



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4114179/2019

Held in Edinburgh on 5 and 6 May 2021

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**Employment Judge: M Sutherland
Members: Z Van Zwanenberg
D Frew**

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Ms Jasmine Rough

**Claimant
Represented by:
Mr K Murray, Solicitor**

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Scottish Borders Council

**Respondent
Represented by:
Mr I Davidson, Solicitor**

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JUDGMENT

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The unanimous Judgment of the Tribunal is that the claim was not presented within the statutory time limit and accordingly the Tribunal does not have jurisdiction to hear the claim which is dismissed.

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REASONS

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1. This Judgment is issued following a request for written reasons made after an oral Judgment was promulgated.

2. The Claimant was represented by Mr K Murray, Solicitor. The Respondent was represented by Mr I Davidson, Solicitor.
3. On 9 December 2019 the Claimant lodged a complaint of direct sex discrimination.
- 5 4. Unfortunately the issue of time bar was not raised until immediately prior to the final hearing. The jurisdictional issue of time bar was identified and following discussion it was determined that the first day of the final hearing would be converted to a preliminary hearing on time bar in respect of which the tribunal would endeavour to issue oral judgment. If it was determined that the claim was brought in time (through a just and equitable extension of time) the final hearing would be heard on the remaining two days.
- 10 5. After consideration and discussion the Claimant confirmed that she relied upon a single act of direct discrimination namely the decision not to appoint her to the role of apprentice mechanic and not, despite initial indications to the contrary, the act of persuading her to take the Fleet apprentice role under false pretenses. Furthermore, and again despite initial indications to the contrary, she ultimately confirmed that she was not asserting any subsequent acts of direct discrimination.
- 15 6. The Claimant gave evidence on her own behalf. The Respondent did not call any witnesses.
- 20 7. Parties had preprepared a joint bundle of documents.
8. Both parties gave oral submissions.

Findings of fact

- 25 9. The Claimant had pre-existing mental health issues but her mental health was good when she applied for and started work for the Respondent. She had been working elsewhere in another job for a year prior to starting work with the Respondent.
- 30 10. On 3 December 2018 the Claimant applied for the role of Apprentice Mechanic. The Claimant was 21 years old when she applied. She was shortlisted and invited to interview. The first interview was conducted by Alan Brown ('AB') and Brian Nairn on 29 January 2019. Alan Brown was Fleet Manager (with responsibility for both the fleet and the mechanics). At the first interview she states she was advised by Alan Brown that she might struggle physically in the

role because she was a small girl. She inferred from this that she would not be appointed to the role because she was female. The Claimant was aware and understood that to not appoint her to the role because she was female was wrong. She did not take any steps to seek advice on this issue until late August 2019. She did not raise this issue with the Respondent until October 2019.

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11. The Claimant was invited to a second interview which was conducted by AB and John Martin on 13 February 2019. John Martin was the Fleet Services Manager. The Claimant alleges that at the second interview she was advised by AB that the Apprentice Fleet Services Officer role was more suitable for her and that there were attempts to persuade her to take that role.

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12. There were no minutes of the interviews but there were a series of written questions with a numerical score.

13. On 15 February 2019 the Claimant was advised by telephone and email that she had been unsuccessful in her application for the mechanic role. The Claimant was advised of the Fleet role which was within the same department. She submitted an application for that role on the understanding that the fleet role would be similar to that of a mechanic.

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14. On 27 February 2019 the Claimant was invited to an interview for that role also with AB and John Martin. On 6 March 2019 the Claimant attended a meeting regarding that role (which she asserts was not an interview) and was formally offered that role on 8 March 2019.

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15. On 18 March 2019 the Claimant commenced employment with the Council as a Fleet Service Officer apprentice and remains in their employment to date. AB was the Claimant's line manager until about May 2019. Bruce Campbell, Fleet Services Officer, was appointed the Claimant's line manager in about May 2019.

