



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss M Kegg

**Respondent:** Mobica Limited

**Heard at:** Manchester (CVP)

**On:** 25 August 2020

**Before:** Employment Judge Hill (sitting alone)

## REPRESENTATION:

**Claimant:** Mr Moss (Solicitor)

**Respondent:** Mrs Shaw (Counsel)

# RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claim for discrimination on the grounds of sexual orientation is dismissed upon withdrawal by the Claimant.
2. The Tribunal does not have jurisdiction to hear the Claimant's claims for constructive unfair dismissal and sex discrimination presented by way of an ET1 dated 9 December 2019 as the claims were presented out of time. Both Claims are dismissed.

# REASONS

1. This hearing was listed as a preliminary hearing to determine whether the Tribunal has jurisdiction to consider the claimant's claims under section 123 of the Equality Act 2010 and/or section 111 of the Employment Rights Act 1996 and whether the Tribunal has jurisdiction to consider the claimant's claims in

light of the disparity between the names of the Respondent on the early conciliation certificate and the claim form.

2. The hearing was listed as a CVP hearing. In attendance at the commencement of the hearing were the parties' representatives and a witness for the Respondent. The Claimant was not in attendance and Mr Moss said that he was representing her on his behalf and relying on her 'impact statement'. I expressed concern that the Claimant was not in attendance particularly as the burden of proof lay with the Claimant and that the witness statement was not signed. Mr Moss was adamant that the Claimant would not be in attendance. I asked Mr Moss to confirm that he had her instructions to continue in her absence but he would not confirm that to be the case. I therefore adjourned the hearing for a short period for him to take instructions. Upon reconvening the hearing, the Claimant was in attendance.
3. The Tribunal was provided with a bundle of documents consisting of 67 pages which included the Claimant's 'impact statement' and a witness statement from Maria Davenport, HR Manager for the Respondent.
4. At the commencement of the hearing Mr Moss confirmed that the claimant was withdrawing her claim for discrimination on the grounds of sexual orientation and the parties agreed that it would be dismissed upon withdrawal.
5. A discussion took place regarding the slight disparity between the name on the EC certificate and the claim form and the Respondent confirmed that it was a minor issue and was not an issue being pursued today. The parties agreed that the correct name of the Respondent was Mobic Limited. The Claimant confirmed that the claim was against the named respondent only and no one individual had been named.
6. The remaining issue for the Tribunal to determine was whether the Tribunal had jurisdiction to consider the claimant's claims of sex discrimination and constructive unfair dismissal in respect of whether the claims were out of time.

### **The Facts**

7. The Claimant was employed as a Business Development Manager with the Respondent company from 10 April 2017 until she resigned on 24 May 2019 and her last day of employment was 21 June 2019.
8. On 17 May 2019 the Claimant attended the Respondent's summer party in Warsaw. During the night of 17 May through to the morning of 18 May 2019 the Claimant alleges that she was sexually assaulted by a colleague in her hotel room. For the purposes of this judgment the details of the incident are not repeated here but the Claimant's account and the Respondent's account are set out in their pleadings.
9. It is sufficient to say that the Respondent commissioned an investigation to be carried out by an independent consultant and suspended the alleged perpetrator who resigned from his position on 24 May 2019. The Claimant was offered counselling services and an initial six sessions were approved.

The Claimant attended at least two sessions, one being on 23 May 2029. The Claimant states that these were stopped on her last day of employment. The Respondent disputes this. I asked the Claimant whether she alleged this was an act of discrimination she was relying upon and the Claimant confirmed that the last act she complained of in respect of her constructive unfair dismissal claim and sex discrimination claim was the incident in the hotel room and the fact that colleagues had known the perpetrator had gone to her room but did not stop him or say anything to her. She did not allege that they knew what his intentions were.

