EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123460/2018

Held in Glasgow on 27 August 2019

Employment Judge L Doherty

Miss D Elliott	**Claimant** **Represented by:** **Mr W McParland - Solicitor**
Kerri Ann Angus	**First Respondent** **Represented by:** **Ms L Hunter - Solicitor**
Peaches Wax Bar Limited	**Second Respondent** **Represented by:** **- see above**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that it does not have jurisdiction to consider the claimant's claim of discrimination.

REASONS

1. The claimant presented a complaint of discrimination on the grounds of sex and maternity, on 6 December 2018. An issue of jurisdiction was identified, on the grounds that the claim was lodged outwith the applicable statutory time limit, and this preliminary hearing ("PH") was fixed to consider whether the tribunal had jurisdiction to consider the claim.

2. In her ET1, the claimant identified a number of reasons why it was said that the tribunal should extend time on the basis that it was just and equitable to do so. These were as follows:

"I feel with the stress and anxiety this has caused me, it has ruined my entire pregnancy. I'm 8 months pregnant and have still not been able to get over the devastation of this.

My self esteem has been completely destroyed, I feel I'm still in a depressed state and I cannot focus on the future as I feel everything was taken away from me within a short period of time. I also feel the situation of being pregnant and let go at work so far along in my pregnancy jeopardised me from getting a new job. I have struggled financially for the last 3/4 months and this is causing a lot of stress. And I do believe being let go from the work place has not given me and my unborn child a great start to her new life and I cannot stress the anxiety this is causing me.

I also believe the way I was treated within the salon was appalling and I felt completely bullied. After I explained I was pregnant to management, each shift I carried out I was constantly on edge and in an anxiety state.

On the day I was let go from the position I felt this was carried out wrongly and again I was bullied by the owner and management team.

I do understand my claim is out of date but as I state before I do believe I did not receive accurate information by ACAS and Citizen advise and it was brought to my attention until yesterday at a meeting with Employment Lawyer.

I do believe my own mental state afterwards was not great and I can confidently say I was not in the correct mindset to have picked up on this sooner.

Soon as I spoke with Employment Lawyer I've tried everything I can to have this resolved. He advised me if it was possible to have an extension onto my claim due to receive inaccurate information by Acas/Citizens advise.

I also feel with the company withholding payment and documents of mine was to buy them more time and to waste the short time frame I had.

Lastly I have carried out all requests made to me within a time limit by Acas and citzen advise and I feel it was let go."

3. In advance of the PH, Ms Hunter for the respondents sought confirmation from the claimant's then solicitor, but these were the four matters relied upon by the claimant in seeking an extension of time. In an email dated 1 March 2019, the claimant's then solicitor confirmed that the four reasons listed in her ET1 are the only reasons she was relying upon with respect to her claim being submitted out of time.

4. Mr McParland represented the claimant at the PH, and the respondents were represented by Ms L Hunter. The tribunal heard evidence from the claimant, and both sides lodged productions. There was a letter of 5 November 2018 signed by the human resources manager which was incorporated within the productions lodged by the claimant. There is no dispute in this case that the claimant was dismissed from her employment with the respondents on 15 August. The purpose of this PH was the discrimination claimed and was taken to have arisen on that date. If the claimant provided additional specification of her claim which is allowed and makes allegations of acts of discrimination which predate 15 August, then any issue of timebar will remain live in relation to such potential claims.

Findings in fact

5. The claimant, whose date of birth is 6 March 1996, began work as a beautician waxing specialist in February 2018. Her employment was subject to a probationary period. The claimant was dismissed from her employment on 15 August 2018 and she was advised that she was being dismissed during the course of a meeting which took place on that date with the first respondent.

