



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103023/2020

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Held in Glasgow on 22 September 2020

Employment Judge L Doherty

10 **Miss C Rooney**

**Claimant
In Person**

15 **Scottish Autism**

**Respondent
Represented by:
Mr B Doherty -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgement of the Employment Tribunal is that it is just that equitable to extend time under section 123 (1) (b) of the Equality Act 2010 to consider the claimant's claim of discrimination and the case will now be listed for a Final Hearing.

REASONS

- 25 1. The claimant presented a claim of sex discrimination contrary to the provisions of the Equality Act 2010 (the EQA) on 2 June 2020.
2. A Preliminary Hearing for the purposes of case management took place in August, at which it was identified that there was an issue as to the Tribunal's jurisdiction to consider the claim on the basis that the claim was time-barred.
- 30 3. This Preliminary Hearing (PH) was fixed to determine whether the Tribunal had jurisdiction to consider the claim. The hearing took place virtually. The claimant represented herself, and the respondent was represented by Mr Docherty, solicitor. No documents were produced; the claimant give evidence on her own behalf.

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Findings in Fact

4. From the information and evidence before the tribunal made the following findings in fact.
5. The claimant, whose date birth is 21 May 1989, is employed by the respondents as an Autism Practitioner. Her employment with the respondent's commenced in December 2017.
6. The claimant went on maternity leave commencing on 1 April 2019, returning on 3 January 2020.
7. During the claimant's absence on maternity leave the post of Senior Autism Practitioner was advertised. This post was advertised between 11 to 25 October 2019.
8. The claimant was unaware of the fact that the post was advertised.
9. On the evening of 11 February 2020, the claimant discovered from a WhatsApp conversation with other members of staff that this post had been advertised.
10. On 12 February 2020, the claimant had a meeting with her line manager regarding this. The claimant was told that this was a Human Resources issue, and she was encouraged to apply for a promoted post on the next occasion when this arose. The claimant explained that she was disappointed, and that she felt discouraged because she had not been told that post was advertised, and it had been filled by the individual who covered her maternity leave.
11. The claimant was advised to speak to HR about this.
12. The claimant lodged a formal grievance on 13 February 2020. This was dealt with by an HR adviser by the name of Hannah Smith. A meeting took place on 3 March 2020. As a result of the impact of the Covid pandemic there was a delay in the grievance being dealt with, and the claimant received the outcome of her grievance by email on 29 April 2020.

13. The claimant's grievance was unsuccessful, and she was advised that she had the right of appeal. The claimant believed that although unsuccessful, the grievance outcome acknowledged deficiencies in the process which had taken place. The claimant exercised the right of appeal, which was to Jacqueline Latto, a Director.
14. An appeal hearing took place by way of a Teams meeting on 25 May 2020, and the claimant receiving outcome on 27 May 2020 when she was advised that the appeal was unsuccessful.
15. The claimant had contacted ACAS on 10 March 2020 for advice about lodging a grievance.
16. At some point around the middle of February the claimant joined Unison. She sought advice from them about taking matters further against her employer and she obtained assistance from a Unison representative, Mr Fullerton. In the period from around mid-February till 15 May 2020 there was email and telephone exchanges between the claimant and Mr Fullerton about the grievance, and lodging an employment tribunal claim. It regularly took around three or four days to obtain a response from Mr Fullerton who was working from home due to the Covid pandemic.
17. By May, Mr Fullerton had to engage his senior, Mr McLaughlin, for assistance. Mr Fullerton normally worked alongside Mr McLaughlin, but they were both working from home, because of Covid. The claimant understood Mr Fullerton to ask for advice from Mr McLaughlin. Mr Fullerton received advise about time limits for lodging a claim approximately a week after he contacted Mr McLaughlin. On 14 May 2020, Mr McLaughlin emailed Mr Fullerton advising of the time limits in place for lodging an employment tribunal claim. He advised that the claimant should in any event lodge a claim, as it was two days out of time, and she could appeal to the tribunal to extend this. Mr Fullerton in turn emailed this advice to the claimant on 15 May.
18. On 15 May 2020 the claimant gave ACAS notification of a claim.
19. The ACAS certificate was issued by on 26 May 2020.