10. The Claimant did not attend work again after the summer party and was on paid leave until her employment ended on 21 June 2019. The Claimant attended an exit interview on 18 June 2019 and completed an exit questionnaire where she confirmed she had found alternative employment with another company which paid significantly more than her current role and was a more interesting project. The Claimant also detailed various other negative aspects of the role and low morale in her team but said that she would consider returning to Mobic. The claimant stated as her reason for leaving were the working environment, lack of direction in the business, overpromising and the incident at the Summer Party in Poland. The Claimant confirmed in evidence that she had attended an interview for her new role prior to the incident in Poland.
11. The Claimant confirmed during evidence that during her garden leave she went to visit family and also went to a spa and took a holiday. The Claimant commenced new employment on 2 July 2029.
12. The Claimant gave evidence that after the event she suffered with severe anxiety and suicidal thoughts. She said that she could not sleep, struggled to leave the house and became isolated. This was for a short period of time until she started her new employment. The Claimant was asked if she sought medical assistance. The claimant was vague about this and could not confirm whether she had or not but suggested that she thought she had had anti-depressant medication increased. The Claimant did not provide any medical evidence or details of any medication she was prescribed. When asked why she had not provided medical evidence she was unable to explain and her legal representative confirmed that they had not sought to provide any to this Tribunal today. The claimant also confirmed that she had not taken any sickness absence from her new role or visited her GP in recent months.
13. The Claimant's witness statement stated that she reported the incident to the Police on 18 August 2019 and said that she was not aware that there was any time limit to bring a claim before a tribunal. However, in evidence the claimant confirmed that she was aware that she had a potential claim and had spoken to a friend in HR at some point between the end of her employment and 31 October but could not provide details; she also said that she had taken advice from another solicitor before 31 October 2019 but could not provide details and that she had contacted her current representative prior to 31 October 2019 but again could not provide details. The Claimant confirmed that she made no enquiries of ACAS or advice agencies such as the CAB regarding her potential claims. The Claimant had therefore had contact with at least two

professional legal representatives prior to 31 October 2019 and one HR professional.

14. The Claimant formally instructed her current representative on 31 October 2019 but could not provide any information or reason as to why no action was taken until 11 November 2019 when initial contact was made with ACAS to instigated Early Conciliation proceedings.
15. The ETI claim form was eventually presented on 9 December 2019. The Claimant provided no evidence as to why after knowing that her claim was out of time, her claim was not submitted sooner. The Claimant's representative gave submissions that the Claimant wanted to try and settle the claim without having to proceed to a tribunal. However, Mr Moss also confirmed that at no point between 11 November 2019 and 9 December 2019 did any settlement discussions take place or indeed any communication between the parties at all either directly or via ACAS. No explanation was provided as to why it was thought appropriate to wait over a month to issue the claim.

## The Law

### Constructive unfair dismissal

16. Section 111(2) of the Employment Rights Act 1996 ("the ERA") provides that a complaint of unfair dismissal must be presented to a Tribunal:
  - a. before the end of the period of three months beginning with the effective date of termination, or
  - b. within such further period as the Tribunal considers reasonably practicable for the complaint to be presented before the end of that period of three months.
17. In accordance with the Court of Appeal's decision in **Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470** section 111(2) ERA should be given a liberal interpretation in favour of the Claimant;
  - a. regard should be had to what, if anything, the Claimant knew about the right to complain to a Tribunal and of the time limit for doing so;
  - b. regard should also be had to what knowledge the Claimant should have had, had she acted reasonably in the circumstances. Knowledge of the right to make a claim does not, as a matter of law, mean that ignorance of the time limits will never be reasonable. It merely makes it more difficult for the Claimant to prove that their ignorance was reasonable.

### Discrimination

18. Section 123(1) of the Equality Act 2010 ("the EqA") provides that a complaint of discrimination may not be brought after the end of:
  - a. the period of three 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.

19. Whilst the Tribunal has wide discretion to extend the period for the bringing of a complaint of discrimination, Tribunals should not extend time unless the Claimant convinces them that it is just and equitable to do so: the exercise of discretion should be the exception, not the rule **{Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576}**.
20. Guidance is provided in *British Coal Corporation v Keeble* [1997] IRLR 336 when considering whether to extend time which are:
- a. "(a) the length of and reasons for the delay
  - b. (b) the extent to which the cogency of the evidence is likely to be affected by the delay
  - c. (c) the extent to which the party sued had co-operated with the quest for information
  - d. (d) the prominence with which the claimant acted once he or she knew of the facts giving rise to the cause of action
  - e. (e) the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action."
21. However, the Tribunal is not bound to slavishly follow this checklist **Abertawe Bro Morgannwg University Local Health Board V Morgan [2018] EWCA Civ 640**.
- a. *First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see **British Coal Corporation v Keeble** [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).*
22. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the Claimant, as is that for establishing that it is just and equitable to extend the period of time to bring a complaint of discrimination.

