

## EMPLOYMENT TRIBUNALS

**Claimant**  
**Ms Daniela Serban**

v

**Respondent**  
**Sargents Bakeries Ltd**

## PRELIMINARY HEARING

**Heard at: Leeds (By CVP)**

**On: 09 July 2021**

**Before: Employment Judge R S Drake (Sitting alone in Private)**

### **Appearances**

**For the Claimant:** In Person

**For the Respondent:** Mr D Spencer (Operations Manager)

## JUDGEMENT

1. Neither the religious discrimination nor the unfair dismissal complaints were presented by the Claimant in time.
2. The complaint of religious discrimination was presented outside the primary limitation period prescribed by Section 123(1)(a) of the Equality Act 2010 ("EqA") and not within such period as this Tribunal finds just and equitable for the purposes of Section 123(1)(b) EqA so as to enable it to extend time.
3. The complaint of unfair dismissal claim was presented outside the primary limitation period prescribed by Section 111(2)(a) of the Employment Rights Act 1996 ("ERA") and not within such further period as the Tribunal can consider reasonable for the purposes of Section 111(2)(b) ERA, as the Claimant did not demonstrate that it was not reasonably practicable for her to present it within the primary limitation period.
4. Further all claims in these proceedings were presented more than 3 months after commencement and completion of the Early Conciliation process required by Section 18A of the Employment Tribunals Act 1996, and that process was commenced more than three months after the last date of any event complained of.
5. These claims (all of them) are therefore dismissed.

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face-to-face hearing because of the Covid19 pandemic.

## REASONS

- 1 This decision and reasons were reserved on the day of hearing and are now being provided in accordance with the power vested in the Tribunal by Rule 62(2) and (3) of Schedule 1 to the Employment Tribunals (Constitution & Rules) Regs 2013 (The "Rules").
- 2 It was common ground that the last date on which the Claimant asserted an act of discrimination occurred was 19 December 2019. The date upon which primary limitation periods for both claims expired therefore was 18 March 2020. She only first sought Early Conciliation via ACAS on 29 May 2020 and presented her claims to Tribunal on 13 November 2020. Both these actions were therefore (by definition) commenced on a date outside the primary limitation period. The Claimant complains of direct religious discrimination as defined by Sections 4 and 13 of the Equality Act 2010 ("EqA"), and harassment as defined in Section 26 EqA. Also, though she accepts her services were at all times between April 2015 and 19 December 2019 provided to the Respondents via an Agency, she asserts that she was unfairly dismissed as an employee of/by the Respondents. These are the only claims extant as at today's date. The allegations/claims relate to the same course or series of events starting on 26 September 2019 and culminating in an incident on 19 December 2019. The Respondents assert that they were never employers of the Claimant, and they deny that they acted contrary to Sections 13 or 26 EqA. Further, and in any event, as a significant and potentially determinative preliminary point, they assert that all the claims are out of time to the extent that they should be dismissed and not be allowed to proceed to substantive hearing. The Claimant herself recognises and accepts that all the claims are out of time.
- 3 The time limit for issuing the discrimination claim is provided for in Section 123 EqA and is as follows:

"... Proceedings on a complaint within Section 120 may not (*my emphasis*) be brought after the end of –

- (a) the period of three months starting with the date of the act to which the complaint relates (*in this case, I find based on common ground that the last date this could be was 19 December 2019*) (the "Primary Period") – or

- (b) such further period as the Employment Tribunal thinks just and equitable (the “Extended Period”) ... “

The time limited for presenting an unfair dismissal claim is provided for by Section 111(2) ERA and is as follows:-

“ ... An Employment Tribunal shall not (*my emphasis*) consider a complaint under this section unless it is presented to the 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 reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months ... “
- 4 I had a bundle of agreed documents to consider plus a written statement from the Claimant, and I heard detailed and extremely helpful submissions from the parties’ themselves. I record gratitude to the official interpreter whose assistance to this Tribunal was of great value in ensuring that the Claimant could present her case effectively via interpretation, and could ensure that her testimony and questions put to and articulated by her, and responses could also be faithfully interpreted.
- 5 The case law (of which I was already aware) and to which I directed the parties included the following: -

5.1 **Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379** from which I note that the time limits for issue of proceedings “... is a jurisdictional and not a procedural issue ... “which means that if a case is out of time and time is not extendable, the Tribunal simply has no power or jurisdiction to hear the claim (*my emphasis*);

5.2 **Palmer & Saunders v Southend BC [1984] IRLR 119** from which I note inter alia that I am to consider the substantial cause (if shown) of the Claimant’s failure to issue within the Primary Period, whether there was any impediment preventing issuing in time, whether or not the Claimant was aware of her right to issue a claim, whether the Respondent had done anything to mislead or impede the Claimant issuing her claim, whether the Claimant had access to advice, and lastly whether delay was in any way attributable to that advice.

