



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102930/2019 (V)**

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**Held via video conference call on 24 June 2020**

**Employment Judge L Wiseman**

10 **Mr C Stewart**

**Claimant  
In Person**

15 **Asda Stores Limited**

**Respondent  
Represented by:  
Mr A Singh –  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Tribunal decided:

- 25 (i) to refuse the respondent's application to have the complaint of sexual harassment struck out for failure to comply with an Order in terms of rule 37(1)(c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013;
- 30 (ii) the complaint of sexual harassment was not presented within the applicable time limit, or such other period as the Tribunal considered just and equitable. A Tribunal does not have jurisdiction to determine the complaint of sexual harassment because it is time barred and
- 35 (iii) the complaints of unfair dismissal (section 94 Employment Rights Act) and automatically unfair dismissal for making protected disclosure (section 103A Employment Rights Act) will proceed to be listed for a final hearing.

## REASONS

1. This hearing was a Preliminary Hearing to determine whether the complaint of sexual harassment had been presented within the applicable time limit and, if not, whether it would be just and equitable to allow the claim to proceed. The Preliminary Hearing took place by video conference.

### Background

2. The claimant presented a claim to the Employment Tribunal on 25 February 2019. The claimant, at section 8 of the claim form, ticked the boxes to indicate he was making a claim of unfair dismissal and discrimination on the grounds of disability and religion or belief. The claimant did not set out any information regarding his claim, but referred to "Acas early settlement have all details of claim." In section 9.2 of the claim form (regarding remedy) the claimant referred to bullying and victimisation.
3. The claimant and a representative for the respondent attended a case management Preliminary Hearing on 30 May 2019. The Employment Judge, in her note following that hearing, noted that it appeared the claimant was bringing claims of unfair dismissal, disability discrimination, discrimination because of religion or belief, harassment, sexual harassment and whistleblowing. The Employment Judge issued an Order requiring the claimant to provide details of the claims.
4. The claimant responded to that Order and noted the complaints of disability discrimination and discrimination because of religion or belief were withdrawn.
5. He further noted details regarding a complaint of sexual harassment which it was said occurred between 17 and 19 September 2018.
6. A further case management Preliminary Hearing took place on 6 November 2019 and another on 28 April 2020. The Employment Judge hearing the latter Preliminary Hearing decided to arrange a Preliminary Hearing to determine

the respondent's application to strike out the claim of sexual harassment on the basis that it was time barred and thus outwith the jurisdiction of the Tribunal to hear that part of the claim.

- 5 7. The Employment Judge, at that latter Preliminary Hearing, made a number of Orders, one of which was to order the claimant to prepare and submit a written witness statement restricted to the disputed preliminary issue of time-bar. The claimant did not comply with that Order.
- 10 8. Mr Singh confirmed, at the commencement of the Preliminary Hearing, that he intended to invite the Tribunal to strike out the claim for non-compliance with an Order. I confirmed I would hear that submission, but before doing so I considered it appropriate to put a number of questions to the claimant to ascertain his position regarding the lateness of the claim.

### Findings of fact

- 15 9. The alleged incident of sexual harassment occurred between 17 and 19 September 2018.
10. The claimant contacted ACAS for early conciliation on 17 January 2019 and the Early Conciliation Certificate was issued on 17 February 2019.
- 20 11. The claimant presented a claim to the Employment Tribunal on the 25 February 2019. The claim was presented to a Tribunal in England and Wales, and was transferred to Scotland on 7 March 2019.
12. The claimant indicated at box 8 of the claim form, that he wished to bring a claim of unfair dismissal and discrimination on the ground of disability and religion or belief.
- 25 13. The claimant had difficulty presenting his claim form online, and noted on the claim form (box 15) that "not letting me type out – keeps coming up error".
14. The claimant told the Tribunal that he had not been aware of the three month time limit for making a claim and that ACAS had told him not much detail was required on the form because he would be asked for it later.

