EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102371/2020 (P)

Preliminary Hearing Held at Glasgow
On 25 February 2021

Employment Judge M Robison

Ms G O'Hare	**Claimant** **Represented by** **Ms A Evans-Jones** **Solicitor**
Shoe Zone Retail Ltd	**Respondent** **Represented by** **Mr M O'Carroll** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal finds that:

1. the claim has been lodged out of time;

2. it is just and equitable to extend time in terms of section 123(1)(b) of the Equality Act 2010.

The claim should now be listed for a final hearing.

REASONS

Introduction

1. This preliminary hearing was listed following a case management preliminary hearing to consider the question of time bar only. While it had originally been intended that it would take place by CVP, for various perfectly legitimate reasons, that was changed to an in person hearing.

2. At the outset of the hearing I took some time to clarify with parties the exact parameters of the claimant's argument. Mr O'Carroll advised that this did not entirely correspond with the reasoning set out in the e-mail from Ms Evans-Jones dated 23 February 2021. I offered him an opportunity for time to reflect on his cross-examination questions after hearing evidence, but in due course he indicated that was not required.

3. I heard evidence on oath only from the claimant. I was referred to a joint file of documents, referred to in this judgment by page number.

Findings in fact

4. On the basis of the evidence heard, and the documents referred to, the Tribunal makes the following relevant findings in fact.

5. The claimant commenced employment as a shop assistant on 5 January 2018, when she was 16 years old. She was 17 at the time of her dismissal on 13 December 2019. Prior to dismissal on 28 November 2019 she was suspended.

6. On 29 November 2019 she consulted solicitors who still represent her in these proceedings. So far as she can recall she was not advised about time limits.

7. She consulted her solicitors in January or February 2020. She believes that she was on that occasion advised about time limits.

8. She advised her solicitors that she had been dismissed on 18 December 2019 but this was incorrect. She now accepts that she was dismissed on 13 December 2019.

9. At the time of her dismissal the claimant was pregnant. She had informed the respondent that she was pregnant around mid-November.

10. This was the claimant's second pregnancy. She had been pregnant aged 15 but had miscarried.

11. While the claimant was employed by the respondent her basic wage was £171 per week, but she would earn up to £300 per week including overtime.

12. The claimant lives with her mother and father and siblings. While in employment she was contributing to the family income through rent.

13. Her partner works on a zero hours contract and gets infrequent irregular shifts.

14. The loss of her job caused the claimant anxiety because she was concerned about her finances especially since she was pregnant.

15. Due to having lost her first baby, the claimant was particularly anxious during her second pregnancy.

16. The claimant ascertained following tests that she is rhesus negative blood group. She looked up the implications of that on the NHS website.

17. The claimant received written correspondence from her solicitors which she did not understand. In particular she was asked to complete two forms but she contacted her solicitors and got assistance in completing them.

18. The claimant became stressed and frustrated and went into a depression. She was worried about the baby; she was worried about her finances. She believed

she had "brain fog" which left her panicking, confused and stressed. She became disorganised.

19. These worries were compounded by the impact of the pandemic which decreased her father's income and the income coming into the household.

20. The implications of the pandemic also caused anxiety because she was pregnant, and three of her family members, including her mother and father, have underlying health conditions.

21. The claimant's daughter was born on 27 June 2020.

22. Shortly after her daughter was born she located a folder which she had mislaid which had papers relating to her medical appointments and to her dealings with the respondent. This included the letter of dismissal at page 39 which she had not been able to locate at the time she was instructing her solicitor.

23. She had also difficulties accessing old e-mails because her phone had broken. She borrowed her sister's phone but she had forgotten the password for her e-mail account. She said she lost access to it just after she appealed against the decision (that is after 16 December). This meant also that she had limited access to correspondence.

Relevant law

24. The relevant provisions relating to time limits in discrimination cases is set out in Section 123 of the Equality Act 2010 which states:

> (1) Subject to Sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
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> (a) the period of 3 months starting with the date of the act to which the complaint relates, or

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

25. Thus, a complaint 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.

26. Conduct extending over a period is to be treated as done at the end of the period; failure to do something is to be treated as occurring when the period in question decided upon it.

27. Section 140B relates to further extensions of time limits in circumstances where a claimant is engaged in early conciliation before instigation of proceedings.

28. 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).

29. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time, but the exercise of discretion is the exception rather than the rule (*Robertson v Bexley Community Centre* 2003 IRLR 434).

30. Whilst not mandatory, the list of factors contained in section 33 of the Limitation Act 1980 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.

31. 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. While it is important that the tribunal does not leave out of account any important factor, the s33 factors should not be elevated into a legal requirement. The Court went on to suggest that 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.

32. The Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* 2021 EWCA Civ 23recently confirmed that a rigid adherence to what have become known as the *Keeble* factors is to be discouraged when dealing with what is a very broad general discretion on the just and equitable question.

Tribunal deliberations

33. This is a pregnancy and sex discrimination claim where it is conceded by the claimant that the claim is out of time. The focus then of these deliberations is on the just and equitable extension question.

34. Notwithstanding Mr O'Carroll's submissions I found the claimant to be a credible witness. Indeed contrary to Mr O'Carroll's submission, I found the claimant to be unsophisticated and inexperienced, which is perhaps to be expected given her age. I accepted her evidence in its entirety as is evident

from the findings in fact, and this is significant when it comes to applying the legal tests to the facts as found.

35. Parties as I understood it were in agreement about the law.

36. Relying on *Hutchison,* Ms Evans-Jones submitted that the Tribunal's discretion is wide, that there is no definitive list of factors to consider and any factor can be relevant; it depends on the facts of the case; but there are certain factors which are almost always relevant.

37. Mr O'Carroll agreed, making reference to *Adediji,* and submitted that the Keeble factors not a mechanical checklist but a useful starting point. The test is multifactorial and no single factor determinative. The Court of Appeal accepted that the tribunal below should place considerable weight on the absence of a good reason being advanced or if they did not believe the claimant.

38. By reference to *Robertson v Bexley*, Mr O'Carroll argued that the onus is on the claimant, and unless the claimant can put forward a good reason for the delay, then extension is the exception rather than the rule.

39. Both parties agreed that the factors which will almost always be relevant are the length and reason for the delay and the prejudice to the claimant, and I consider these factors first as Ms Evan-Jones did. I then turn to other relevant *Keeble* factors, and to additional relevant factors here. I was also alert to the fact that the facts did not necessarily support one of the factors exclusively, but there was some overlap.

Length of the delay

40. I sought during discussions to understand the exact extent of the delay in this case.

41. Actually, the ET1 stated that the claimant was dismissed on 18 December 2020, which was clearly an error, because what was intended was 18 December 2019. This is the date which the claimant advised her solicitors was the date she was dismissed.

42. On the face of things then I took the view that the claim was in time. Had the claimant been dismissed on 18 December 2019, then she would require to contact ACAS to get the benefit of the extension of time by 17 March 2020, which it is clear that she did given the date on the EC certificate. The EC certificate was issued on 1 April 2020. The claimant is given the benefit of a one-month extension. The claim was lodged on 30 April. It is apparent that the claimant's solicitors were under that impression that the claim was lodged in time.

43. Mr O'Carroll argued that even if the claimant had been dismissed on 18 December 2019, still the claim would have been lodged out of time. This was because of the implications of Section 140B of the Equality Act 2010, which states in working out when the time limit expires the period with the day after Day A and ending with Day B is not to be counted, where Day A is the date that ACAS is contacted and Day B is the date that the EC certificate is issued.

44. I take it in this case that day A is 17 March, ie that date that the claimant contacted ACAS. The time limit would have expired on that date, 17 March. Section 140B(4) states that where the time limit would expire during the period *beginning with Day A*,….that means day A is included for time limit purposes. The day after day A is the first date to count when calculating how many additional days to extend the time limit (which would be at least one month where the time limit expires on a day beginning with day A, as in this case, on 17 March, although may be less if ACAS was intimated before the time limit expired).

45. This is clearly a hypothetical scenario because the claimant was in fact dismissed on 13 December 2019. As I understood his argument, Mr O'Carroll

said this was notwithstanding relevant because it impacted on the length of the delay under consideration. That may well be right, but I could only see that it makes a difference of one day.

46. In any event in my view the deadline to lodge a claim (or contact ACAS) was 12 March 2020. where the claim is lodged after that date the claimant does not get the benefit of any extension. The claim was lodged on 30 April 2020, that is seven weeks late.

