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# EMPLOYMENT TRIBUNALS

**Claimant:** Ms K McCairn  
**Respondent:** Acanteen Limited  
**Heard at:** East London Hearing Centre  
**On:** 29<sup>th</sup> July 2019  
**Before:** Employment Judge Reid

## Representation

**Claimant:** In person (accompanied by her father Mr McCairn)  
**Respondent:** Mr Bansal, solicitor

# RESERVED JUDGMENT

**The Claimant's claim was brought outside the time limit in s123(1)(a) Equality Act 2010 and it is not just and equitable to extend time under s123(1)(b) Equality Act 2010. The Claimant's claim is therefore dismissed.**

# REASONS

## Background

1 The preliminary issue identified in the case management summary dated 24<sup>th</sup> April 2019 was whether the Claimant presented her claim outside the time limits set out in s123(1)(a) and (b) Equality Act 2010. The Claimant's claim for pregnancy/maternity discrimination was presented on 14<sup>th</sup> January 2019 (the second attempt – see case management summary para (7)).

2 There was a one file bundle to page 102 for this hearing plus the Claimant's witness statement which she signed at the hearing (document starting 'Main reasons for delay...'). I also heard oral evidence from the Claimant and submissions on both sides on the time limit issue. In a nutshell, the Claimant's explanation for her late claim was that she was focused on looking after her daughter (born on 15<sup>th</sup> August 2018), had anxiety and depression which was being treated by her GP and did not have any help from anyone else to do the ET1 claim form.

3 Since the hearing on 15<sup>th</sup> April 2019 the Claimant had provided a bullet point list of events she said constituted the pregnancy/maternity discrimination. The last identified date in this series of events (penultimate bullet point) was 23<sup>rd</sup> April 2018 (request for a risk assessment which was ignored). The final bullet point was an undated allegation about lack of pay/benefits which the Claimant clarified at this hearing was a reference to only ultimately being entitled to maternity allowance because of her prior period of sickness absence, which she felt the Respondent should have told her about sooner, rather than saying they would pay maternity pay but then telling her she was not entitled to it because she had been on sick leave. The Respondent's case on this issue was that this was not a separate act forming part of the claim but was a consequence of having been on sick leave.

4 At this hearing the Claimant raised that she considered an act occurring after April 2018 was the fact that she had been unable to come back to work (ie stop her then sick leave and return) because of the situation created by the Respondent, which she said was the Respondent's failure to either let her work as front of house manager again (with some changes) or to let her work as a waitress on the new terms she said had been agreed as to hours and pay. The Respondent's case was that she had been off sick from 4<sup>th</sup> April 2018 and it had not been suggested till this hearing that she would have come back to work and would have ended her sick leave. I identified that this particular claim (the would have come back to work claim) was not in the Claimant's 49 page attachment to her ET1 because she did not say that she would have come back to work and would have ended her sick leave – by contrast she was signed off work and said she was unable to leave the house (page 17-18 of her attachment to her ET1). I therefore identified that the would have come back to work claim which Claimant was referring to was not in her claim form.

5 After some discussions and a further review of the 49 page ET1 attachment it was identified that the last act complained of in the 49 page attachment was the outcome of the second grievance meeting, with the Respondent saying that that date was 10<sup>th</sup> July 2018 (date of the grievance outcome decision) and the Claimant saying that date was 19<sup>th</sup> July 2019 (date she got the letter telling her the outcome). I therefore identified that time started to run on one of these two dates, subject to any extension for the ACAS early conciliation (EC) process.

### Findings of fact

6 I find that the Claimant took legal advice for the first time by at least 26<sup>th</sup> April 2018 (ET1 attachment para 88). She then sought advice about a possible settlement (para 94) around 30<sup>th</sup> April 2018. On 9<sup>th</sup> May 2018 her solicitor wrote a formal letter to the Respondent (para 96). I find based on her oral evidence that she was aware at this time that a Tribunal claim was an option but was not specifically advised about time limits by her solicitor. I find however based on her oral evidence that she herself did some internet research at this time and was aware there were time limits to bring a claim.