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16. When the Claimant started work in March 2019 she established that one of the apprentice mechanics who had been appointed was male. During the course of performing the Fleet role she established that there was a disparity between her expectation for the Fleet role and the reality of that role. The Fleet role transpired to be an office job, it was not similar to that of a mechanic (it was desk based) and she was not being provided with tasks (other than administration) or learning and development (a college course had not been

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identified). The Claimant raised these issues informally with her managers. This disparity began to negatively affect her mood.

17. Her managers arranged for her to obtain work experience as a mechanic for a month which she undertook throughout June 2019. She thoroughly enjoyed the experience, her mood brightened and she looked forward to work.
18. In June 2019 issues were identified with the Claimant's dyslexia and the Claimant's manager arranged for her to obtain assistance through HR and occupational health.
19. In early June, during her work experience, she established that the other two apprentice mechanics who had been appointed were also male and had the same qualification as her. The Claimant was aware and understood that this was wrong. She did not take any steps to seek advice on this issue until late August 2019. She did not raise this issue with the Respondent until October 2019.
20. On 3 July 2019 the Claimant contacted HR for advice about her situation. A meeting was immediately arranged with Stacy Hendron, HR Manager. At that meeting she raised issues with the Fleet role including that she was not being provided with tasks or learning, and with Alan Brown's management style which she described as confrontational and aggressive. The Claimant was very unhappy and felt down about her situation at work. She did not raise with HR or otherwise any issues suggesting AB was sexist or that she had not been appointed to the mechanic role because she was female.
21. In late July 2019 the Claimant had a meeting with John Martin and Bruce Campbell about the issues she had with the Fleet role.
22. On 2 August 2019 the Claimant contacted HR for advice about her Fleet role.
23. This disparity between her expectation for the Fleet role and the reality of that role was having a negative effect on her mood and ultimately affected her mental health. In early August 2019 the Claimant visited her GP about her mental health.
24. In mid-August 2019 the Claimant was absent on holiday for two weeks.
25. In late August 2019 the Claimant visited her GP about her mental health. She was prescribed anti-depressant medication which she continued to take until her claim was submitted. She explained to her GP about what was happening at work and her GP encouraged her to go to Citizens' Advice.

26. Towards the end of August 2019 the Claimant had a meeting with Citizens' Advice who gave her advice about the process and time limits for raising tribunal proceedings. She had a further meeting with Citizen's Advice sometime before mid-October.
- 5 27. On 26 August 2019 the Claimant began a period of sick absence from work which absence continues to date. Her absence was described on her fitness work certificate as work-related stress/ post-traumatic stress disorder/symptoms.
- 10 28. On 27 August 2019 the Claimant attended an absent management meeting with Stacy Hendron, HR and Bruce Campbell to discuss her absence from work. She was provided with a stress management form for completion to outline her work related concerns. She was also provided with information regarding their employee assistance programme.
- 15 29. On 16 September 2019 the Claimant provided the Respondent with a very detailed stress management report form. In that form she stated that AB at interview in February 2019 had stated that he wasn't being sexist but I think you would struggle as there is a lot of heavy lifting; that she was offered the Fleet role without a proper interview; that she was unhappy in the Fleet role because it transpired to be an office job, was not similar to that of a mechanic (it was desk based) and she was not being provided with tasks (other than administration) or learning and development (a college course had not been identified); that she thoroughly enjoyed her work experience as a mechanic, her mood brightened and she looked forward to work.
- 20 30. The Claimant was sent a holding response on 25 September 2019 and received a substantive response from HR on 9 October 2019 which sought a meeting to discuss her concerns with the Fleet role and advised that there was capacity for her to move to the mechanic role should she wish which had been discussed with John Campbell and AB who were happy to support this move and were looking into college start dates.
- 25 31. On 10 October 2019 the Claimant advised by email that her main concern was that she was not offered the mechanic role in the first place because she had been discriminated against because of her gender. She felt that offering the role clearly proved she was capable in the first place and they were just trying to brush the issue under the carpet. The Claimant did not take up the offer of
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the mechanics role. She explained that she would have accepted it in July but by October it was too late. The Claimant advised that she wanted to ensure that her statement was being progressed by the Respondent as a formal complaint. On 16 October she advised HR that she had been in touch with ACAS.