47. Ms Evans-Jones submitted that the Tribunal should focus on what she called the "true" delay in this case, that is the practical implications of the late lodging. By that, I took her to mean that having contacted ACAS on 17 March, as opposed by 12 March when she ought to have done, it can be seen that the claim was in fact intimated (to ACAS) only 5 days after it ought to have been. Had it been intimated to ACAS on that date, the claimant would have had the benefit of a further month's extension.

48. I conclude then that at most the delay is seven weeks. However, I take on board Ms Evans-Jones argument when it comes to questions of prejudice to the respondent, discussed further below. Further, she argued in any event not only that the respondent was aware of the claimant's intention to pursue a claim on 17 March, but that the claimant had advised as far back as 16 December 2019 of her intention to pursue a claim of unfair dismissal.

49. Mr O'Carroll's distinguished between the time bar for the section 99 automatic unfair dismissal claim and the pregnancy discrimination claim. In submissions, he set out a time line of the dates. For the section 99 claim, the date of dismissal was 13 December 2019, and so the expiry of the primary time limit is 11 December when ACAS should have been contacted. Since they were contacted on 17 March 2020, section 18A would not have the effect of extending the time limit since it had already passed; without the extension the claim was 7 weeks or 49 days late after the expiry of the primary time limit.

50. With regard to the discrimination claims, noting that the ET1 narrative does not specify dates, he argues that the "trigger date" for the pregnancy/maternity discrimination is between 14 and 28 November (when the claimant was suspended). He argues that the claim was lodged some five to five and a half months after the acts of discrimination complained of (which he took to be relating to the complaint about carrying of boxes) so that claim is lodged some two to two and a half months late.

51. However, as I read the pleadings, the claimant argues that the pregnancy discrimination claim encompasses events from November 2019 until the appeal against dismissal. I take it from the pleadings that it is argued that the dismissal while the claimant is pregnant is an act of pregnancy discrimination, so that the pleadings indicate to me that the claimant relies on a continuing act (and there is no need to specifically plead that, see Khetab v AGA Medical Ltd EAT/0313/10). The s99 claim is plead as a separate claim (paragraph 17).

52. I note in fact on re-reading the ET1 that the claimant relies too on the outcome of her appeal which was not communicated to her until on or after 17 December. Clearly an argument might have been made that time did not run until on or after that date (in which case the claim might have been in time).

53. However, and in any event, given my decision in this case, there is no need to revisit that matter. For the avoidance of doubt, I accept prima facie that the pregnancy discrimination claim is plead as a continuing act, and my deliberations in regard to the just and equitable question apply to both pregnancy discrimination and dismissal.

Reasons for the delay

54. This case is unusual to the extent that the focus on the claimant's explanation is not in fact on the reason for the delay at all but rather on the claimant's confusion about the date of dismissal. The claimant's evidence is that she advised her solicitor of the wrong date. She said that she got it mixed up with

a date she had a medical appointment. Although there is a letter of dismissal which makes the date of dismissal crystal clear, she states that she had not passed that letter to her solicitor because she had mislaid a folder of papers relating to her employment.

55. Ms Evans-Jones quite properly focused on the reasons to explain why the claimant had given the wrong date. She submitted that this was due to the impact of a number of stress factors which caused the claimant to be depressed and reduced her clarity of thinking, including:

1. The impact of the dismissal on the claimant, especially in regard to her financial position. She had been getting a regular income with overtime but then she was concerned about her financial position because her partner was on a zero hours contract with irregular shifts and her parents had limited income which had been supplemented with her rental payments. The financial stresses were exacerbated by the anticipated arrival of the new born.

2. The claimant had a large number of hospital appointments around that time, which meant that it was difficult for her to keep track of dates.

3. Further, her pregnancy was particularly stressful because she had suffered a miscarriage two years previously; and then on 2 December 2019 she was confirmed to be rhesus negative blood group which was a threat to her and her baby's lives and this caused significant distress.

4. The dismissal coincided with the Covid 19 pandemic when the claimant was very concerned for her health and well-being and that of her family.

56. Ms Evans-Jones argued that these stresses affected her organisation and clarity of thinking and she was unable to remember dates. She advised the wrong date because she was confused and it was not because of carelessness or recklessness but was a genuine error the primary cause of which was her mental state and health.