5.3 **British Coal v Keeble [1997] IRLR 336** from which I note inter alia that I am to consider the length and reasons given for delay, the extent to which delay may affect cogency and recollection of evidence, any promptness of action by the Claimant once, after the Primary Period had expired, she became aware of the alleged facts which gave rise to his cause of action, the steps she took once she knew of the possibility of taking action, and lastly the balance of prejudice to the Claimant of not allowing the claim to proceed and to the Respondent in allowing it to do so;

5.4 **Robertson v Bexley Community Centre [2003] IRLR 434** from which I note that application of S123(b) involves the exercise of a discretion which is an

exception rather than the rule; this point is augmented by the EAT's decision in **Simms v Transco [2001] All ER 245** which is authority for the proposition that whilst the fact a fair trial is impossible will most likely preclude extension of time, it does not follow that merely because a fair trial is still possible time should be extended – each case is fact specific;

5.5 **Afolabi v Southwark BC [2003] ICR 800** from which I note that it is my duty to ensure no significant circumstance is left out of my consideration when considering whether to exercise my discretion or not, and also that if I fail to take account of prejudice to a Respondent of allowing a claim to proceed out of time, I will be in error.

5.6 **DCA v Jones [2008] IRLR 128** in which the Court of Appeal held that a Tribunal had been entitled to consider that a Claimant's own inability to admit to himself that he was mentally ill, and disabled was a factor potentially justifying delay in presenting a claim.

6 I noted the evidential burden rested with the Claimant and heard her evidence given by written statement and oral testimony (assisted by a Romanian speaking interpreter Ms Treifi, to whom I express my immense gratitude for her assistance to the Tribunal) in and to which a number of the documents were referred. I considered all this material in my post-hearing deliberations.

7 I am satisfied that the Claimant gave her evidence sincerely and believing it to be the truth. However, I noted that she tended to stray from the narrow issues I had to consider in what was after all a preliminary hearing about time limits and the limited basis for extending them, and she was clearly exercised heavily by her perception of the alleged wrongs done to her. I explained these were not within my purview as a Judge at a Preliminary hearing determining jurisdictional issues, but I recognise it was hard to reconcile herself to this legal reality.

8 In particular, my findings on the evidence significant to the guidance set out above by statute and case law are as follows:

8.1 The Claimant agrees that the last date on which anything happened giving her cause for complaint was 19 December 2019.

8.2 She is clearly sufficiently sophisticated and knowledgeable to marshal necessary skills in the use of a computer, smart phone and other IT materials to be able to use them for communications and research;

8.3 Her services were supplied to the Respondents via an agency but she was never ever directly engaged as an employee; she aspired to becoming an employee, but her aspirations were never fulfilled; to some degree she takes exception to this, and feels that she was better qualified than certain other agency workers who were taken on as employees by the Respondents, but the main thrust of her claim is that when her engagement with the Respondents was terminated, this amounted to unfair dismissal, and that such dismissal and failure to offer her continuing engagements amounted to discrimination on grounds of her religion – she is an Orthodox Christian;

8.3 She accepted and I find that the last date upon which an event occurred which could form the basis of an unfair dismissal claim or a religious discrimination claim was 19 December 2019; from that date onwards she sought to complain about the way the Respondents had dealt with an incident in which she was involved and raised two grievances which gave rise to a formal grievance hearing in December 2019 and an informal airing of a grievance in January 2020; she says that she did not get satisfactory responses and nor was she offered an opportunity to appeal. However, the Respondents say that they did reach conclusions and make them known to her, and she accepts that she received responses to both, the last being on 20 February 2020; she was dissatisfied with both, but did not issue proceedings until 13 November 2020 and she did not even commence the early conciliation process until 27 May 2020;

8.9 Because the Claimant was not legally represented, I sought carefully to elicit from her an explanation as to what if anything had prevented her after 19 December 2019 from issuing her claim before 18 March 2020, but all she could say was that she was awaiting the outcome of her grievance complaints and that she felt that because she was awaiting resolution of her issues, she was thereby misled into thinking that there would be a solution which would obviate the need to issue proceedings; she admitted to me that both before and after 19 December 2019 she had been consulting her Union (GMB) and taking advice, and the last time she had any contact with the Union, which decided not to support her, was some time in January 2020, but I find that she certainly had available to her competent advice about what she could do to expedite resolution of her disputes or otherwise protect her interests by issuing proceedings, but I find that she failed to issue her proceedings without satisfactory explanation;