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32. On 9 October 2019 the Claimant made contact with ACAS. On 16 October 2019 the Claimant initiated ACAS Early Conciliation which concluded on 30 November 2019.

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33. On 25 October 2019 the Claimant attended a meeting with HR and Bruce Campbell to discuss the points raised in her stress at work form, her absence from work and any support they could provide. She was accompanied by a friend. At this meeting she advised that she could not see herself returning to the Council.

34. On 4 November 2019 the Claimant instructed a solicitor.

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35. On 9 December 2019 the Claimant lodged her ET3 claim form with the Employment Tribunal.

Observations on the evidence

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36. The Claimant was in the main a credible and reliable witness. She had difficulty in remembering the chronology of events but that was understandable given the passage of time.

37. It was submitted that she was young and had issues with her mental health making her extremely vulnerable which impeded her from seeking advice and raising proceedings.

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38. In giving evidence the Claimant came across as intelligent and articulate. She was at times upset in giving evidence but she quickly regained her composure. However we recognized that over 2 years had passed since she was first appointed.

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39. We were provided with a copy of a letter from her GP from April 2021 which referred to her having "a long history of mental health related illness including adjustment disorder, anxiety and low mood but no dates of diagnosis". She first presented to that practice with mental health symptoms on 15 January 2019. The letter did not advise of any dates of diagnosis and we were not provided with a copy of her medical records. There was no medical evidence that she was extremely vulnerable at the relevant time.

40. The Claimant's representative initially sought to lead evidence on the historic causes of her mental issues. We did not consider that to be relevant (not least given the sensitive personal nature of these issues). He accepted that our focus was instead on the state of her mental health at the relevant time.

5 41. Whilst she had pre-existing mental health ill issues, the Claimant's evidence was that she was in good mental health in June 2019. She was however off work with stress in late August 2019 and it is inferred that there was some deterioration in her mental health in the period to late August but it is also noted that she attended work throughout this time. The Claimant was absent with stress from end August 2019 but was in detailed communication and attended meetings with HR in September and October 2019. In early September 2019 she was able to prepare a very detailed statement setting out the issues she had with the fleet role. The Claimant stated in evidence that she found it difficult to stand up to people and to raise issues but this did not square with her
10 correspondence and meetings with HR in July 2019 and September 2019. We did not accept that her youth and mental health at the relevant time impeded her from seeking advice and raising proceedings.

15 42. The Claimant indicated that she had been offered the mechanic role after and because she had advised them that she had contacted ACAS but this inference is not supported by her chronology.

20 43. She stated in evidence that she had not accepted the offer of the mechanic role because it did not coincide with the college courses but the email itself explained that they were exploring college courses. She then explained she thought it too late to start and she was not fit to accept the offer but she did not ask to defer it. The Claimant accepted in cross examination that she felt things
25 had gone too far to resolve.

44. The Claimant accepted in cross examination that she knew the sexist remark was wrong and she knew not appointing her because she was a woman was wrong but "I didn't know the process".