**Respondent's submissions**

15. Mr Singh invited the Tribunal to strike out the complaint of sexual harassment because the claimant had failed to comply with the Tribunal's Order (in terms of rule 37(1)(c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, hereinafter referred to as the Rules). Mr Singh submitted that by not complying with the Order the claimant had not actively pursued his claim and had prevented a fair trial from taking place.
16. Mr Singh submitted no reason had been given by the claimant for non-compliance. The respondent's position had been prejudiced by the non-compliance because it did not have the claimant's witness statement setting out his position in respect of timebar.
17. Mr Singh further invited the Tribunal to strike out the complaint of sexual harassment because the claim was out of time and there were no grounds for extending the time limit.
18. Mr Singh noted the claimant had been dismissed on 22 October 2018. He presented a claim to the Employment Tribunal on 25 February 2019. There was no reference in the claim form to a complaint of sexual harassment. Mr Singh referred to the Order issued by the Employment Judge following the Preliminary Hearing on 30 May 2019, and to the claimant's response on 9 July 2019. The response included new allegations of sexual harassment said to have occurred on 17/19 September 2018.
19. Mr Singh referred to section 123 Equality Act which made clear that a complaint may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Mr Singh noted the allegation of sexual harassment related to a single one-off act on the (at the latest) 19 September 2018. There was no suggestion of an ongoing course of conduct in this case.

20. Mr Singh referred to the case of **British Coal Corporation v Keeble** 1997 IRLR 336 and in particular to paragraph 8 of the judgment where the EAT set out five factors to be considered when looking at the prejudice which each party would suffer as a result of the decision made (regarding timebar).
- 5 21. Mr Singh submitted, in relation to the first factor (length of and reasons for the delay) that the claimant had failed to provide any good reason for the delay, and had not provided any good reason why sexual harassment had not been included in the claim form. The alleged act had occurred on 19 September 2018: the claimant had until 18 December 2018 to raise it with ACAS to initiate  
10 early conciliation. The claimant failed to do so, and therefore his claim was out of time.
22. The second factor related to the extent to which the cogency of the evidence is likely to be affected by the delay. Mr Singh submitted the respondent's evidence would be impacted to a greater extent than the claimant's evidence  
15 because of the length of time between the alleged incident and any hearing.
23. The third factor related to the extent to which the party sued had cooperated with any requests for information. Mr Singh noted the respondent had provided the claimant with all relevant information.
24. The fourth factor related to the promptness with which the claimant acted once  
20 he knew the facts giving rise to the claim. The claimant's position appeared to be that having spoken to a trade union representative, he decided to "let matters lie". He did not plead sexual harassment in the claim form and did not raise it until further information was provided on 9 July 2019. The claimant had not provided any justification for not acting to raise it promptly.
- 25 25. The fifth factor related to the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action. Mr Singh submitted the claimant had failed to take professional advice and had dragged his heels in this regard.

26. Mr Singh submitted a fair trial would not be possible if the complaint were allowed to proceed. Mr Singh referred to the case of **Mills and CPS v Marshall 1998 IRLR 494** and submitted the present case could be distinguished from that authority because the claimant had not been misled by the respondent and legal advisers. Mr Singh also referred to the allegations of sexual harassment not being well documented, and although the matter was raised during stage 2 of the appeal process, the claimant had failed to provide further information when requested to do so.
27. Mr Singh concluded by submitting the balance of prejudice lay with the respondent and the complaint of sexual harassment should be struck out because it was not presented within the time limit and it would not be just and equitable to extend that time limit.

#### **Claimant's submissions**

28. Mr Stewart considered that he had complied with the Tribunal's Orders, and he referred to the Order issued following the first Preliminary Hearing and his response to that Order where he had set out details of his complaints, including the complaint of sexual harassment. Mr Stewart disputed the respondent would be prejudiced because the issue had been raised with the respondent during the appeal process and Mr Martin had been interviewed about it. Accordingly, paperwork would exist to assist with recall of information, as well as CCTV and witnesses.
29. Mr Stewart noted he had had six weeks' notice of this hearing and he had no money for a solicitor.
30. Mr Stewart reiterated that he had had problems completing the claim form and had noted this on the form. He had provided ACAS with information but he did not know what had happened to this information.
31. Mr Stewart referred to having spoken to a senior trade union representative at the time of the alleged incident and had accepted it was not a good idea to raise it at that time. He had however raised it during the stage 2 appeal but

felt he had been closed down. Mr Stewart felt the respondent had dragged its feet and therefore he had been under time pressure to try to get his claim in on time.

5 32. Mr Stewart noted that he had not ticked the box for a complaint of discrimination because of sex, but he had not read this as including complaints of sexual harassment.

