



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112589/2018

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Held in Aberdeen on 24 January 2020

Employment Judge N M Hosie

10 **Mrs C Brown**

**Claimant
In Person**

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Andron Contract Services Ltd

**First Respondent
Represented by:
Ms G Duffy -
Litigation
Consultant -
Peninsula**

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Mr M Brownlie

**Second Respondent
No appearance and
No representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that:

1. the Tribunal has jurisdiction to consider the discrimination complaint of “harassment by association” and it will proceed to a final hearing; and
2. the claimant’s application to amend to include a complaint of “automatic unfair dismissal” is refused.

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ETZ4 (WR)

REASONS

Introduction

1. This case has something of a history. The claimant, who is unrepresented, submitted a claim form on 15 July 2018. The claim is denied in its entirety by the respondent.
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2. After various procedures and a number of case management preliminary hearings, there appeared, from the averments in the claim form, to be a basis for a complaint of so-called “harassment by association”, the protected characteristic being race. I decided that complaint could proceed, subject to determination of a time-bar issue, which the respondent’s representative had raised.
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3. I also identified a possible complaint of automatic unfair dismissal in terms of s.103(A) of the Employment Rights Act 1996. However, the claimant had not advanced such a complaint in the claim form and it required to be introduced by way of amendment, which was opposed by the respondent. I refer to the Note which I issued to the parties following a case management preliminary hearing on 21 October 2019.
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4. I also recorded in that Note that I had decided to sist Mike Brownlie as a second respondent. The claim was duly intimated to him but he has not submitted an ET3 response form.
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Strike out

5. On 7 November 2019, the respondent’s representative applied to the Tribunal for an Order striking out the claim, in terms of Rules 37(1)(a), (d) and (e) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“ the Rules of Procedure”).
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6. The respondent’s representative also confirmed that she opposed the introduction of a complaint of automatic unfair dismissal, by way of amendment; and submitted that the Tribunal did not have jurisdiction to consider the complaint as it was time barred.
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7. This case came before me, therefore, by way of a preliminary hearing to consider the following issues:-

(i) strike out;

(ii) time bar; and

5 (iii) whether the claim should be amended to include a complaint of automatic unfair dismissal.

The evidence

8. I heard evidence from the claimant at the preliminary hearing.

10 Chronology of events

9. The following "timeline" was agreed between the parties:-

3.7.17 *Claimant's employment commenced.*

20.12.17 *Last discriminatory act alleged by the claimant.*

15.1.18 *Grievance raised by the claimant.*

15 7.3.18 *Claimant advised that her grievance had not been upheld.*

15.3.18 *Claimant summarily dismissed.*

13.3.18 *Claimant intimates an appeal against the outcome of the grievance and her dismissal.*

12.4.18 *Appeal hearing.*

20 13.4.18 *Claimant advised that her grievance about Mr Brownlie making racist remarks was upheld, but they were unable to investigate her grievance against Mr Cooper. The respondent offered the claimant an opportunity to continue in her role at a different site so that she would not be required to work with Mr Cooper.*

25 17.4.18 *The claimant advised the respondent that she would not return to work with them.*

4.7.18 *EC notification.*

5.7.18 *ACAS Certificate issued.*

15.7.18 *Claim form submitted.*

24.7.19 *Identified at a case management preliminary hearing possibility of a complaint of automatic unfair dismissal for making a protected disclosure.*

5 8.8.19 *Submissions from the respondent's representative to the effect that such a complaint would be time barred and, "there was never an intention by the claimant to lodge such a complaint".*

Claimant's evidence

10 10. The claimant gave her evidence in a consistent, measured and convincing manner. She presented as credible and reliable. She had no experience of Employment Tribunal procedures. She said that she thought she had to await the outcome of her grievance before submitting a claim form to the Employment Tribunal. She was not advised of the outcome of her appeal against the outcome of her grievance until 13 April 2018. She was offered 15 the opportunity of continuing her role at a different site, but on 17 April she wrote to the respondent to advise that this was not acceptable and that she *"would not be returning to work"*.

11. She took advice from the Citizens' Advice Bureau towards the end of April 2018. Her recollection was that she was advised that she needed two years' 20 continuous employment to bring an unfair dismissal claim.

