



EMPLOYMENT TRIBUNALS

Claimant: Ms R Tabuko

Respondent: (1) CIS Security Limited
(2) Metodi Metodiev

HELD AT: Remote hearing by Cloud Video Platform **ON:** 17 and 18 June 2021

BEFORE: Employment Judge Barker
Mr R Singh
Mrs A Williams

REPRESENTATION:

Claimant: Ms Wright, counsel

Respondent: (for the First Respondent) Mr Harris, counsel
(for the Second Respondent) Mr Gloag, counsel

JUDGMENT

1. The claimant's claims of sex discrimination and race discrimination against the second respondent were not presented within the primary time limit in s123 Equality Act 2010.
2. The claims against the second respondent were not presented within such time as the employment tribunal thinks just and equitable in the circumstances of the case, as per s123(1)(b) Equality Act 2010.
3. The claimant's claims against the second respondent are therefore dismissed. Her claims against the first respondent will proceed and will continue to be heard at the resumed hearing.

REASONS

1. The claimant's claims against the first and second respondent were partly heard at a hearing on 17 and 18 June 2021. At the conclusion of the time available, it

became clear that the parties would need to attend for further hearing time to finish hearing the evidence and to allow for final submissions to be made. The parties agreed that the claimant's claims against the second respondent were issued outside the primary time limit in s123 Equality Act 2010.

2. At an earlier case management hearing, it was directed that the issue of any extension of time regarding the claimant's claims against the second respondent would be considered at the final hearing.
3. The Tribunal had heard evidence from the claimant and the first respondent's witnesses, but not the second respondent. Evidence and submissions had been presented to the Tribunal on the issue of whether the claimant's claims against the second respondent were presented within such time as may be found to be just and equitable.
4. The Tribunal adjourned to consider these submissions. Recorded below is the Tribunal's decision on the issue of a just and equitable extension of time only.

Findings of fact on the issue of time limits

5. The claimant's complaints against the second respondent arise out of an incident on 24 December 2018 at which the claimant says the second respondent subjected her to direct discrimination and harassed her on the grounds of her sex and her race. The claimant also claims direct sex and race discrimination and harassment on the grounds of sex and race against the first respondent, on the basis of its vicarious liability for the second respondent and also in relation to other allegations.
6. As of 27 December 2018, it is agreed by the parties that the claimant was in contact with and receiving the assistance of her union representative David Gibbs, in relation to the incident of 24 December 2018. This assistance continued in relation to a written complaint of the incident, filed on 30 December 2018. The claimant then engaged in ACAS Early Conciliation against the first respondent from 18 January 2019 to 18 February 2019. The claimant submitted a grievance to the first respondent on 23 January 2019 and attended a grievance hearing on 12 February 2019, accompanied by her trade union representative. The outcome of this was given to her on 20 February 2019 and she appealed against it the same day.
7. Her trade union instructed solicitors on her behalf who made contact with the claimant on 28 February 2019.
8. The claimant attended an appeal hearing against her grievance outcome on 6 March 2019, accompanied by her union representative.
9. From 12-13 March 2019 she engaged in ACAS Early Conciliation against the second respondent. On 21 March 2019 she received the outcome of her grievance appeal and resigned the same day.