33. Mr Stewart also referred to a time limit of six months for presenting a claim.

### Discussion and Decision

10 34. I decided it would be appropriate to determine the respondent's first motion to have the complaint of sexual harassment struck out because of failure to comply with an Order in terms of rule 37(1)(c) of the Rules.

15 35. There was no dispute regarding the fact Employment Judge I McPherson ordered the claimant to prepare and provide a witness statement setting out his position in respect of the issue of time bar. The Employment Judge specifically noted the claimant's witness statement was to be restricted to the issue of time bar and not to extend into the substantive issues in this case.

20 36. I noted there was clearly correspondence between the claimant and Employment Judge McPherson regarding the witness statement and I noted Employment Judge McPherson confirmed he was not prepared to allow more time for the preparation of the witness statement and that the Preliminary Hearing was to proceed. He considered it would be a matter for this hearing to determine whether we could proceed in the absence of the claimant's witness statement.

25 37. I accepted there had been noncompliance by the claimant with the Order issued by Employment Judge McPherson.

38. I also accepted there appeared to be some confusion on the part of the claimant regarding what had been required of him. I say that because the claimant, on a number of occasions, made reference to the fact he had

complied with Orders and had provided information regarding the complaint of sexual harassment.

39. I considered that in circumstances where the claimant and the respondent's representative were present and ready to deal with the issue of time bar, that progress with this issue could, and should, be made. I asked the claimant some questions to ascertain his position regarding the claim form, why sexual harassment had not been included in it and why he said it would be just and equitable to allow the claim to proceed. Mr Singh had an opportunity to ask the claimant questions and comment on his evidence.
40. I acknowledged Mr Singh's submission included reference to the failure to provide a witness statement causing prejudice and unfairness, but given the very narrow scope of this hearing, I did not consider that in fact any prejudice had been caused to the respondent.
41. I decided, for these reasons, to refuse the application to strike out the complaint of sexual harassment for failure to comply with an Order.
42. I next considered the issue of time bar. There was no dispute the alleged incident of sexual harassment occurred (at the latest) on 19 September 2018. The claimant had a period of three months (that is, by 18 December 2018) in which to contact ACAS before making a claim to the Employment Tribunal. The claimant did not contact ACAS within this timescale.
43. The claimant contacted ACAS on 17 January 2019 and the certificate was issued on 17 February 2019. The claim was presented to the Employment Tribunal on 25 February 2019.
44. The claimant told the Tribunal he had spoken to a senior trade union representative regarding the alleged incident and had decided it was not a good time to raise it. I took from this that the claimant made a conscious decision not to raise the matter internally (at that time) or externally with ACAS/the Employment Tribunal.



45. The claimant also told the Tribunal that he was not aware of the three month time limit. The claimant must, however, have been aware of it in circumstances where he knew to contact ACAS within three months of his dismissal.
- 5 46. The claim form presented by the claimant contained scant information regarding the nature of the claim. He had ticked box 8 to indicate he was bringing a claim of unfair dismissal and discrimination because of disability and religion or belief. I acknowledged the claimant did not consider the box marked "sex" to include sexual harassment (because of the reference to  
10 claims of equal pay), but there is a section asking if any other claims are being brought and nothing had been added in that section.
47. The claimant maintained he had had difficulties completing the claim form because information kept being deleted. I acknowledged this but noted there was no suggestion by the claimant that he had inserted/included reference to  
15 sexual harassment but this had been deleted from the form.
48. The claimant also stated he had sent all information to ACAS. The claimant did not however suggest what information he had sent to ACAS, and he did not suggest he had made any efforts to try to recover that information if indeed it was helpful to his case.
- 20 49. I concluded, having had regard to all of the above points, that the claimant did not contact ACAS within three months of the date of the alleged incident. Accordingly, his claim was not presented within the relevant time limit.
50. I must now consider whether it would be just and equitable to allow the claim to proceed, albeit late. I was referred to the *Keeble* case above where the  
25 EAT issued guidance to follow when considering whether an extension of time would be just and equitable. The Tribunal must consider the prejudice each party would suffer as a result of the decision to be made, having regard to all of the circumstances of the case.