12. She also consulted a solicitor, *"between May/June 2018"*. Her recollection was that she was advised of the three month time limit for bringing a claim but thought that started to run from 17 April 2018 when, as she put it, her *"job ended"*. She said that she, *"understood, rightly or wrongly, that you had to 25 follow internal procedures"*. She completed the claim form herself. She said that, *"it was kind of confusing for me online as I didn't know anything about the law. I had to read it a few times."*

13. In cross examination, she claimed that she had been advised by ACAS in January that she had to go through the grievance process before submitting 30 an Employment Tribunal claim and that, *"an Employment Tribunal is the last resort"*. She accepted that she was advised of the outcome of her grievance on 7 March 2018.

14. The claimant accepted the “timeline” in the respondent’s “Further Evidential Preliminary Hearing Submissions”.

15. Having exercised her right of appeal, on 13 April she was advised that her grievance had been upheld in respect of her allegation that Mr Brownlie had made racist remarks but she was advised that the respondent was unable to investigate her grievance against Mr Cooper further. The respondent offered the claimant an opportunity to continue in her role at a different site so that she would not be required to work with Mr Cooper. However, the claimant wrote to the respondent on 17 April to advise that she would not return to work. The claimant said in evidence, *“it wasn’t the same job”* as it involved travelling from one job to another. She said that, *“it wasn’t what I had signed up for.”*

Respondent’s submissions

16. The respondent’s representative made written submissions which I had regard to in arriving at my decision. In particular, she made written submissions on 7 November in support of her application that the claim should be struck out; and by way of “Further Evidential Preliminary Hearing Submissions” along with a “Summary”.

Strike out

17. The respondent’s representative submitted that the complaint of “harassment by association” should be struck out in terms of Rule 37 (1)(a) in Schedule 1 of the Rules of Procedure as it, *“has no reasonable prospect of success... due to the issues of time bar. Along with the fact to date that it is the respondent’s position that the claimant has been unable to advance and submit a reasonable explanation as to why the last alleged discriminatory act occurred on 20th December 2017. Then why did the claimant then take until July 2018 to commence Early Conciliation and then subsequently make a claim in the same month and overall as being in the very least some six months if not more since the last alleged discriminatory act.”*

18. So far as the complaint of “automatic unfair dismissal” was concerned, the respondent’s representative made the following submissions:-

5 *“Judge Hosie has commented in their [sic] post Preliminary Hearing note that whilst the claim for unfair dismissal was not possible they were of mind to consider if a further and alternative claim of Automatic Unfair Dismissal could be pled by the Claimant and by way of amendment to the claim. This was as the Judge noted the Claimant’s position was that she had raised a grievance and she has alleged that it had not been dealt with in a satisfactory manner by the Respondent. Yet the claimant is yet to advance any submissions or*
10 *evidence to support her view and opinion. Furthermore my colleague Ms Munir who attended the Hearing representing the Respondent indicated and submitted to the Judge that neither [sic] the less, even if the claimant was invited to amend their claim to add Automatic Unfair Dismissal to it. Thus it should still fail on a time bar point and issue due to the fact that the claimant*
15 *resigned on 17th April 2018 (sic).*

Therefore the respondent respectfully submits and requests that the claim for automatic unfair dismissal should not be allowed to be introduced by way of amendment to the claim.

20 *It is submitted that the Tribunal can determine on facts alone whether the application for a strike out should be allowed or not. The respondent’s stance remains as per our submissions at the Preliminary Hearing held on 21st October 2019 that the claimant’s overall claims and potential claims if amendment were allowed are all time barred and accordingly, should be struck out. Should the Tribunal be minded to allow the claim to progress, it is*
25 *our submission that the respondent’s position will be prejudiced.”*

19. In further support of her submissions that the claim should be “struck out due to time bar”, the respondent’s representative made the following submissions, by way of summary:-

30 *“The respondent wrote to the claimant in correspondence dated 15th March 2018 confirming the claimant’s termination of employment.*

The claimant then had a period of up to 3 months less one day in order to register her thought or intention to make claim via ACAS Early Conciliation and in order to obtain an Early Conciliation Certificate.

35 ***Yet for already either vaguely described and construed reasons and whatever other reason/s the claimant failed to contact ACAS until 4th July 2018. It is also noted the claimant’s claim was either made to or received by the Tribunal on 15th July 2018.***

40 *Information for prospective claimant’s on time limits for contacting ACAS and separately making an Employment Tribunal claim is both widely and freely available via the internet and which the claimant has made some reference to. There is a variety of legitimate sources of such information freely available.*

One source being the Citizen's Advice Bureau's website, which clearly sets out the parameters of time limits for which to make an Employment Tribunal claim and by first contacting ACAS Early Conciliation."