6. At the point when she was dismissed, the claimant was five months pregnant. The claimant was shocked and distressed at being told that she was dismissed. The claimant was told by the first respondent during the course of the meeting that she had failed her probation. The claimant had no previous experience of employment tribunals, ACAS, or the CAB, but one week after her dismissal contacted ACAS, and explained to ACAS the situation which she was in. She was told by ACAS to contact the CAB and to try and sort out the problem internally. The claimant contacted the CAB

on 22 August, on the same day, and made an appointment to see a CAB advisor on 29 August. The claimant attended the CAB on 29 August, and spoke to a lady with the first name of Edith. She told her the situation, and explained to her that she had spoken with ACAS, and that ACAS had told the claimant to contact the CAB. Edith said she was going to call ACAS and check the advice. She did this during the course of the appointment. She told the claimant to draft a grievance letter and indicated that ACAS had advised her about this.

7. On 29 August, the claimant emailed her employer, raising queries about payment of her wages, and the issue of wage slips. She also stated 'I was told by Kerry on the day that I was let go that I would receive in the post a letter to confirm why I was relieved of my position within the company and can I have a copy of my one to one meeting?'. The respondent's Michelle Madden responded on the same day, stating that she would ask the respondent if she sent a letter which the claimant was querying.

8. On 21 October, the claimant sent to the respondents what she considered to be a letter of grievance (c6/c7) which queried a number of matters. There was email correspondence back and forward between the claimant and the respondents, and on 5 November, the respondents wrote to the claimant asking her to attend another meeting on 14 November. Attached to that letter, were a number of documents, including notes of one to one meetings with the claimant, and minutes of the meeting on 9 August. The claimant did not attend the appeal hearing on 14 November [?]. She received an email from Ms McKenna from the respondents on 15 November (c18) to arrange a telephone conversation for the following day, stating that 'I have tried to arrange to meet with you on several occasions now and would like to make you aware if you do not attend the telephone conversation with me tomorrow I will consider the matter resolved.' The claimant did not attend the appeal hearing.

9. After the claimant received this email, she spoke with her partner, who suggested that she obtain legal advice. She contacted Macnairs Solicitors in Paisley on 15 November, and made an appointment to see a solicitor, Mr

Wilson, on 5 December. During the course of the meeting with Mr Wilson, he advised her that the claim was out of time. She was advised to contact ACAS, which she did immediately. She telephoned ACAS on 5 December, which was the date of receipt of her early conciliation certificate. The early conciliation certificate was issued on 6 December, and the claimant lodged her employment tribunal claim on that date.

Notes on evidence

10. The tribunal found the claimant's evidence to be credible and reliable. It was suggested by Ms Hunter in submission that it lacked credibility in that it was suggested ACAS nor the CAB had mentioned time limits to the claimant. The tribunal was satisfied however that when it was discussed between the claimant, the CAB and ACAS, it was set out in the findings in fact. In reaching its conclusion, the tribunal took into account that the claimant did write to her employer on 2 October in what was described as a letter of grievance, which was consistent with her evidence as to the advice she was given by the CAB.

Submissions

Claimant's submissions

11. Mr McParland provided outlined written submissions, which he supplemented with oral submissions. He took the tribunal to the terms of section 123 (1) of the Equality Act 2010 (EqA). He referred to the wide discretion afforded to the tribunal under this section in comparison to other jurisdictions. Mr McParland referred to the case of **British Coal Corporation v Keeble & others 1977 IRLR 366**, and the suggested factors listed in that case which provided guidance as to the exercise of the just and equitable discretion, although it was not legally required to apply those factors so long as no significant factor is left out (**Southwark London Borough v Afolabil 2003 IRLR 220**).

12. Mr McParland addressed the tribunal with each of those factors. Firstly, there was the length of the delay and reason for it. Mr McParland submitted the claim is 22 days outwith the limitation period. Had the claimant lodged the

application of an ACAS certificate timeously, then the time limit would not have been triggered until 14 December, which was in fact after the claim was lodged, but this was an important factor for the tribunal to take into account. Mr McParland submitted that the claimant sought evidence from ACAS and the CAB, but it was only when she obtained legal advice that she realised that her claim was out of time, and under the circumstances, she had acted promptly.