51. The EAT set out five factors to be considered, and it is helpful to have regard to these factors and the various points put forward by each party.
52. The first factor relates to the length of and reasons for the delay. The alleged incident occurred on 19 September 2018. There was no notice in the claim form of any complaint of sexual harassment. The first reference to such a claim was at the case management Preliminary Hearing on 30 May 2019 and details of the claim were provided by the claimant on 9 July 2019.
53. The reasons put forward by the claimant for the delay are referred to above. The claimant put forward a number of reasons for the delay but I did not find any of the reasons to be entirely credible. For example, it was not credible for the claimant to suggest he did not know of the three month time limit when he then acted within a three month time limit to bring his claim of unfair dismissal and discrimination.
54. The second factor relates to the extent to which the cogency of the evidence is likely to be affected by the delay. I acknowledged there was a period of some 10 months between the alleged incident and the respondent receiving details of the complaint of sexual harassment from the claimant on 9 July 2019. However, I balanced that with the fact the claimant raised the issue with the respondent at the stage 2 appeal, Mr Martin was interviewed regarding the incident and the respondent knew, from the date of the first Preliminary Hearing that a complaint of sexual harassment was going to be set out by the claimant.
55. I acknowledged the fact that issues raised at or near the time they allegedly occurred will be fresher in the memories of those involved. I considered that with the benefit of notes prepared at the time the claimant raised the issue at the stage 2 appeal, the cogency of the evidence would not be affected to any great extent by the delay.
56. The third factor is the extent to which the party sued has cooperated with any requests for information. I accepted the respondent had provided the claimant will all relevant information.

57. The fourth factor related to the promptness with which the claimant acted once he knew the facts giving rise to the cause of action. The claimant knew the facts giving rise to the cause of action on 19 September 2018. The claimant may well have acted to “let matters lie” after seeking advice from his trade union, but that passed once the claimant was dismissed on the 26 October 2018. The claimant could have contacted ACAS regarding the alleged incident before the time limit expired on 18 December 2018, but he did not do so. The claimant could have included the sexual harassment complaint on the claim form presented to the Tribunal on the 25 February 2019, but he did not do so. It was not until 30 May 2019 that the claimant clarified that his claim included a complaint of sexual harassment, and he provided details of the complaint on 9 July 2019.
58. The fifth factor relates to the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action. I accepted the claimant does not have the financial means to obtain legal advice regarding his claim. There are other sources of legal advice, but there was nothing to suggest the claimant had explored these options.
59. The claimant, in addition to the above, made reference to a six month time limit in which to bring a claim. I considered this was a reference to a consultation document where there is a proposal that the time limit for presenting a claim should be six months. The current time limit is three months (as set out above in terms of section 123 Equality Act) and the proposal does not impact on this in any way,
60. I, in reviewing and balancing the above factors, acknowledged there will be prejudice to the respondent if the complaint of sexual harassment is allowed to proceed. I say that because the respondent will be required to defend the complaint and may require to bring additional witnesses to the Tribunal to deal with the matter.
61. I also acknowledged there will be prejudice to the claimant if the complaint of sexual harassment is not allowed to proceed. I say that because he will have

lost the opportunity to proceed with this complaint. There were however two points which I considered mitigated the prejudice to the claimant. Firstly, there was no dispute regarding the fact Mr Martin (the person said to have been involved in the alleged sexual harassment) was the dismissing officer and accordingly he will be present at the final hearing of the case to speak to his reasons for dismissal. The claimant will have an opportunity to cross examine Mr Martin and will be able to suggest to him what allegedly took place on 19 September 2018, and whether this influenced his decision to dismiss. Secondly, there was no dispute regarding the fact the claimant made reference to the alleged incident during the stage 2 appeal. Accordingly, it would appear the alleged incident forms part of, and part of the background to, the dismissal and it would therefore be in order for the matter to be included in the evidence of the claimant and in his questions for other witnesses.

62. I, in conclusion, decided the complaint of sexual harassment was not presented to the Tribunal within the applicable time limit or such other period as the Employment Tribunal considered just and equitable. A Tribunal accordingly does not have jurisdiction to determine the complaint of sexual harassment. This means the complaint of sexual harassment cannot proceed.

63. The claimant's remaining claims of unfair dismissal (section 94 Employment Rights Act) and automatically unfair dismissal for making a protected disclosure (whistleblowing) (in terms of section 103A Employment Rights Act) will proceed.

Employment Judge: L Wiseman  
Date of Judgment: 01 July 2020  
Entered in register: 10 July 2020  
and sent to parties