



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107473/2019

Hearing Held at Dundee on 8 November 2019

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Employment Judge A Kemp

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Miss K Stanley

**Claimant
In person**

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Caversham Finance Limited t/a Brighthouse

**Respondent
Represented by:
Miss E Wood
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The claims made under sections 13 and 26 of the Equality Act 2010 were presented out of time and are outwith the jurisdiction of the Tribunal. They are accordingly dismissed.

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2. The claim made under section 19 of the Equality Act 2010 is within the jurisdiction of the Tribunal, and together with that under section 27 of the Act in respect of which no issue of jurisdiction arises shall proceed to a Final Hearing.

REASONS

Introduction

- 5 1. This case was called for a Preliminary Hearing to address issues of time bar that arose following the Preliminary Hearing held on 6 September 2010. The issues relate only to the claims made under sections 13, 19 and 26 of the Equality Act 2010.
- 10 2. The claimant has withdrawn her claim of unfair dismissal. In relation to the claim of indirect discrimination under section 19 of the 2010 Act she provided further particulars by email dated 19 September 2019. After discussion it was noted that the provision, criterion or practice she founded on was that she could work only in either the Stirling or Perth stores, not at Alloa where
- 15 she had previously worked, and that that allegedly continued to point of termination of employment. Miss Wood wished to reserve her position on that, and argue that timebar arose for all claims save that of victimisation.

Evidence

- 20 3. The respondents had prepared a bundle of documents for the purposes of the hearing.
4. Evidence was given orally by the claimant herself.

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Issues

The issues before the Tribunal were:

- 30 1. Did any of the acts of discrimination alleged under sections 13, 19 and 26 of the Equality Act 2010 take place outside the statutory time limit for raising such claims, and if so

2. Was it just and equitable to permit any of those claims to proceed?

Facts

5 5. The Tribunal found the following facts to have been established:

6. The claimant is Miss Katie Stanley.

7. She was employed by the respondent initially at its store in Stirling on a part-
10 time basis, in a sales role. She was then promoted to a full-time role in the
summer of 2016. In September 2017 she was promoted again to be deputy
manager of the store in Alloa. One of those on the interview panel for that
role was a Mr Jamie Hunter.

15 8. In September 2018 Mr Hunter became the claimant's direct manager. She
alleged that thereafter he exaggerated and mocked her accent in a manner
that she found upsetting and offensive. She is of mixed race, with her
biological father from a Caribbean heritage, and her biological mother being
white. She was adopted into a white family. She was raised in the north of
20 England, and speaks with an English accent. She identifies as mixed race
and English.

9. She spoke with Mr Hunter to ask him to stop such behaviour on 5 November
2018. She was not content with the reply from him which was to the effect
25 that she should speak to him similarly, and sent a formal written grievance on
8 November 2018 to Ms Helen Swan, the head of HR at the respondent. A
mediation meeting was arranged in the store involving the claimant,
Ms Hunter and Ms Swan on 13 November 2018, which led to an outcome
initially discussed at a meeting between Ms Swan and the claimant on
30 16 November 2018, then recorded by letter dated 20 November 2018. The
result was that the claimant worked at the store in Stirling, not Alloa, not full
time but 30 hours per week, and not as Deputy Manager but as a customer
sales adviser.

10. The claimant had the opportunity to raise questions about that outcome if she wished, including with Ms Swan or the Regional Manager, but did not do so. She did not consider that she could pursue matters further at that stage as she needed to remain in employment to care for her daughter, she being a single parent.
11. The claimant alleges that she was only offered roles at Stirling or Perth during that mediation and discussion process, not what she had wished which was to continue at Alloa in her then role as Deputy Manager, but with what she felt were professional boundaries between her and Mr Hunter.
12. The claimant spoke to a friend who had worked in human resources in early December 2018 who advised her to make a complaint, but did not elaborate on that.
13. On 1 February 2019 the claimant was informed that there was a risk of the store at which she then worked, Stirling, being closed, and that was confirmed to her formally on 4 February 2019.
14. The claimant contacted the Citizens Advice Bureau for advice on 13 February 2019. The possibility of raising a claim at the tribunal was then discussed, in relation both to the prospective redundancy and the outcome of the grievance relating to Mr Hunter.
15. The claimant's employment with the respondent terminated by reason of redundancy on 30 March 2019.
16. The claimant commenced early conciliation through ACAS on 4 April 2019. The certificate was issued on 4 May 2019.
17. The claimant presented a Claim Form to the Tribunal on 25 June 2019.

Submissions for claimant

18. The claimant made a short submission arguing that it would be just and fair to allow her claims to proceed out of time, with each side able to argue its case, stating that Tribunals had been established for a reason.

Submissions for respondent

19. The following is a summary of the submission. The case law was well-known, and the question was of prejudice to both parties. It was for the claimant to convince the tribunal and extension was the exception not the rule.

20. The claim was fairly significantly out of time. Commencement of early conciliation was not until 4 April 2019, when the material events occurred in early November 2018. There had been a grievance submitted but that had been addressed at mediation and an agreed outcome reached. There had been no further appeal of that or other grievance raised. By mid February 2019 the claimant was aware of time limits for presenting claims, but had not started that until April 2019.

21. On the issue of prejudice there was one witness who spoke to a remark allegedly made by the claimant, which she denies, who has since left the business. The respondent could seek a witness order but the witness is not likely to appear voluntarily and attempts to take a statement have failed.

22. There was no good reason presented for the delay, with no undue delay, or new document, or similar.

Law

23. The law relating to discrimination is complex. It is found in statute, case law, and from guidance in a statutory code.