13. Mr McParland submitted that the cogency of the evidence was allowed to be affected to any extent given the extent of the delay. In relation to the extent to which the parties sued for has cooperated with any request for information, Mr McParland submitted that the claimant had lodged a grievance on 2 October, but this had not been dealt with. In relation to the promptness of which the claimant acted once she knew of the facts giving rise to the cause of action, Mr McParland submitted the claimant acted promptly after she had spoken with Wilson Macnairs Solicitors. In relation to the steps taken by the claimant to obtain appropriate professional advice, once she knew of the possibility of taking action, the claimant had an appeal meeting on 14 November, which she did not attend. After she had received the email of that date, she took legal advice and when she discovered the position in relation to the time limits, the ET1 was lodged.

14. Mr McParland submitted the claimant did not seek advice from ACAS or the CAB about time limits and she continued to be engaged in an internal process up until 15 November. There was no evidence to support the conclusion that the claimant had any advice about time limits from the CAB or ACAS. Mr McParland submitted it was relevant that the delay was minimal, and that the circumstances had been different, and the extension of time made under the ACAS early conciliation scheme, then the claim would have been submitted in time. He submitted the claimant provided a credible explanation for delay in lodging the claim. Mr McParland referred to the fact that the claimant was not a solicitor, and that she was young and inexperienced, and should not be penalised when she was making a genuine effort to address discrimination. He submitted it was relevant the claimant was involved in an internal process

and he submitted the general principle is that a delay caused by a claimant awaiting a completion of an internal process may justify the extension of time limit but that it is only one factor to be considered (the case of **Apelogun-Gabriels v Lambeth London Borough Council & another 2002 ICR 713 CA**). Mr McParland also referred to the case of **Osajie v London Borough of Camden EAT 317/96** in which it was held that the claimant had been entitled to seek information from her employer before deciding whether or not to pursue a discrimination claim. Mr McParland submitted this was not a case where the claimant had done nothing, but she had been engaged in a process of seeking a remedy. Mr McParland submitted that the respondent had suffered little or no prejudice with the claim where considered by the tribunal. It was important to note the prejudice did not arise simply by having to defend the claim, they would have had to do so if the claim was lodged in time. Rather the question is whether the delay in lodging the claim causes prejudice to the respondents, and Mr McParland submitted there was no prejudice in this case, and the claim should be allowed.

15. In response to Ms Hunter's submission to the effect that the tribunal should not take into account any submission in relation to the effect of the claimant engaging in the internal procedure, on the basis this was not identified as a factor in the ET1, Mr McParland submitted that what was identified in the ET1 included having received inaccurate information from ACAS/Citizens Advice, and therefore the tribunal is entitled to take this into account.

Respondent's submissions

16. For the respondents, Ms Hunter submitted there was no real reason for the claimant being presented late. She referred to the case of Bexley Community Centre v Robertson 2003 EWCA Civ 576, in particular paragraph 25, of that judgment. Ms Hunter submitted there was no medical reason, as alluded to in the ET1, which would have prevented the claimant through ill health or incapability of presenting the claim. This was not an exceptional circumstances case. The claimant had spoken to ACAS and CAB at an early stage and he submitted it was not tenable that she had not received advice about time limits from them, and she referred [?] to paragraph 17 of the case

of **Edomobi v La Retraite RC Girls School UKEAT/1080/16/DA**, in which the tribunal concluded it was implausible that three agencies, ACAS, FRU, and the CAB, who the claimant consulted in that case, had all given her the same incorrect advice to the effect that she had to exhaust an internal grievance procedure, and all had failed to tell the claimant about time limits.

17. Ms Hunter submitted that the same consideration should apply in this case, and the claimant's evidence, to the effect that she had never been told about the time limits by the CAB and ACAS, was not tenable. It was also submitted that the length of the delay, 22 days, did cause considerable prejudice to the respondent. The respondents are entitled to consider [?] claimant was at an end, and there was [?] defend the claim which should not be properly allowed. Ms Hunter did not agree that the claimant was waiting until the completion of an internal procedure was a matter of which triggered an extension of time on the grounds of justice and equity.

18. In any event, she submitted the tribunal was precluded from considering the submission, on the basis that the claimant was confined to the grounds identified in the ET1, in which it was said that a just and equitable extension should be granted.