20. The claimant presented the claim to the Employment Tribunal on 2 June 2020. She waited for the outcome of the grievance appeal before doing so as she thought her employer might uphold the grievance, as she believed they had acknowledged shortcomings in their process in advertising the post in the outcome of her grievance, albeit her grievance had not been upheld.
21. The subject of the complaint is that a senior post was advertised while the claimant was on Maternity Leave and she was not advised about this or given the opportunity to apply.
22. Although the claimant had input from Unison, they did not continue to support her as she did not have a sufficient period of membership with Unison. The last advice which the claimant received from Unison was on 15 May 2020.
23. The claimant did not carry out any research herself as to time limits for lodging an employment tribunal claim.

Note on Evidence

24. There were no significant challenges to the claimant's credibility or reliability, and the Tribunal found the claimant to be a credible and reliable witness.

Submissions

Claimant's Submissions

25. The claimant submitted that much of the delay in this case was occasioned by the Covid pandemic. This was apparent from the length of time it had taken the respondent to deal with matters, and on at least two occasions they had said the Covid Pandemic had caused the length of time it had taken to deal with things, or sought extensions because of the effects of the pandemic. Had Mr Fullerton and Mr McLaughlin be working together in the office advice could be provided more promptly to the claimant. In particular the advice she received about time limits on 15 May 2020 would have been available a week earlier. The claimant also experienced delays in getting a response from Mr Fullerton when she contacted him because he was working from home, and it could take him three or four days for him to respond.

Respondents Submissions

26. Mr Docherty for the respondents took the tribunal to the relevant statutory provisions in section 18, and section 123 (1) and section 140(B) of the Equality Act 2010 (the EQA).
- 5 27. Mr Docherty submitted that the date of the alleged detriment from which time ran was 11 to 25 October. He accepted however that the claimant did not discover that the post was advertised until 12 February 2020, and that was a significant factor in considering an extension of time on the grounds of justice and equity.
- 10 28. Even on that basis, Mr Docherty submitted the claim was lodged late. He did not accept that the Covid pandemic had occasioned any significant delay, submitting that a three or four-day delay in receiving a reply to correspondence sent to the Trade Union official was not unreasonable.
- 15 29. Mr Docherty reminded the tribunal that an extension of time is an exception rather than the rule, citing the case of *Robertson v Bexley Community Centre 2003 IRLR 434 CA*.
30. Mr Docherty also submitted that the claimant potentially could have a remedy against Unison for incorrect advice.
- 20 31. Further, Mr Docherty referred to the case of *Hunwick v Royal Mail Group UKEAT 3/07*. The incorrect advice in this case was given after the time limit expired, and did not cause the time limit to expire, and therefore should not be taken into account.
- 25 32. Mr Docherty submitted that there would be prejudice to the respondents in allowing this claim to proceed. It was around 11 months since the post been advertised which is a considerable delay.

Consideration

33. Section 123 of the Equality act provides:

(1) *Subject to sections 140A and 140B proceedings on a complaint within section 120 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*

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

34. Section 140B deals with the extension of time limits to facilitate conciliation before the institution of proceedings, and provides that the power conferred on the tribunal to extend the time limit on the grounds of justice and equity is
10 exercisable in relation to that time limit as extended by section 140B.

35. The issue for the tribunal therefore is to identify from when time runs for the purposes of Section 123, and thereafter to consider whether it is just and equitable to extend that time limit in order to consider the claim.

36. The tribunal reminded itself that an extension to the time limit is an exception,
15 and that it rests with the claimant to convince the tribunal that it is just equitable to extend the time limit.

37. The subject of the complaint is that a post was advertised in the period from 11 to 25 October 2019 while the claimant was on maternity leave and she was not advised about this. On that basis, time would run from 25 October 2019
20 being the last date from which the post was advertised.