(i) *Statute*

24. Section 4 of the Equality Act 2010 (“the Act”) provides that race is a protected characteristic. Issues of race include nationality and national origins under section 9(1) of the Act. The claims presently at issue are those under sections 13 for direct discrimination, 19 for indirect discrimination and 26 for harassment.

25. Section 123 provides as follows:

“123 Time limits

(1) [Subject to section 140A and 140B] proceedings on 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.....

.....

(3) For the purposes of this section—

- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.”

(ii) *Case law on what is just and equitable*

26. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***). Even if the tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, ***Pathan v South London Islamic***

Centre UKEAT/0312/13 and **Szmidt v AC Produce Imports Ltd UKEAT/0291/14**. Although the EAT decided that issue differently in **Habinteg Housing Association Ltd v Holleran UKEAT/0274/14** that is contrary to the line of authority culminating in **Ratharkrishnan**.

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27. In that case there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of **London Borough of Southwark v Afolabi [2003] IRLR 220**, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to **Dale v British Coal Corporation [1992] 1 WLR 964**, a personal injury claim, where it was held to be to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

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“What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see **Hutchison v Westward Television Ltd [1977] IRLR 69**) involves a multi-factoral approach. No single factor is determinative.”

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28. The factors that might be relevant include the extent of the delay, the reasons for that, the balance of hardship including any prejudice to the respondent caused by the delay, and the prospects of success of the claim, although all the facts are considered. In **Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13** the EAT said that a litigant can hardly hope to satisfy that burden unless she provides an answer to two questions:

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“The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was.”

29. In *Averns v Stagecoach in Warwickshire UKEAT/0065/08* the issue of the lack of knowledge of the ability to claim is addressed, and it was held that the assertion must be genuine and the ignorance – whether of the right to make
5 a claim at all, or the procedure for making it, or the time within which it must be made – must be reasonable.

Observations on the evidence

10 30. Miss Stanley gave clear and candid evidence, and I accepted it as credible and reliable.

Discussion

15 31. I did not consider that the claimant had established that it had been just and equitable to allow the claims for direct discrimination and harassment to proceed. There are a number of reasons for that. Firstly, the delay was not insignificant, both as to when the Claim was intimated to ACAS, but also as to when it was presented. The last date at which matters could be argued for,
20 which is probably 16 November 2018, when a meeting was held to discuss outcomes, which was later confirmed by letter of 20 November 2018, meant that Early Conciliation required to be commenced by 15 February 2018. It was not, until 4 April 2019. There is then a second period of delay, from the issue of the Early Conciliation Certificate on 4 May 2019 to the date of
25 presentation of the Claim Form on 25 June 2019. That is a material period of time both separately and collectively.

32. Secondly, the reasons for the delay were somewhat unclear. Whilst I appreciate that the claimant did not have legal advice, she did have initial
30 advice from a friend who encouraged her to pursue matters, and was aware from 1 February 2019 of the potential for redundancy. If there was a desire not to imperil her position at work initially, that changed when the risk of redundancy then arose. The claimant accepted that she had spoken to the

CAB on 13 February 2019. She could then have commenced ACAS early conciliation, and been in time to do so. There was a delay however both to commence early conciliation, of about six weeks, and then a further period of about seven weeks after the Certificate was issued before the Claim Form was presented. Given that the claimant had received advice from the CAB, that was a delay that was not clearly explained.

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33. Thirdly, the matter of prospects of success is affected by the claimant having a claim for victimisation in respect of which no issue of timebar is taken, and which she will therefore be able to pursue. Whilst that does not directly address the behaviours of Mr Hunter of which she complains, her grievance which founds the claim of victimisation does set that out. I deal below with the issue of the claim of indirect discrimination. By refusing to allow the claims of direct discrimination and harassment to proceed I do not prevent the claimant from pursuing some of the claims she wishes to make.

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34. Finally, the fact that the respondent has not been able to take a statement from one potential witness who has left the business weighs in the balance, although that is only a limited matter as a witness order can be sought for that person.

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35. Taking all the matters together, I concluded that the claims for direct discrimination and harassment had been presented out of time, and that it had not been shown by the claimant that it was just and equitable to allow it to be received. The respondent would suffer greater prejudice than the claimant in all the circumstances. Those claims were therefore dismissed as outwith the jurisdiction of the Tribunal.

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36. The position is I consider different in respect of the claim for indirect discrimination. The claimant alleges that a provision, criterion or practice was applied to her that she work either in the store at Stirling or Perth, that that applied from on or around 19 November 2018, and continued to the termination of her employment on 30 March 2019. The respondent reserved

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its position on that claim, and does not accept that such a PCP was applied. If however the claimant is able to establish in evidence that such a PCP was applied, and that that continued to termination, her claim will have been presented timeously. On that basis, it appears to me that no issue of the just and equitable extension arises on the allegations so made, in that the claim has been raised within three months of the end of the period where the PCP was alleged to have been applied. Whether or not such PCP was applied is an issue that is disputed, and will be determined at a Final Hearing, but I consider that the Tribunal does have jurisdiction to consider it.

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37. I have therefore concluded that the Tribunal does have jurisdiction to consider the claim for indirect discrimination under section 19 of the 2010 Act. That, together with the claim under section 27, in respect of which no issue of timebar is taken, shall proceed to a Final Hearing.

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38. I have dealt separately with case management matters for that hearing by a Note issued with this Judgment.

Conclusion

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39. The Claimant's claims under sections 13 and 26 of the Equality Act 2010 are dismissed as the Tribunal does not have jurisdiction to consider them. The claims under sections 19 and 27 shall proceed to a Full Hearing.

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Employment Judge:
Date of Judgment:
Date sent to parties:

Alexander Kemp
12 November 2019
14 November 2019