limit did not expire during the conciliation period and so section 140B(3) applies to disregard the 25 days spent in conciliation. In other words, the time limit is extended by 25 days.

13. If the claim is presented outside the primary limitation period, the Tribunal may still have jurisdiction if in all the circumstances, it considers that it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:-

- The Claimant bears the burden of persuading the Tribunal that it is just and equitable to extend time. There is no presumption that time will be extended.
- The Tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late weak claim and less prejudicial for a claimant to be deprived of such a claim.
- This is the exercise of a wide general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other timeously presented claims will be relevant because it will mean on the one hand, that the Claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues.
- There is no requirement to go through all the matters listed in section 33(3) of the Limitation Act 1980 provided that no significant factor has been left out of account.

14. The Claimant's discrimination claims were presented on 15 November 2018, one month and one week after the time limit had expired. As the claim was out of time, I must consider whether or not it is just and equitable to extend time in all the circumstances of the case.

15. The discrimination claims were not well particularised in the claim form

and the Claimant was required by Judge Gilbert to provide further information. The information provided by the Claimant on 13 December 2018 scarcely took the matter further: she alleged that one member of the team treated her differently to other members of the team “because first I was a girl”; then the two colleagues had “treated me differently because I was black”. It is not clear why any of the treatment was said to be linked to race or sex, nor was it clear which primary findings of fact the Tribunal would be asked to make and what inference drawn from them. As currently pleaded, the claims do not appear strong. In contemporaneous emails between the Claimant and her former employer, the Claimant appears to accept that she had come in late on several occasions, the lateness being periods of up to two hours at a time. As currently pleaded, the Respondent’s prospects of defending the claim appear relatively strong.

16. The Claimant has not adduced any evidence to explain why she was late presenting her claim. She has not discharged the burden that is upon her to do so. In her email of 25 July 2018 to her former employer, the Claimant refers to behaviour which is abusive, illegal and recognised by the law and the courts. In a letter sent to the Respondent on 1 August 2018, the Claimant refers expressly to unfair dismissal and harassment. Whilst the Claimant may not be a lawyer, she is clearly aware of the ability to bring a complaint arising out of these causes of action.

17. In all the circumstances of the case I am satisfied that the prejudice to the Respondent in granting the extension of time outweighs that caused to the Claimant in refusing it. The claims of discrimination because of race and/or sex were presented out of time and it is not just and equitable to extend time.

18. This decision was made in the Claimant’s absence. If the Claimant has a good reason for her failure to attend, she should notify the Tribunal and provide evidence in support. For example, if the reason is said to relate to a medical or travel difficulty, she must provide the appropriate documentation to support her contention. Mere assertion alone will not be sufficient.

Employment Judge Russell

Date: 18 July 2019