10. She engaged in further ACAS Conciliation for one day on 4 April 2019 with the first respondent and submitted her ET1 claim form against both respondents, assisted by her solicitors, on 18 April 2019.
11. The complaints made against the second respondent are in relation to contact with him that ended on 24 December 2018. The claimant told the Tribunal that she did not see him again after that date. Time therefore started to run, in terms of limitation for presenting a claim, as of 24 December 2018.
12. The primary limitation period of three months for presenting a claim would have expired on 23 March 2019. ACAS Early Conciliation extended this by one day, to 24 March 2019. The ET1 was presented on 18 April 2019. The claim against the second respondent is three and a half weeks late.
13. The claimant's submissions to the Tribunal were that there was some confusion over when limitation expired and also that her mental health was a contributing factor in the delay. The Tribunal accepts that the claimant was receiving counselling and was under the care of her GP for her mental health issues at the time, for the period after the incident of 24 December 2018 and until 18 April 2019. It is accepted that this would have had some effect on her ability to engage with legal proceedings. It is also accepted that the incident on 24 December 2018 caused her significant distress. The claimant's counsel told the Tribunal that the claimant considers the second respondent's actions to be at the heart of her claim.
14. However, it is clear that the claimant was receiving assistance from her trade union and their solicitors for the entire period in question, as of 28 December 2018. She engaged with numerous stages of the first respondent's internal processes. She raised a grievance and an appeal against the outcome of it. She engaged in repeated ACAS conciliation. She issued a letter of resignation. She made a complaint about the second respondent to the police. It is clear that she was able to engage with her complaints and the related processes, and it cannot be said that she was without assistance in doing so.
15. On the balance of probabilities and from the evidence before us, we find that the claimant's mental health issues did not prevent or restrict her to any material degree in her engagement with her complaints and her actions taken against the first and second respondent.
16. She told the Tribunal that there was some "*confusion*" over the issue of limitation, but there is, in our view, no good reason on the evidence before us for there to have been any confusion in relation to when limitation would start to run from in relation to her claims against the second respondent. It is as clear as it possibly could be, that there was a single incident of discrimination on 24 December by the second respondent and no further contact thereafter. Limitation would clearly start to run from 24 December. A trade union representative and the union's solicitors could not, in our view, have been in any way confused in this regard.

17. Other than the reasons set out above, the claimant has provided no further explanation for the delay.
18. She informed the Tribunal via her representative that she considers the second respondent's actions to be at the heart of her claim. However, the Tribunal notes that it was open to her to commence proceedings against him (and the first respondent) at any time after 24 December 2018, irrespective of whether her employment with the first respondent continued or not.
19. Not all claimants that bring their claims to an Employment Tribunal receive the assistance of a trade union from the very outset of their complaints, and a significant number do not receive the assistance of legal representatives. The claimant has received the assistance of both her trade union and their solicitors. She makes no complaint about the accuracy or timeliness of her advice from them.

The Law

20. Discrimination complaints are subject to the limitation periods set out in the Equality Act 2010 at s123(1), as follows:

“Proceedings on a complaint within section 120 may not be brought after the end of –
 - (a) the period of 3 months starting with the date to which the complaint relates, or*
 - (b) such other period as the employment tribunal thinks just and equitable.”*
21. The Tribunal must consider a number of factors in deciding whether a claim presented out of time can still be considered on a “just and equitable” basis. These include, but are not limited to, the prejudice each party would suffer as a result of the decision reached, and the circumstances of the case, such as the length of the delay and the reasons for the delay, the extent to which the evidence might be affected by the delay and the steps taken by the claimant to obtain advice once she knew of the possibility of taking action. The Tribunal must also take into account the merits of the claim.
22. It is not the case that it is never just and equitable to extend time where there is no good explanation for the delay. *Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA* held that any explanation advanced by the claimant is a matter to which the Tribunal is to have regard but is not determinative of whether or not the Tribunal should extend time.
23. In discrimination claims, a claimant must engage with ACAS Early Conciliation before an ET1 can be submitted. The ACAS Early Conciliation must begin within three months of the date of the act complained of.
24. In the case of *Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA* a Tribunal refused to allow a race discrimination claim to be presented three days late. While the three-day delay was not substantial, the

alleged discriminatory acts took place long before the claimant's employment terminated, and he could have complained of them in their own right as soon as they occurred or immediately following his resignation.

Application of the law to the facts found.