30 **Submissions**

45. Parties made brief oral submission.

46. The Claimant's submissions in summary were –

- a. The Claimant has a history of mental health issues and the tribunal have a wide discretion to take into account limitations caused by her

mental health (*Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA*)

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- b. The Claimant was young and had issues with her mental health making her extremely vulnerable which impeded her from seeking advice and raising proceedings.
- c. Her account was honest and accurate with understandable errors in chronology given her mental health
- d. The Claimant did not know of the wrong until June 2019
- e. The Claimant was trying to resolve issues from July 2019 (*Robinson v Post Office 2000 IRLR 804, EAT*)
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- f. The Claimant did not know of the process or the 3 month time limit - she only became aware on advice from CAB
- g. She acted promptly once she had advice from CAB
- h. The *Walls Meat* principle (see below) applies only to an extension of time on the grounds of reasonable practicability
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47. The Respondent's submissions in summary were –

- a. The Claimant was aware of the alleged sexist remark at interview and that she had not got the position by 15 February 2019. She was aware by that time something was wrong.
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- b. Ignorance as to a cause of action or a time limit must be reasonable (*Walls Meat v Khan [1978] IRLR 499*). The Claimant failed to take reasonable steps to seek advice.
- c. The Claimant raised a number of serious issues with HR about her role but she did not raise the alleged sexist remark or the alleged decision not to appoint her to the mechanic role because she was a woman
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- d. She was aware in late August of the process and time limits for raising tribunal proceedings. She did not contact ACAS until mid October. She did not raise tribunal proceedings until early December. She delayed unreasonably in taking those steps.
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- e. All steps she did take to progress her claim (taking advice from CAB, contacting ACAS, instructing a solicitor) were taken during her sickness absence suggesting her mental health was not the reason for her failure to take action

The Law

48. Section 123 of the Equality Act 2010 states that a complaint under that Act must be made to the employment tribunal before the end of three months starting with the date of the act of discrimination, or such other period as the employment tribunal thinks just and equitable.
49. The discretion to extend time is broader than under the “not reasonably practicable” formula (*DPP v Mills* 1998 IRLR 494), and the court’s power to extend time on the basis of what is just and equitable entitles the tribunal to take into account anything which it judges to be relevant (*Hutchison v Westward Television Ltd* 1977 IRLR 69).
50. The onus is on the claimant to persuade 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)
51. Whilst not mandatory, the following is a useful checklist of relevant factors (*British Coal Corporation v Keeble* 1997 IRLR 336), namely: 1) Prejudice; 2) The length of, and reasons for the delay; 3) The extent to which the cogency of evidence is likely to be affected by the delay; 4) The extent to which the party sued has co-operated with requests for information; 5) The promptness with which the claimant acted once he knew the facts giving rise to the cause of action; and 6) The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.
52. The Court of Appeal in *Southwark London Borough Council v Afolabi* 2003 ICR 800 confirmed that, while that list provides a useful guide for tribunals, it need not be adhered to slavishly. There are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent.
53. We required to exercise our discretion on the basis of the Claimant’s pleadings taken at their highest. What that means is that we required to assume that the alleged acts of discrimination happened exactly as the claimant said they did. It is not possible for us to form a view on the merits of any such claim without evidence being heard other than for us to note that the claim is a stateable one.
- Length of delay

54. The alleged act of direct discrimination occurred on 15 February 2019 when she was advised she had not been appointed to the mechanics role. The claim was lodged on 9 December 2019 some 10 month later. This must be considered in the context of a three month time limit set as provided for by parliament in the statute.

Reasons for the delay

55. The Claimant had inferred from comments made at interview in February 2019 that she would not be appointed to the role because she was female. She was aware that she was not appointed in February. When she started in March 2019 she established that one of the apprentice mechanics who had been appointed was male. By the start of June 2019 she had established that the other apprentice mechanics who had been appointed were also male. She believed they had the same qualifications as her. By early June 2019 she was fully aware of the facts giving rise to the cause of action.

56. The delay caused by a claimant awaiting completion of a relevant internal procedure may justify an extension of the time limit but it is only one factor to be considered in any particular case (*Robinson v Post Office 2000 IRLR 804, EAT*). In July 2019 the Claimant was focused on resolving the issues with her Fleet role in discussion with HR. She did not raise with HR failure to offer her the mechanics role either at all or because she was a woman. She was not endeavoring to resolve the subject matter of her claim. Her attempts to do that arose in October 2019 when she advised the Council that she no longer wished to work there and she sought an alternative resolution with the assistance of ACAS.