19. After an adjournment around 15 minutes, Ms Hunter also addressed the tribunal on the relevance of the internal procedure, and in particular, addressed the tribunal on the case of **Robinson v The Post Office 2000 IRLR 804EAT** in paragraphs 27 to 30 of the decision in that case. The position, Ms Hunter submitted, was that there was no proper position of broad applicability but however so long as there was an unexhausted internal procedure then delay to await its outcome necessarily [?] an acceptable reason for delay in presenting an ET1 (paragraph 29). She relied on the fact that no such position was enshrined in any of the legislation, including the EqA.

20. Ms Hunter submitted the tribunal should not consider any submission in relation to this on the basis that she did not have fair notice of it, and whether she had been allowed to argue the point as she had to do so in the absence

of any preparation in relation to the claimant's actions once she had received information, thus Ms Hunter submitted that the claimant had received information from the respondents on 5 November 2019, but there was a slight delay in her acting.

21. Lastly, Ms Hunter referred to the case of **De Souza v Manpower UK Ltd UKEAT/0234/12/LA.**

22. [Insert above under 'notes on evidence'] The tribunal heard evidence from the claimant, and on one material point, did not find her evidence to be credible or reliable. That was to the effect that the claimant was not given any information about time limits in the course of her discussion with ACAS or the CAB. It appeared to the tribunal that such a position lacked plausibility. Mr McParland submitted that the respondents can make no submissions as to the claimant's credibility on this point, as a matter of it not being put to her during cross examination. The claimant was however asked for examination about the advice that she obtained from the CAB, and ACAS, and she was asked whether she had received information about time limits from both these organisations, and on both occasions, answered no.

23. [Insert above under 'notes on evidence'] While the tribunal did not consider it tenable that on three separate occasions, ACAS, and the CAB, would have given advice about a complaint of a dismissal, without including in that advice, advice about time limits. The tribunal was satisfied that the claimant did, as she said, receive advice to the effect that she should send a grievance, or an appeal, that advice would be consistent with the ACAS code, the terms of which there was an obligation on the claimant to appeal against the decision to dismiss. It seemed however to the tribunal that it was unlikely, that on three occasions, such advice would not have been accompanied by information about time limits, and the claimant, as she claimed, had no notice of time limits in respect of these, until she had consulted with her solicitor on 5 December.

24. [Insert above under 'notes on evidence'] In reaching this conclusion, the tribunal also takes into account the [?] claimant's credibility and it also took

into account that the evidence in relation to her reason for dismissal was to a degree unreliable. When asked initially why she was dismissed, she said the reason was unknown and the reason was never given. She said she believed it was because she was pregnant, and that she had addressed this at the meeting with the first respondent. Later during her examination in chief, the claimant said that it had been explained to her at the meeting by the first respondent that she was not being kept on because she was failed her probation and these two positions appeared to the tribunal to be inconsistent, and impacted to a degree adversely on the tribunal's assessment of the claimant's credibility. Further, when the claimant was asked during her evidence in chief why she did not attend the appeal hearing, she replied that it was cancelled by Louise McKenna. When she was asked when, she replied it was cancelled on 15 November, and she received an email saying it was cancelled on that date. The claimant was then taken to Ms McKenna's email and upon reading that, accepted that the confusion was on her part. The claimant's answers initially sought to create the impression that the appeal hearing was cancelled unilaterally by the respondents, and it was not until she was taken to the correspondence, that she accepted that the reason she did not attend the appeal was because of an error on her own part.

25. [Insert in the findings in fact] Further to a discussion with ACAS and the CAB, on 29 August, the claimant was aware from the discussions, that a time limit applied for the presentation of her claim to the employment tribunal.