Submissions

23. The Claimant argued that it was a very distressing claim so she thought the best option was to contact ACAS and once she realised that was not going to be successful, she submitted a claim but that she tried to avoid at all cost going to Tribunal. The claim was submitted the same day the early conciliation certificate was issued. In respect of the discrimination claim it was just an equitable because it changed her life and she was still attending therapy followed by months of a 'blur' and the tribunal should exercise its discretion.
24. The Respondent argued that the reasons relied upon being her mental health and lack of knowledge lacked evidence and conflicted with her ability to go on holiday start a new job and performed sufficiently well and took no absences. She was unable to say whether she had sought medical assistance and provided no medical evidence to support her case.
25. The Respondent also argued that the alleged perpetrator no longer worked for the company and the length of time made it more difficult for them to make contact with him. Further the Claimant had sought advice from a HR friend; a previous solicitor and her current representation prior to 31 October 2019 and then there was still a lack of promptness to submit the claim without reasonable explanation. She also was able to report to the Police in August and could have taken further steps to obtain advice around that point in time.
26. the Respondent argued that the claim was 3 months and 24 days out of time for her discrimination claim and 2 months and 20 days out of time for her constructive unfair dismissal claim. The argument that she was ignorant of time limits is not reasonable she had been in contact with professional advisors and had made no enquiries of ACAS or CAB and although she agreed she was aware that she had a potential discrimination claim.
27. In addition, there was a complete failure to act promptly after instructing solicitors on 31 October and no claim was presented until 9 December 2019 which was an unexplained and unreasonable gap.

Conclusions

28. The claimant has brought two claims with different limitation periods. In respect of the constructive unfair dismissal claim the limitation date was 20 September 2019 and was therefore 2 months and 20 days out of time and in respect of the discrimination claim the limitation date was 17 August 2019 and was therefore 3 months and 24 days out of time.
29. It is clear that the claimant's claims were presented outside the period of three months from the effective date of termination and or beginning with the act complained of. The Claimant confirmed that the last act relied upon in respect of her discrimination claim was the night of 17/18 May 2019.

30. The Tribunal must decide whether it considers it is just and equitable to consider the discrimination complaint out of time and whether it considers it was not reasonably practicable for the Claimant to present her constructive unfair dismissal claim in time or within a reasonable amount of time thereafter.
31. In considering the claimant's application for an extension, the correct approach for the Tribunal to take is to bear in mind that the Employment Tribunal time limits are to be enforced strictly and to ask whether a sufficient case has been made out to enable the Tribunal to exercise its discretion in favour of extending time.

#### Constructive unfair dismissal

32. Tribunals can extend the basic 3-month time limit for bringing unfair dismissal claims in the following circumstances:
- a. it was "not reasonably practicable" for the claim to be presented in time; and
  - b. when it did become reasonably practicable to present the claim, it was presented within a reasonable amount of time after that.
33. The claimant has relied upon illness and being ignorant of time limits. A tribunal may in these circumstances, consider these factors in determining whether to extend time or not. In determining whether to extend time to present a complaint of unfair dismissal, the Tribunal must consider the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the promptness with which the Claimant acted once she knew of the possibility of taking action and the steps taken by the Claimant to obtain appropriate professional advice once she knew of the possibility of taking action.
34. Looking at the evidence before the Tribunal today it is clear that the Claimant has failed to demonstrate that her health impacted on her ability to present her claim in time. She has failed to provide any medical evidence to support her claim. She has been unable to confirm that she even sought medical assistance and whilst her representative referred to her receiving therapy during submissions, no evidence was given in this regard by the claimant herself. Upon enquiry regarding the lack of medical evidence, the Tribunal was provided with no satisfactory response as to why none had been sought other than it was not.
35. I accept that the Claimant was deeply affected by the incident and that she may not have been able to deal with tribunal proceedings in the aftermath of the incident. However, the evidence before me was that she had taken up new employment and did not need to take time off as a result of her mental health; she took a holiday; she was sufficiently able to report the matter to the police in August 2019 and was aware that she had a potential claim and sought advice from a HR professional and another solicitor prior to instructing her current representative.