- 5 20. The respondent's representative submitted that the claimant required, "to prove that it was not reasonably practicable for them to present their claim in time." She then went on to make the following submissions:

10 *"It is the respondent's understanding that the said test is quite strict and gaining an extension of time is not an easy request for the claimant to seek or be granted. In terms of this claim and matter before the Tribunal, for example, if an employee is pursuing an internal appeal against dismissal, this on its own should not mean that it is not reasonably practicable for the employee to submit a claim within the time limit, even if this means submitting the claim before the appeal has been concluded.*

15 *Thus, the claimant failed to date to meet the test; accordingly, her claim should be struck out and as per the submission and application of the respondents sent to the tribunal on 8th November 2019.*

20 *Furthermore and again, as per the respondent's applications and prior submissions made on 8th November 2019. In the alternative and as stated then, the claim has no reasonable prospects of success should the tribunal not grant a strikeout order in favour of the respondent and proceed to list the claim for a final hearing."*

- 25 21. The respondent's representative then submitted, in the alternative, that as the claimant had, "rejected a genuine offer of re-engagement", she had failed to take reasonable steps to mitigate her alleged losses and detriments. However, that was not relevant to the issues with which I was concerned at the preliminary hearing.

Claimant's submissions

- 30 22. The claimant also made the following written submissions which were received by the Tribunal on 26 November 2019:-

"Claim of harassment by association

35 *In regards to the time bar I was informed that I had to go through grievance procedure before I could make an application to an employment tribunal. This I did and one of the reasons (of which I have proof) that the time limit expired was the poor handling and in my opinion delaying tactics used by the*

respondent to delay the process so that should I go to a tribunal that it would of course be out of time.

5 *The other was that I was misinformed by Citizens Advice that I was required to have 2 years' service to go to a tribunal. It was only through research on the internet and a call to a solicitor who looked at my case and set me on this long and stressful journey to set the record straight and clear my name and so that this doesn't happen to any other employees that may find themselves (sic) in the same situation.*

Automatic unfair dismissal

10 *I started this process seeking constructive dismissal and was yourself Judge Hosie that had mentioned that, that was in your view a claim for automatic unfair dismissal. I still am unsure of the difference as I thought that they were both very similar and so in that respect I would like to make an amendment from constructive dismissal to one of automatic unfair dismissal.*

15 *I have suffered a loss of confidence to the point where I no longer find it easy to trust any employer to do the right thing in similar circumstances.*

20 *Also I have suffered financially as a result of leaving the respondent's employment and all the costs of seeking a satisfactory conclusion to this process in the hope that the respondents take situations like this more seriously and in an efficient and sympathetic manner to the person bringing situations like these to their notice.*

As I said previously I am not an expert in these proceedings and I am hoping that this is what you meant by written submission."

25 **Discussion and decision**

Harassment by association complaint

Time bar

23. The general rule is that complaints of work-related discrimination under the Equality Act 2010 ("the 2010 Act") must be presented to the Employment
30 Tribunal within the period of 3 months starting with the date of the last act complained of (s.123 (1) (a)).

24. In the present case, the last discriminatory act alleged by the claimant was on 20 December 2017. Early Conciliation did not commence until July 2018 and the claim form was not submitted to the Tribunal until 15 July 2018. This
35 complaint, therefore, is out of time.

Just and equitable extension

25. However, the 3-month time limit for bringing a discrimination claim is not absolute: Employment Tribunals have discretion to extend the time limit for presenting such a claim where they think it "*just and equitable*" to do so (s.123 (1) (b)).
26. Tribunals thus have a broader discretion under discrimination law than they do in unfair dismissal cases, as the Employment Rights Act 1996 provides that the time limit for presenting an unfair dismissal complaint can only be extended if the claimant shows that it was, "*not reasonably practicable*" to present the claim in time.
27. In determining whether I should exercise my discretion and allow the late submission of the discrimination complaint in the present case, I found the guidance in ***British Coal Corporation v Keeble & others*** [1997] IRLR 336 to be helpful. In that case, the EAT suggested that Employment Tribunals would be assisted by considering the factors listed in s.33 of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts and personal injury cases and requires the Court to consider certain factors.

Prejudice

28. Were I to decide not to exercise my discretion to extend the time limit, then the claimant will be prejudiced as her claim will be dismissed. On the other hand, were I to allow the claim to proceed, then the respondent will be prejudiced in having to defend the proceedings and incur expense. However, I was mindful that the respondent had upheld the claimant's grievance in respect of her complaint about the way she had been treated by her fellow employee, Mr Brownlie, who has been sisted in the case as second respondent. I decided that the balance of prejudice favoured the claimant.