Consideration

26. Section 123 (1) of the Equality Act 2010 provides "subject to sections 14A and 14B proceedings on a complaint within section 120 may not be brought after end of:

(a) the period of three months starting from the date the act to which the complaint relates, or

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

27. The tribunal therefore has a wide discretion to allow an extension of time under the tests in section 123 of just and equitable. The tribunal however also takes into account the guidance given in the case of **Robertson v Bexley Community Centre,** referred to by Ms Hunter, [?] what was said in that case at the Employment Tribunal, when considering exercising discretion and section 123 (1)(b) of the EqA "there is no presumption that they should do so unless they can justify a failure to exercise discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule." The onus rests with the claimant to convince the tribunal that it is just and equitable to extend the time limit to determine whether to exercise discretion under section 123 (1)(b) the tribunal began by considering the case of **British Coal Corporation v Keeble**, referred to by Mr McParland. In that case, the EAT suggested the tribunal would be assisted by considering the factors listed in section 33 of the Limitation Act 1980. That section deals with the exercise of discretion in the civil courts, which requires the court to consider the prejudice which each party would suffer as a result of the decision reached, having regard to all the facts and circumstances of the case. A number of factors in particular are listed, and these are referred to by Mr McParland, and the tribunal dealt with each of these in turn.

28. The first is the length of the delay, and the reason for it.

29. The delay in the claim being presented in this case is 22 days. However that delay is not inconsiderable, and cannot be a significant delay. As Mr McParland points out, had the claimant lodged her ACAS early conciliation certificate application timeously, then she could have benefited from an extension of time which went beyond the date for which the ET1 was in fact lodged.

30. The tribunal then considered the reasons for the delay. The tribunal did not find that there was any good reason for the delay in this case. For the reasons given above, it was satisfied that the claimant was aware of the existence of time limits by, at the latest, 29 August. Notwithstanding what was said in the ET1, there was no evidence before the tribunal to support the

conclusion that the claimant was in some way incapacitated or prevented from presenting her claim because of ill health. The claimant was clearly able to engage in a process with ACAS, the CAB, and her former employers. The tribunal was satisfied it was likely the claimant was aware of time limits at the point when she wrote her emails of 29 August, and her letter of 2 October, and there was no reason before the tribunal to explain why she did not pursue the claim beyond those steps at that stage. No one has explained why the claimant delayed between 29 August, and 2 October, pursuing matters with her employer. It led to the tribunal's conclusion that the claimant would have been given information about time limits, the reason for the delay was unexplained.

31. The tribunal considered the extent to which the cogency of the evidence was likely to be affected by the delay, and was satisfied that there was likely to be little impact for the delay on the cogency of the evidence, given the extent of the delay in this case.

32. The tribunal also considered the extent to which the parties sued cooperated with any request for information. In this regard, the tribunal took into account that Ms Hunter submitted the tribunal should be precluded from considering any matter which went outwith the points identified in the claimant's ET1 on the basis that albeit she had the opportunity of addressing the tribunal on this, she had not had the opportunity of preparing for it, and therefore a lack of fair notice, and the respondents were disadvantaged. The tribunal was not satisfied that it was entitled to exclude from its consideration on the basis of Ms Hunter's submission this element which was identified in **British Coal Cooperation v Keeble**. In reaching this conclusion, it takes into account that Ms Hunter herself referred to the Keeble case, which is a well known case, in connection with the application of time limits, and further that she had the opportunity of addressing the tribunal on this point, after an adjournment, and she took the tribunal to relevant authority (Robertson v The Post Office) in connection with this. In the submission made by Mr McParland to the effect that the fact that the claimant delayed until the completion of the internal appeal may justify the extension of time, but there is only one factor to be

considered in each particular case. The tribunal was satisfied it was entitled to take this into account. [?] takes into account that the claimant for no reason which was explained to the tribunal, failed to attend the appeal hearing on 14 November, albeit recognised that this was the final date upon which the claim could have been presented timeously.

33. The tribunal also considered the promptness which the claimant acted once she knew the facts giving rise to the cause of action. The tribunal was satisfied that the claimant did act, in that she contacted the CAB, and ACAS very shortly after her dismissal however she did not act from the information which she obtained at that time. The same applies to the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking legal action. The tribunal was satisfied that the claimant was aware of the possibility of the claim, and the terms to which applied to it, in the early stages after her dismissal, but took no steps to launch the claim, until 5 December, when she consulted her solicitor.