7 I find based on her oral evidence that the Claimant was aware of the EC process by 26<sup>th</sup> June 2018 (para 118). I find based on her oral evidence that having contacted ACAS the Claimant was aware that once the EC certificate was issued that time started to run again for her to bring her claim. I therefore find that as at 26<sup>th</sup> August 2018 (the date of issue of the EC certificate) the Claimant was aware that the clock was now ticking.

8 I find that the Claimant thought that the time limit for her claim was 25<sup>th</sup> November 2018 (witness statement), apparently calculated on the mistaken basis that the 3 months ran from the date of the issue of the EC certificate.

9 I find based on her oral evidence that the Claimant started to create her 49 page attachment to her claim in August 2018. I find that she finally finished it shortly before she submitted her first claim on 28<sup>th</sup> December 2018.

10 The Claimant was on sick leave from 4<sup>th</sup> April 2018 until her maternity leave started on 1<sup>st</sup> August 2018. I do not have the certificates for this period but the Respondent does not dispute that the reason given on the certificate was the Claimant's mental health (page 102). The Claimant's daughter Olivia was born on 15<sup>th</sup> August 2018.

11 I find based on her oral evidence that the Claimant's GP referred her to the perinatal community mental health team in May 2018 (page 102) but that an appointment did not then come through. I find that the Claimant did not chase up that appointment despite going to her GP around every 2 months and that her GP did not take any further steps to get that appointment for her or advise her that she should go because she needed to. I therefore find that although diagnosed with anxiety and depression for which she subsequently started to take medication in around October 2018, the Claimant's mental health was not at the serious end of the scale such that it was likely to significantly affected her ability to complete the online ET1 form, taking into account she was during this period able to work on her 49 page summary, which her father then helped her to finalise. I find her father was able to help her do this even though he lives in Bristol and not locally. I find based on her oral evidence that the Claimant produced the draft as she had all the facts and dates and that her father helped her finalise it; she described him as having 'tweaked' her draft from which I find his input was towards the end and he was not involved in most of the drafting which the Claimant did herself.

12 I find based on her oral evidence that the Claimant was able to apply for maternity allowance online on the gov.uk website in around September 2018, around a month after her daughter was born.

13 Taking into account the above findings and her ability to work on a long complex and detailed document from August 2018 despite having depression/anxiety and despite a new baby requiring a lot of attention, I find that the Claimant was able to fill in the online ET1 form which would have taken her a relatively short time to complete compared to her extensive attachment and an easier document than her extensive attachment. She had found the time despite it being a busy and difficult time to produce a long and complex document mostly on her own which was put together by her going back through texts, messages and emails in order to reconstruct what had happened. If she had the time to do that she had the time to do the ET1 form online which was a considerably smaller task than her attachment. Whilst she said that she did not complete the attachment until December 2018 around the time she submitted her first claim, she was working on it from August 2018. I therefore find that the Claimant could have submitted her claim within the time limit (or what she thought was the time limit ie 25<sup>th</sup> November 2018) in terms of having the ability and time to do so, despite it being a busy period with a small baby and despite her depression and anxiety. The reasons she gave as to why her claim was submitted late were not in fact reasons why she could not bring her claim in time, in the light of what she was in fact able to do during a period when she was aware of time limits applying and

the clock ticking.

14 The Claimant knew when she submitted her first claim on 28<sup>th</sup> December 2018 that it was out of time, even on her own understanding of the time limit (on that understanding, late by around a month). This was not therefore a claimant who presents a claim within what they think is the time limit but are mistaken. It was also not a situation of a claimant who presents their claim in the gap between the real time limit and their understanding of the time limit.

#### Relevant law

15 s123(1)(a) Equality Act 2010 provides that a claim must not be presented after the end of 3 months starting with the date of the act complained of. This time limit is subject to any extension caused by the application of the EC process. The Tribunal also has the power under s123(1)(b) to allow a claim beyond that time limit, in such other period as the Tribunal thinks just and equitable. The just and equitable exception in s123(1)(b) is to be considered as the exception rather than the rule (*Robertson v Bexley CC [2003] IRLR 434*). This is not the same thing as saying that exceptional circumstances are required to allow the extension and the relative prejudice to the parties must be considered (*Pathan v South London Islamic Centre EAT 0312/13*).

