EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Yusuf	v	**Apple Retail UK Limited**

OPEN PRELIMINARY HEARING

Heard at: London South by CVP **On: 13 October 2020**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: **Mr N Toms of Counsel**
For the Respondent: **Ms C Davies of Counsel**

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable to do so.

JUDGMENT on PRELIMINARY HEARING

1. The claimant's claim of sex discrimination and harassment was not presented within the time limit imposed by section 123 of the Equality Act 2010 and it is just and equitable to extend the time for the presentation of the claim. Accordingly, the Tribunal has jurisdiction to entertain the claim.

2. The claim is continued for further procedure.

REASONS

Preliminary

1. This preliminary hearing was fixed in order to consider the claimant's claim of sex discrimination and harassment contained in an ET1 which was lodged out of time.

2. The claimant gave evidence on her own behalf. There was a bundle of documents to which reference will be made where necessary.

Findings

1. The claimant has been employed by the respondent from 6 May 2005. Her role at the time of her allegations was as a Manager in the respondent's store in Bluewater Shopping Centre, Dartford. Her employment is continuing.

2. The claim relates to alleged incidents on 11 and 12 June 2019.

3. Following the alleged incidents, the claimant raised a grievance through the respondent's internal grievance procedure dated 24 July 2019. The procedure was still ongoing in January 2020 and did not conclude until the 26 March 2020 [94].

4. The claimant was signed off sick on the 16 September 2019 [40].

5. On 14 October 2019, she emailed the respondent concerned that it had failed to address her grievance in a timely manner [39].

6. On 27 November 2019, she emailed the respondent to say that she was unable to attend the appeal meeting because of her health and requested deferment until, after 4 January [44].

7. In consequence of the claimant receiving advice from a new trade union representative in relation to her appeal, the claimant contacted ACAS to commence early conciliation on 21 January 2020 [13].

8. The claimant submitted her ET1 on 9 February 2020. At the time of presenting the claim, the claimant had not advanced any reason for the delay. However, further to the Tribunal's order at a preliminary hearing on 9 April 2020, the claimant provided a witness statement in which she set out the reasons for not submitting the claim in time. The claimant gives four reasons for her failure to present her claim until 9 February 2020 which are not repeated here [35-36].

Submissions

9. The Tribunal received written submissions from both parties and heard oral submissions from both Counsel.

Law

Just and equitable extension

10. Section 123(1)(b) permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable. Section 140B of the Equality Act 2010 serves to extend the time limit under section 123 to facilitate conciliation before institution of proceedings.

11. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR

279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

12. The Tribunal also notes the guidance offered by the Court of Appeal in the case of **Apelogun-Gabriels v. London Borough of Lambeth & Anr** [2002] ICR 713 at 719 D that the pursuit by a claimant of an internal grievance or appeal procedure will not normally constitute sufficient ground for delaying the presentation of a claim: and observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

13. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment … cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what LJ Auld said "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised."

14. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

- the length and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information;
- 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 they knew of the possibility of taking action.

15. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

16. Further guidance cited to the Tribunal was that the Tribunal must not make assumptions in the claimant's favour on any contentious factual matters that are relevant to the exercise of the discretion: **British Transport Police v Norman** UKEAT/0348/14 at para 39. The lack of specific prejudice to the respondent does not mean that an extension should be granted: **Miller v Ministry of Justice** UKEAT/0003/15 at para 13. Where a claimant asserts ignorance of the right to make

a claim, the same principles that are relevant to the 'not reasonably practicable' clause apply when considering a just and equitable extension (see **Bowden v. Ministry of Justice** UKEAT/0018/17 *(*25 August 2017, unreported para 38); **Averns v. Stagecoach in Warwickshire** UKEAT/0065/08 *(*16 July 2008, unreported*)*. Accordingly, the assertion must be genuine and the ignorance – whether of the right to make a claim at all, or the procedure for making it, or the time within which it must be made – must be reasonable. It is not enough, in a case where ignorance is relied upon, for a tribunal to conclude that a claimant has not acted reasonably and promptly without specifically addressing the alleged lack of knowledge (see **Averns** at para 23). Nor is it correct to say that the only knowledge that is relevant when considering an extension of time is knowledge of the facts that could potentially give rise to a claim, not knowledge of the existence of a legal right to pursue compensation in respect of those facts; as a matter of law both kinds of knowledge are relevant and should be taken into account. Incorrect legal advice may be a valid reason for delay in bringing a claim but will depend on the facts of the case: **Hawkins v Ball & Barclays** [1996] IRLR 258 and **Chohan v Derby Law Centre** [2004] IRLR 685. In answering the question as to whether to extend time, the Tribunal needs to decide why the time limit was not met and why, after the expiry of the primary time limit, the claim was not brought sooner than it was; see **Abertawe Bro Morgannwg University Local Health Board v Morgan [**2014] UKEAT/0305/13 unreported per Langstaff J. However, in determining whether or not to grant an extension of time, all the factors in the case should be considered; see **Rathakrishnan v Pizza Express (Restaurants) Ltd** (2016) IRLR 278.

17. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as “the just and equitable power” has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

18. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the “just and equitable” discretion should be exercised in the particular case. That obligation is not just a matter of the burden of proof. It also raises the question of what is the standard of proof to be established in order to persuade the Tribunal that a period other than the normal three months should be applicable. It is therefore a matter which requires evidence – which may be oral and subjected to cross examination or documentary.

DISCUSSION and DECISION

19. In this case, the alleged incidents took place on 11 and 12 June 2019. Consequently, the primary time limit expired on the 11 September 2019. The claimant did not make an application to ACAS until 21 January 2020 – a delay of just over 4 months.

20. The four reasons advanced by the claimant for the delay are considered in turn:

a. Lack of knowledge: The claimant states “in all my working life I have not had any experience of dealing with an employment tribunal or making a claim”. However, in October 2014, she had contacted ACAS to start Early Conciliation in respect of a potential sex discrimination claim relating to a request to change her hours [53-55]. The claimant said this did not make her aware of how to start the process of bringing a claim or of time limits. The Tribunal considered that this might be unlikely but reserved its position. The claimant seemed to the Tribunal to be highly competent and should know the general context for her actions.

b. Misinformed by union representative: In her written evidence, she states that she was informed of her right to bring a claim by her union representative on 7 August 2019. In oral evidence, she said this was the day of her grievance hearing and she met her union representative for an introductory coffee prior to the hearing. She said there was no discussion of time limits at this meeting. Although the oral evidence of the claimant diverged from her written statement, the oral account was more credible. After the grievance hearing on 8 August 2019, she says there was discussion with her union representative about telling the respondent she was bringing a claim. Her representative advised her that it was always a risk to threaten litigation early in a grievance process and that he thought it would be better left to the grievance appeal stage if she was unhappy with the grievance outcome [36]. The Tribunal did not have available to it the claimant’s text message to her union representative. The Tribunal considers that, as of 8 August 2019, the claimant knew either from her own knowledge from 2014, generally or from the discussion with her union representative (i) she could bring a claim; (ii) the first stage in doing so was to start Early Conciliation though ACAS but what she did not know was the time limit. Her oral evidence was if she had known she would have done what was necessary. In the light of the Tribunal’s assessment of the claimant, the Tribunal concluded that the claimant’s lack of knowledge of the time limit was genuine. The union representative’s approach might be a sensible tactic provided the process did not take too long. At the time of the discussion, the limitation period was well advanced and there was no date for the appeal. While the advice was not correct or sensible, it was reasonable for the claimant to rely on it at the time.

c. Tried to resolve the matter with employer; **Apelogun-Gabriels** makes it clear that this approach would not normally excuse a late claim however, in the light of the finding in the preceding paragraph, the present case was an exception to the normal rule.

d. Mental health and wellbeing: the claimant had a period of sickness absence which started after the expiry of the three-month time limit. On 27 November 2019, she sent the investigating manager for her appeal an email stating that she needed to defer the appeal meeting as she felt unable to attend a meeting due to her current state of ill health. In October 2019, she was acting as a carer for her mother who was undergoing experimental treatment at St Bartholomew's hospital for cancer. The Tribunal considered that these circumstances made it reasonable not to identify and act on the time limit under the second limb of the test in **Morgan** until the point that she did.

Balance of prejudice

21. The Tribunal, having set out its conclusions on the evidence of the claimant, turned its attention to the remaining factors.

22. It is likely that a delay the length of the one in this case might have a detrimental impact on the cogency of the evidence in a case where the allegations are centred on oral conversations which took place over seven months before the claim was presented. Whilst, those giving evidence might struggle to remember exactly what happened in the level of detail which might have been possible had the claims been presented in time, the Tribunal did not consider that this factor tipped the balance either way. There are now long delays before a Tribunal hearing.

23. In relation to prejudice generally, the respondent will have the prejudice of having to defend a claim. The claimant said in her Time Limits Statement that "the grievance and appeal outcome in themselves are discriminatory acts". She has issued a new claim which has been brought within time in respect of those acts. The respondent argued that even if time is not extended, the claimant will not be left without any course of redress against the respondent as she has a second set of proceedings. Counsel for the claimant argued that this information should not be taken into account. The Tribunal did take it into account as it was in favour of the claimant because although she had a further set of proceedings, it was unlikely that those proceedings would directly examine the original incidents.

24. On the guidance set out earlier and weighing all the relevant factors, the Tribunal considers that it is just and equitable to extend the time for lodging the claim.

Employment Judge Truscott QC

Date 19 October 2020