38. In considering whether to exercise its discretion to extend time, the tribunal had regard to the prejudice which each party would suffer as a result of the decision to extend time, and had regard to the relevant circumstances , in particular the length of the delay and the reason for it, the extent to which the cogency of the evidence is likely to be affected by the delay, and the
25 promptness which the claimant acted once here she knew the factors giving rise to the cause of action, and the steps taken by the claimant to obtain appropriate advice once here 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 delay in this case is not inconsiderable. On the basis that time runs from 25 October 2019, subject to any extension as a result of the conciliation process, the claim should have been lodged by 24 January 2020.
- 5 40. The Tribunal considered the reason for the delay in lodging the claim, and what steps the claimant had taken once she knew the facts which give rise to the cause of action, and the steps she took to obtain advice once she knew of the possibility of taking action.
- 10 41. The Tribunal accepts, and indeed there is no dispute that the claimant was not aware of the post being advertised until the evening of 11 February 2020. The Tribunal was therefore satisfied that the reason for the delay up until then was because was because the claimant was unaware of the facts giving rise to the alleged act to discrimination which is the subject of this claim.
- 15 42. The claimant thereafter took matters up with her employer promptly, contacting her line manager on 12 February 2020 and thereafter lodging a formal grievance which was dealt with by human resources. There was a delay in human resources responding to that grievance, occasioned by the Covid pandemic, and the claimant did not receive the outcome of a grievance until 29 April. The claimant's appeal did not take place until 25 May 2020, with the outcome being delivered on 27 May 2020.
- 20 43. The Tribunal was satisfied that the claimant waited for the outcome of her grievance and her appeal of the grievance outcome, before lodging her Employment Tribunal claim, and that she did so because she considered that there was prospect that the appeal would go in her favour. Support for this conclusion is found in that at the stage when the claimant was aware of time limits for lodging the claim, and had initiated the early conciliation process with ACAS on 15 May 2020, and received ACAS certificate of 26 May 2020, she still waited until the outcome of the appeal before lodging her Employment Tribunal claim.
- 25 44. The Tribunal was satisfied that the claimant had sought to take advise promptly and had taken advice from her Trade Union representative in
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February. It was also satisfied that the timing of advice which the claimant was able to obtain from her Trade Union representatives was to some degree impacted as a result of the Covid pandemic, and the fact that trade union representatives were both working from home. The Tribunal was satisfied that as the claimant said in evidence it took a week for Mr McLaughlin to provide advice about time limits. That however is only one factor, and the Tribunal could not conclude that the delay in lodging the claim was occasioned solely because of the delay in the claimant being advised by her Trade Union representative about time limits. The claimant was aware of the time limits which applied by 14 May 2020.

45. Mr Docherty submitted that the tribunal should not attach any weight to the fact that the Trade Union given the claimant wrong advice about the time limits, as this did not affect the timing of the claim. The tribunal did not conclude that it was incorrect advice which the claimant received from her trade union which caused the claimant to be lodged late.

46. The Tribunal concluded that the claimant did not become aware of the facts which give rise to the alleged discrimination until 11 February 2020, and that she waited until the outcome of the grievance and grievance appeal, believing that that her appeal might be upheld, which caused the delay in the claim being lodged. The tribunal also concluded that that the completion of the internal process was delayed as result of the effects of the Covid pandemic. The claimant received the outcome of a grievance on 27 May 2020, and the claim was presented on 2 June 2020, and therefore there was still a delay of some days before the claim was lodged. By that stage however the claimant was not receiving assistance from her trade union, who were no longer able to provide support to her, and she was acting in an unrepresented capacity.

47. The fact that the claimant waited for the outcome of the internal proceedings is only one factor however, and it does not of itself justify an extension of the time limit and the Tribunal also considered the other factors present in this case.

48. The Tribunal considered the extent to which the cogency of the evidence was likely to be affected as a result of the delay. The delay here is not inconsiderable, however that the factual matrix upon which the claim rests is a narrow one, relating to the fact that a promoted post was advertised in October 2019, and that the claimant was not advised about this. Furthermore, the facts on which the claim rests have also been the subject of a grievance procedure which the respondents have engaged up until the end of May 2020, and in the circumstances, on balance, the tribunal was not persuaded that the cogency of the evidence was likely to be significantly affected by the delay, albeit a not inconsiderable delay in this case.
49. The Tribunal then considered the prejudice which each party would suffer as a result of the decision reached. The claimant will potentially suffer considerable prejudice in that she would be precluded from pursuing her discrimination claim. The prejudice which the respondent would suffer if time is extended is that they will have to deal with the claim which has been lodged out with the statutory time limits, but it remains open to them to defend the claim.
50. Taking all the relevant factors into account, and considering those factors alongside the prejudice which each party will suffer as a result of the decision to extend the time limit, the tribunal was satisfied that it was just equitable to extend the time limit under section 123 (1) of the EQA and that the tribunal has jurisdiction to hear the claim.
51. The case should not proceed to listing for a Final hearing. The listing process will take place by way of date listing stencil.

52. Parties should also advise the Tribunal in writing within 14 days as to whether they consider a final hearing could take place by way of CVP.

Employemtn Judge: L Doherty

5 Date of Judgement: 24 September 2020

Entered in register: 6 October 2020

And copied to parties