Alternative remedy

29. As I have recorded below, I have decided not to allow the claimant to amend the claim to include a complaint of “automatic unfair dismissal”. This means that the claimant is unlikely to have any other remedy open to her if she is not
5 allowed to proceed with the complaint of harassment by association.

Conduct of the claimant

30. I was mindful that the claimant had been unwell but that did not appear to have a material bearing on the delay in submitting her claim form.

31. It was clear that the claimant felt strongly about the way Mr Brownlie had
10 behaved and how she alleged this had affected her. Her position in this regard had been entirely consistent. She had even gone to the extent of taking advice and, as the respondent’s representative submitted, information as to how to bring an Employment Tribunals claim is readily available on the internet where there is information about time limits. However, as I recorded
15 above, the claimant presented as both credible and reliable when she gave evidence and I accepted that she was under the mistaken belief that she should await the outcome of her grievance before commencing Tribunal proceedings. There was also some delay on the respondent’s part in dealing with the grievance.

Length of time

20 32. I was mindful that were I to exercise my discretion and allow this claim to proceed, by the time the case reaches a final hearing, it will be over two years from the date of the last act complained of.

33. Nevertheless, the claimant’s complaints have already been the subject of
25 investigation in the course of the grievance and notwithstanding this lengthy period and, albeit with some hesitation, I arrived at the view that it would still be possible to have a fair hearing and that the length of time would not affect the cogency of the evidence.

34. In all the circumstances, therefore, I decided that, although out of time, I should exercise my discretion and allow the complaint of harassment by association to proceed on the basis that it is “just and equitable” to do so.

35. I also record, for the sake of completeness, that having regard to the outcome of the grievance, I had no difficulty rejecting the respondent’s submission that the claim should be struck out as having no reasonable prospect of success. It is clear based on her allegations that she has a stateable case, at least. The relevant case law also makes it clear that as discrimination cases are “fact sensitive” strike out is exceptional. I was also satisfied that the claimant had endeavoured to “actively pursue” her claim and, as I recorded above, I am satisfied that notwithstanding the delay, it is still possible to have a “fair hearing”.

Automatic unfair dismissal complaint

36. In the course of the case management preliminary hearing on 21 October 2019, I raised the possibility of the claimant having a complaint of automatic unfair dismissal. However, this complaint was not included in the claim form and therefore could only be introduced by way of an application to amend which the claimant has now made. Of course, this new complaint is being introduced well outwith the 3-month time limit as the claimant was dismissed on 17 April 2018.

37. Valuable guidance on how a Tribunal should deal with an application to amend was given by Mummery LJ in *Selkent Bus Co. Ltd v Moore* [1996] ICR 836.

Nature of the amendment

38. This was an application to add or substitute a new cause of action which was linked, to an extent, to the original claim.

Applicability of time limits

39. As I recorded above, the proposed amendment is well out of time. However, that issue is not determinative.

The timing and manner of the application/prejudice and hardship

40. As I also recorded above, I had raised the possibility of there being such a complaint. But, she could not argue, in this case, that she was awaiting the outcome of a grievance or some other such procedure which the respondent was dealing with. There did not appear to be any impediment to the claimant raising this complaint in time, other than it is not a “standard” unfair dismissal complaint which requires two years’ continuous service and is somewhat more complex and is much less common. However, as the respondent’s representative submitted, information about such complaints is readily available on the internet by reasonable enquiry. I was also mindful that prior to submitting her claim form, the claimant had sought advice both from the CAB and a solicitor.

Prejudice/hardship

41. Were I to refuse the application, the claimant will still be able to pursue her discrimination claim. Were I to grant the application, the respondent would require to defend another claim and incur additional expense.

42. In my view, the balance of prejudice/hardship favours the respondent.

43. I decided, therefore, in all the circumstances that the claimant’s application to amend should be refused.

44. I also wish to record, for the sake of completeness, that, in any event, I am not persuaded that this complaint has a “reasonable prospect of success”. Even taking the claimant’s averments at their highest (i.e. assuming that she will be able to prove all that she alleges), I am not persuaded that she would be able to establish that her dismissal was as a result of her raising a grievance.

Further procedure

45. Accordingly, only the claim of “harassment by association” which will proceed to a final hearing. Dates will be fixed for this shortly.

46. I am also mindful that the claim is not defended by the second respondent. However, this Judgment will be intimated to him and it would be very much in his interests to intimate to the Tribunal whether or not it his intention to defend the claim. If not, a Judgment may well be issued against him.

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Employment Judge:**Nicol Hosie****Date of Judgment:****05 March 2020****Date Sent to Parties****06 March 2020**

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