8.10 Initially, she sought to argue that she was distracted by the need to care for and manage the situation of a child who had been injured at school and whose care necessitated return to Romania, but I find that on her evidence, this all happened following an accident on 5 December 2018 and that the return to Romania was in July 2019 and that she brought the child back in December 2020 and therefore this all happened before the primary limitation period started to run and therefore had no effect upon it;

8.11 Much of the Claimant's evidence before me today related to events which post-dated the expiry of the primary limitation on 18 March 2020, but did not satisfactorily explain why there was considerable further delay before commencement of the Early Conciliation process on 29 May 2020, and further delay when that process ended 26 June 2020 before commencement of proceedings on 13 November 2020;

8.12 Despite my efforts to ensure that the Claimant had an opportunity to explain (if she could) the reasons for her delay in issuing her claims, at worst she could give no explanation whatsoever, or at best she could not give me an explanation which I found to be satisfactory; the only explanation which she made was that she was waiting for responses from the Respondent, but on the evidence she had such responses by 20 February 2020, and thus what she really meant was that she was awaiting responses which were satisfactory to her which she never received;

8.13 She accepted that she had not been so physically indisposed as to be unable to manage her affairs and set her mind to pursuing claims, but I can accept that in January 2020 she had her last contact with her Union, but that this was still within the limitation period and did not prevent her from issuing her claim within that period.

8.14 There was no evidence before me of any obstacle preventing the Claimant from issuing her claim within the Primary Period, and certainly no barrier or impediment erected/caused by the Respondent; this addresses the points in **Palmer& Saunders** and also **Keeble**.

8.15 Two points are particularly significant: -

8.15.1 The Claimant's complaint is limited solely to the events upto and including 19 December 2019 and if her claims are struck out on the basis they are out of time, she would lose the opportunity to pursue those claims on their merits; In contrast, if the claims were allowed to proceed, the Respondent would be put to the task of defending itself in relation to events which are not contested but which are clouded by the passage of time and no real argument in the Claimants case of how or why she says that the acts complained of were because of her religion so there is little which is indicative to me, such as to indicate undeniably strong merits favouring the Claimant; When considering what is just and equitable, I have to take account of any imbalance in this respect but seen together with all other relevant matters as found above;

8.15.2 Similarly, I am to take account of the actual duration of time which flowed in the Further Period, which in this case was from 18 March 2020 to 13 November 2020 i.e., 240 days;

8.16 All the factors I have noted above I find favoured the Respondent or at least demonstrated that the Claimant could not establish she had issued her proceedings within a further period after expiry of the Primary Period such as could be characterised as just and equitable; furthermore I conclude on my findings of fact that the Claimant's evidence does not support the argument (which she needs to prove) that it was not reasonably practicable for her to issue her claim before 18 March 2020.

9 Applying the law to these findings, and taking account of the guidance referred to above, I find that the Claimant had access to advice before 18 March 2020 and access to means to research her position and lodge a claim. She was eventually able to do so by 13 November 2020 and there is no good reason before me to explain the delay.

10 Therefore, I conclude that a delay as long as 240 days beyond the Primary Period is such that it would not be just or equitable to extend the Primary Period at all. I have considered the balance of prejudice and though I recognise that a Claimant whose claim is struck out at this stage is disadvantaged substantially, I also recognise

that a Respondent which is put to the time, trouble, and cost of defending a claim based on an as yet unsubstantiated allegation of religion as a basis for alleged discrimination, is also substantially disadvantaged. This disadvantage to the Respondents outweighs the Claimant's disadvantage, so the balance of prejudice does not favour the Claimant as much as she says it does, or that it upsets and clearly outweighs the other significant and many points referred to in paragraphs 8.15 above. This addresses the points in **Robertson**, **Simms** and **Afolabi** .

11 Accordingly I find that the claims were issued out of time for not being issued within the Primary Periods, and that in the circumstances as found in this case, and bearing in mind the principal guidance that extending time is the exercise of a discretion which should be exceptional in discrimination cases, it would not be just and equitable to extend time beyond the Primary Period. Thus, the discrimination claim is dismissed as the Tribunal has no jurisdiction to hear it. This deals with both the **Dedman** and again the **Robertson** points. Further, the unfair dismissal claim must be struck out, as the Claimant has not shown it was not reasonably practicable to issue her proceedings within time.

Employment Judge **R S Drake**

Date: 09 July 2021