36. Mere ignorance of the right to bring a claim or of the time limit or procedure for making a claim, will not satisfy the reasonable practicability test. The Tribunal needs to be satisfied that the Claimant's ignorance of the relevant time limit was reasonable. A Claimant's ignorance will not be reasonable if she ought reasonably to have made enquiries about how to bring a Tribunal claim before the relevant time limit expired. Whether it was reasonable for this Claimant to be ignorant of the relevant time limit is a question of fact for the Tribunal to decide.
37. It is clear that the Claimant knew of or ought to have known the limitation issues prior to 31 October 2019 because she confirmed she had taken legal advice from a previous solicitor and her current representative prior to 31 October. She also confirmed that she had spoken to a HR advisor and was aware that she had a potential claim. She did not take any steps to ascertain her position and it would appear did not act on any advice given although the Claimant's evidence was hazy and evasive when questioned on this point. What is not in dispute is that she instructed solicitors formally on 31 October 2019 and despite this there was a further delay of 1 month and 9 days before the claim was submitted. It cannot be said that once made aware of the limitation date the Claimant acted in a timely manner.
38. Even if it was not reasonably practicable for her to have presented her claim on 20 September 2019 it is clear that when she formally instructed solicitors on 31 October 2019 there was a further unreasonable delay before issuing proceedings and the explanation that she was trying to settle the claim so did not issue until 9 December 2019, lacked credibility because the Claimant conceded that there were no communications between the parties at any point between 31 October 2019 and 9 December 2019.
39. For all these reasons the Tribunal does not find that it was not reasonably practicable for the claimant to have presented her claim in time or within a reasonable period thereafter.

### Discrimination

40. In deciding whether or not it is just and equitable to grant an extension of time, the Tribunal must take care first to consider the reasons why the claim was brought out of time and then the reasons why the claim was not presented sooner than it was. However, the failure to put forward a good reason for not having submitted the claim in time (or sooner) does not necessarily mean time should not be extended as all the relevant factors need to be considered. There are examples where time has been extended where the Tribunal accepted that the claimant was unaware of her rights; illness, or indeed that she had received incorrect advice from her lawyers. The Claimant has not made any suggestion that she was misadvised by her lawyers either those she is instructing in these proceedings or those she consulted prior to 31 October 2019. The Claimant's argument in respect of her failure to issued proceedings in her discrimination case is the same the constructive dismissal claim, as referred to above.



41. When considering the length and reasons for the delay I have considered that the Claimant has had mental health issues but she has given evidence that she was able to continue with her new employment and has not had to take time off work as a result. She went on holiday and also reported the matter to the police in August 2019.
42. Further the Claimant has not had to seek regular medical assistance and indeed the Claimant was not clear that she had attended her GP at all as a result. Whilst her representative said in submissions that she was undergoing therapy no evidence was given on this matter by the Claimant, it was not referred to in her witness statement and no documentary evidence was provided. No explanation was given as to why there was an absence in providing any medical evidence.
43. There was no explanation as to why despite having taken legal advice prior to 31 October 2019 and instructing solicitors on 31 October there was a further delay of over a month before initiating tribunal proceedings. Whilst the Claimant's representative stated in submissions that she wanted to settle matters without the need for formal proceedings, the evidence did not support that any settlement discussions had taken place and indeed no contact had taken place between the parties. Further the Claimant herself gave no evidence to support this submission.
44. I accept the Respondent's argument that the delay in this case is likely to make it more difficult for them to contact the alleged perpetrator in this matter and obtain witness evidence from particularly in view of the fact that he now longer worked for the Respondent and the Claimant was aware of that. There is nothing to suggest that the respondent has not cooperated when dealing with this claim.
45. It is not credible that the Claimant was ignorant of time limits until 31 October 2019 because the Claimant herself said that she had taken advice from at least two professional but did not offer any explanation at all as to why she did not acted prior to 31 October when she formally instructed her current solicitors or why here was a complete lack of urgency once solicitors were instructed.
46. I am not satisfied that the Claimant has established that it is just and equitable to extend time in these circumstances. Time limits are there for a reason and extending time is the exception rather than the rule. In all the circumstances of this case I find the discrimination claim as being out of time and it is not just and equitable to extend time.
47. Consequently, both claims are out of time and are dismissed.

Employment Judge

Date 14 October 2020

JUDGMENT SENT TO THE PARTIES ON  
23 October 2020

FOR THE TRIBUNAL OFFICE

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