34. The tribunal also considered the prejudice to the parties in allowing the claim. The prejudice to the claimant was that she would be precluded from pursuing the claim, and the tribunal's prejudice to the respondents that they will require to defend the claim which is late by a factor of 22 days, albeit such a delay is unlikely to have an impact on the cogency of the evidence.

35. The tribunal considered all of these factors, and what weight should be attached to each of them. The tribunal considered that material weight should be attached to the fact that there was a delay to the claimant making an enquiry about her position in relation to her employment with the respondents, and her dismissal from that employment, at an early stage, and from that advice, her awareness of time limits, but that the claim was not presented within the relevant statutory time limit. It appeared to the tribunal this was a significant factor, to which significant weight should be attached.

36. The tribunal also attached weight to the fact that there was limited prejudice to the respondents to the claim being presented late, and that the cogency of the evidence was unlikely to be affected by the delay. In balancing these

factors, the tribunal took into account that it is for the claimant to satisfy the tribunal that it is just and equitable to extend time in order for the claim to be considered, and that extension of time is the exception rather than the rule.

37. It appeared to the tribunal that there was no good reason in advance as to why it was just and equitable in this case to extend time, and the claimant's relative youth and inexperience were insufficient and on the face of it the tribunal's conclusion that she had little awareness of time limits, and therefore the tribunal was not satisfied that it should exercise the discretion to extend time in order to allow the claim to be presented. The effect of this conclusion is that the tribunal has no jurisdiction to consider the claim.

Alternative ending

38. The tribunal considered the facts and guidance given in the Keeble case. That was to the effect that the EAT suggested tribunals would be assisted by considering the factors listed in section 33 of the Limitation Act, of which the section deals with the exercise of the discretion in civil courts, and requires a court to consider the prejudice which each party would suffer as a result of the decision reached, and have to regard all the circumstances of the case, and in particular the length and reason for the delay, the extent to which the cogency of the evidence was likely to be affected by the delay; the extent to which the parties sued has cooperated with any requests for information; the promptness of which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant as to obtain appropriate advice once he or she knew of the possibility of taking action.

39. The tribunal began by considering the length of the delay and the reason for it. The length of the delay in this case is 22 days. While that delay is minimal, it could not be said that such a delay is significant. The claimant applied for an ACAS early conciliation certificate within the limitation period, if she would have benefited potentially from an extension of time which took the time limit beyond the date upon which the ET1 was in fact lodged. The tribunal was satisfied that the reason for the delay, was because the claimant having

consulted with ACAS and the CAB, was unaware that there was a time limit, and that she engaged in an internal procedure.

40. The tribunal considered the extent to which the cogency of the evidence was likely to be affected by the delay. Given the extent of the delay (22 days), the tribunal did not consider it likely that there would be any material impact on the cogency of the evidence as a result of the delay.

41. The tribunal then considered the extent to which the respondents had cooperated with any requests for information. While it was suggested by the claimant that she had delayed in taking action until such time as the internal appeal was dealt with, there was no suggestion that the respondents had not cooperated with any requests for information.

42. The claimant's submission was that the fact that she waited until the internal appeal was dealt with was a factor which the tribunal may take into account. The tribunal [?] to be to the effect there was no [?] in principle that it will be just and equitable to extend time where the claimant is seeking [?] employment procedure before embarking on legal proceedings, and the general principle is that a delay caused by a claimant awaiting completion of an internal procedure may justify the extension of the time limit, but it is only a factor to be considered in any particular case.

43. Ms Hunter submitted the tribunal should not take this into account, as it was not prefigured in the ET1, and the reason for the delay was that she did not have the opportunity to properly prepare submissions on this point. It was Mr McParland's position that this was identified under the umbrella of a statement to the effect that the claimant did not receive accurate information from ACAS and Citizens Advice, and that [?] led her to lodge a grievance (go with first one).

Employment Judge: Laura Doherty
Date of Judgment: 03 September 2019
Date sent to parties: 04 September 2019