25. Limitation periods are set down in statute and parties and Tribunals must have regard to them. They go to the Tribunal's jurisdiction and if a claim is not brought in time and cannot be brought within a statutory "escape clause", such as the just and equitable extension of time in s123(1)(b) Equality Act 2010, a Tribunal has no jurisdiction to hear it.
26. It is accepted by the claimant that her claim against the second respondent was not brought in time. Can her claim be said to have been presented within such further period as the Tribunal finds was "just and equitable"? Tribunals have a wide discretion to consider all the facts relevant in each particular case in deciding how to exercise their discretion.
27. In the claimant's case, it is clear that the delay is relatively short, in that the claim is three and a half weeks late. The cogency of the evidence would not be affected by such a delay.
28. It is clear that the claimant acted promptly to obtain advice once she knew about the possibility of taking action. She engaged in ACAS conciliation with the assistance of her advisors prior to the expiry of the time limit.
29. However, inexplicably, she did not submit her ET1 claim form within the primary time limit. No persuasive reason has been provided to the Tribunal as to why this was the case. It is not suggested that the claimant was ignorant of her rights, or that she has received incorrect advice from her union or her solicitors.
30. She informed the Tribunal that her health was significantly impacted by stress and anxiety. However, she has engaged in a number of actions against the respondents between the incident itself and the expiry of the primary time limit. The claimant's circumstances did not change, according to the evidence before us, between 21 March 2019 when she resigned, 24 March when limitation expired and 18 April when the ET1 was submitted. She was able to engage in ACAS conciliation on 4 April with the first respondent. She was still assisted by the union and her solicitors, so far as we are aware. She has not been able to explain particularly why the ET1 claim form could not be submitted in time when other steps were taken during that period by her and/or her advisors.
31. In terms of the balance of hardship and prejudice to the parties in allowing or refusing the claim to proceed, it is evident that the claimant will still have a cause of action for her claims against the first respondent, who is ordinarily vicariously liable for the actions of the second respondent in accordance with s109 Equality Act 2010. The first respondent's counsel has indicated that there are circumstances in these proceedings which ought to lead the Tribunal to conclude that the actions of the second respondent were not carried out "in the course of

employment” such that the first respondent is not vicariously liable. He will rely (*inter alia*) on the case of *WM Morrisons Supermarket [2020] UKSC 12*, a case not involving discrimination at work but vicarious liability by an employer for breaches of the Data Protection Act by an employee. That case is not, on the basis of the evidence and submissions currently before us, one which the Tribunal considers to be determinative of the first respondent’s prospects of success in relation to s109 Equality Act 2010.

32. There would appear to be, as matters currently stand, no danger of the financial collapse of the first respondent such that the claimant is at risk of not being able to recover compensation from them in the event that she is successful in her claims. On the contrary, the Tribunal understands that the second respondent’s financial circumstances are precarious, such that an award against him may result in his bankruptcy.
33. The prejudice to the second respondent in allowing the claim to proceed is that he will have to attend at the resumed hearing to be cross-examined. He has already had to prepare for the hearing by instructing counsel and providing a witness statement and evidence and so by continuing with a resumed hearing he will incur less expense and prejudice than if this matter were at an earlier stage in the proceedings. However, he will still have to attend the hearing and pay counsel’s fees for attending as his representative. He may, of course, be the subject of a decision against him and be required to pay some compensation to the claimant, which we have been informed may have significant adverse financial consequences for him.

Conclusion

34. Taking all of the above factors into account, the Tribunal finds that the claimant has not provided an adequate explanation for the delay in presenting her claim. Although a failure to provide an explanation for a delay in bringing a claim does not inevitably result in an extension of time being refused, it is a factor for the Tribunal to consider.
35. Given the claimant’s availability of a remedy from the first respondent for the second respondent’s actions by means of vicarious liability, the prejudice to the claimant in not allowing her claims to proceed against the second respondent is less than it would be were her claim against the second respondent alone. The prejudice to the second respondent in allowing the claims to proceed is significant in terms of the financial risk to him and the prejudice in incurring further legal costs.
36. Therefore, on balance we do not find that the claimant’s claims against the second respondent should be subject to an extension of time. They are hereby dismissed.

Case No. 2301367/2019

Date_____26 July 2021_____

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