57. It was submitted that the reason for the delay in raising proceedings was that she was young and had issues with her mental health making her extremely vulnerable which impeded her from seeking advice and raising proceedings. We did not accept that her youth and mental health impeded her from taking the necessary steps. We did not accept that her youth and mental health was the reason for the delay in raising proceeding. The reason for the delay was that her focus was on progressing the issues she had with the fleet role.

Prejudice

58. There is significant prejudice to the claimant if the claim is not permitted to proceed. Her claim would be at an end. There is a degree of prejudice to the

respondents if the claim is permitted to proceed. They then face a claim which otherwise they would not. However they attended the hearing ready to proceed with a final hearing which was converted on the day of the hearing to a hearing on time bar. They would however face some prejudice regarding the cogency of the evidence.

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Cogency of evidence

59. A delay of 10 months would have an effect on the quality of the evidence. There were no minutes of the relevant meetings in February 2019. A delay in raising the claim informally until October 2019 and formally until December 2019 deprived the Respondent of the opportunity to precognose the relevant witnesses when the events of the interview and the appointment decisions would be clearer in the minds of interviewees and the decision makers. It is noted that there was a greater delay of 19 months between proceedings being raised and the final hearing but by that stage the Respondent would have already taken those preparatory steps.

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Co-operated with requests

60. There was no suggestion that the Respondent did not cooperate with any requests for information.

Promptness

61. The focus of the Claimant's concern was her severe disappointment with the Fleet role and not her claim that she had not been selected for the mechanic role because she was a woman. In July 2019 the Claimant raised a number of issues with HR about AB but she did not raise with HR or otherwise that he had made a sexist remark at interview and/or that she had not been selected for the mechanic role because she was a woman. She did not raise these issues with the Respondent until October 2019, 8 months after her interview.

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Steps taken to obtain advice

62. The Claimant was aware and understood that making a sexist remark at interview and not selecting her for the mechanic role because she was a woman was wrong. She was not initially aware that she required to raise tribunal proceedings within 3 months of the act of discrimination or how to go about raising those proceedings. The Claimant became aware of that requirement after her visit to CAB at the end of August 2019.

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63. The law requires ignorance of legal rights and procedures to be reasonable (*Bowden v Ministry of Justice* UKEAT/0018/17 which supports the application of the *Walls Meat* principle in the context of the just and equitable extension of time). It is clear that the Claimant had the opportunity of taking advice on the wrong in June, July and August before her sick absence commenced on 26 August. The Claimant did not take any steps to seek advice until towards the end August (7 months after the interview at which the sexist remarks were made and almost 3 months after she established the gender and qualifications of all of the apprentice mechanics). The Claimant did not proceed with Early Conciliation until 16 October (1 ½ months after she had first received advice from CAB). The Claimant did not raise legal proceedings until 9 December (1 month after she had appointed a solicitor).
64. In our view, whilst there was a basis upon which to extend the time period by 3 months (given that she did not find out about the gender and qualifications of all of the mechanics until early June), there was no impediment to the Claimant making relevant enquiries about the wrong she perceived and then initiating tribunal proceedings by commencing early conciliation within that extended time period.
65. Having regard to the length of the delay, the reasons for that delay, the effect on the cogency of evidence, the lack promptness of her action once knowledge was acquired, the steps taken by the Claimant, the prejudice to the Claimant, the prejudice to the Respondent, it is on balance not considered just and equitable to extend the time limit until 9 December 2019 when her claim was

presented. Accordingly the claim has been presented out of time and is therefore unable to proceed to a full hearing.

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Employment Judge: Michelle Sutherland
Date of Judgment: 31 May 2021
Entered in register: 02 June 2021
and copied to parties

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