16 Time may be extended even in the absence of an explanation of the delay from the claimant. However, any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal ought to have regard, (*Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640*).

17 The Tribunal can consider the factors set out in s33 Limitation Act 1980 (as modified by the EAT in *British Coal Corporation v Keeble and ors [1997] IRLR 336*). The Tribunal must consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to (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 respondent had co-operated with any requests for information, (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

18 Under s123(3)(b) Equality Act 2010 a failure to do something is treated as occurring when the person decides on it.

#### Reasons

19 Taking into account the above findings of fact I conclude that the last act complained of was the Respondent's refusal to allow the Claimant's second grievance (ie its refusal to allow the Claimant to return to work as a manager or a waitress on the basis she had proposed). Although the refusal was not an express refusal, the Respondent's response to the grievance was not to come back to the Claimant on her proposals from which it was clear that the Respondent had not accepted her proposals. This decision was

made after the grievance meeting on 10<sup>th</sup> July 2018 and therefore time started to run from this date (the last act complained of) and not from the later date (19<sup>th</sup> July 2018) when the Claimant received the letter. The time limit of 3 months was therefore 9<sup>th</sup> October 2018. With the ACAS EC extension (Day A 26<sup>th</sup> July 2018, Day B 26<sup>th</sup> August 2018 ie 31 days) the time limit for the Claimant's claim was extended to 9<sup>th</sup> November 2018.

20 Applying the above factors and considering the prejudice to each of the parties:

- The Claimant has not shown that the reason she gives for her delay in fact stopped her from bringing her claim in time
- The Claimant had legal advice from an early stage and was aware that there were time limits from her own researches and from ACAS
- The length of the delay was of around six weeks until her first claim was brought and a further two more weeks before her second claim was presented; the Claimant knew that her claim was late throughout the month after she thought the time limit had expired (on her understanding of it) and still waited a month
- The claim was not due in the early weeks following the birth of her daughter but around 3 months after the birth
- The events complained of started in January 2018, so by the time of the hearing (listed for January 2020) will be some two years old; the Claimant has however kept a detailed record of events and relevant documents which she compiled in the latter half of 2018 but that was done at least a year before the hearing would take place meaning that even her own recollection will have faded
- The Claimant was not waiting to hear anything from the Respondent after she got the July 2018 grievance outcome or after the Respondent confirmed her maternity pay before she went on maternity leave
- The Claimant was aware of the facts of her claim by the July 2018 grievance outcome; when she went on maternity leave on 1<sup>st</sup> August 2018, she had taken legal advice, contacted ACAS and done her own research into time limits; after 1<sup>st</sup> August 2018 the Claimant had everything she needed to know to bring her claim and only had to wait for the expiry of the ACAS EC period on 26<sup>th</sup> August 2018; everything she relied on predated the start of her maternity leave and it was not therefore a case that events were still happening after she went on maternity leave which she thought might mean the matter was ongoing
- As regards the balance of prejudice to the parties, the effect of not allowing the claim is that the Claimant will be unable to pursue a pregnancy/maternity discrimination claim, a significant matter; the Claimant was on maternity leave when her claim was due and this is a relevant factor

- The effect of allowing the claim to proceed on the Respondent is that a dispute which originated in January 2018 which was not pursued by the Claimant bringing her claim until the end of December 2018 is resurrected, with potential consequences as regards the witnesses' recollection of events over around a 6 month period some two years later; whilst the Respondent was aware in July-August 2018 that the Claimant might pursue a claim, in fact nothing happened until the end of December 2018 meaning that the Respondent could not take steps in the latter half of 2018 to ensure witnesses wrote down their recollection of events when still fresher in the mind.

21 Weighing the above factors up, I conclude that it is not just and equitable to permit the claim to be brought outside the usual time limit. I have considered the balance of prejudice to the Claimant and the consequence that she will be unable to pursue her claim, but weighing up the above factors I conclude that it is not just and equitable to extend time.

**Employment Judge Reid**

**5 August 2019**