57. Mr O'Carrol in contrast argued that the extension should not be granted because the claimant lacked credibility. In particular he noted that she had sought to obtain advice even before she was dismissed, and indicated on 16 December an intention to claim unfair dismissal just three days after getting advice. He argued that this demonstrates a level of sophistication in apprising herself of her rights even before she was dismissed. He submitted that the claimant has not given a cogent reason not to contact ACAS in time. By reference to the factual background in the *Adedeji* case, Mr O'Carroll submitted that even if the claimant had been right about the date, the claimant adopted a high risk strategy leaving both contacting ACAS and lodging to the very last minute.

58. With regard to her access to the internet, her evidence lacked credibility. She was able to access NHS website but not in regard to her claims with her solicitor. With regard to the reasons for the delay, she made no reference to the issue about the mobile phone in the e-mail setting out the basis of her argument. In oral evidence, she said that her phone had broken in January/February but this was well ahead of the 11 March deadline. She was in any event aware of the three-month time limit.

59. The claimant kept hospital appointments which she viewed as important dates, but even though she was very angry about how she had been treated by her employer she did not treat this with same importance; she has not given any good reasons why she was not mindful to ensure her day in court. Given this the respondent asks the Tribunal to disbelieve her when she says she was muddled with the dates.

60. With regard to her reliance on the pandemic, during almost the entirety of the relevant period there was no pandemic in Scotland, with full lockdown not occurring until 23 March. Her reliance on Covid as a reason to explain the circumstances lacks credibility.

61. Mr O'Carroll also argues that the co-incidence of dates also damages the claimant's credibility. If the dates which she puts in the ET1 are correct (starting date and termination date) that would just happen to give her two years' service and the claim would be in time.

62. As stated above, I accept that the claimant is a credible witness. I did not therefore accept Mr O'Carroll's submissions largely because I accepted the claimant's evidence that she had mixed up the date and that she had mislaid the dismissal letter so not handed it to her solicitor.

63. Although she was questioned in some detail about her knowledge of the three-month time limit, and she confirmed that she was (by January/February at least) aware that there was a three month time limit.

64. Further, I did not accept that the claimant had deliberately sought to mislead by giving the wrong dates, not least because the correct dates were easily verifiable.

65. Mr O'Carroll put to the claimant that she should have been as careful about dates for her dismissal, which was a very serious matter, as she was about her medical appointments. I did not necessarily agree that her employment matters would be as important to her as her health matters, but in any event, she had put the matter into the hands of solicitors, she had assumed she had given them the correct date, and she was relying on them.

66. While the claimant's youth and inexperience alone may have been sufficient to explain this confusion, that was compounded in this case with the fact that the claimant was pregnant, that she had previously miscarried, that she had been confirmed to be rhesus negative blood group which meant high risks for herself and her baby; that as a result she had a large number of medical appointments; and she had financial worries with the loss of her job.

67. No doubt the pandemic added an additional level of stress to the claimant's life, although I accepted Mr O'Carroll's submission on that point that this could not explain the claimant's confusion over dates or indeed any delay in letting her solicitor know the correct dates since, as I understand it, she did not come across the dismissal letter until after her baby was born (which would have been July).

Prejudice to the respondent caused by the delay

68. With regard to the balance of prejudice, Mr O'Carroll argued that the respondent is entitled to rely on the statutory time limits. Otherwise the respondent will be required to defend the claim and expend resources in doing so to address a claim that has little merit given that the unfair dismissal claim cannot be pursued. Looking more widely, he argued that there is an important public interest to uphold, in time limits being adhered to and legal certainty and finality in proceedings (relying on *Edomobi v La Retraite RC Girls School* UKEAT/0180/16). There is a reason for time limits to exist and they should be adhered to unless there are good reasons not to.

69. Ms Evans-Jones argued that the question of prejudice was linked to the length of the delay. If the claimant had given the correct date, the ACAS extension would have applied; so that in practice there was only a five day delay. This can have no effect on the cogency of the evidence or on the timing of the final hearing. The respondent knew a claim was likely from what the claimant said in her email dated 16 December 2019 as a result of which the respondent had plenty of opportunity to investigate matters from early in the process and prior to the claim.

70. I agreed that the prejudice to the claimant in not allowing her to pursue her claim at all far outweighed any prejudice to the respondent. The respondent would be put to the trouble of defending the claim, which they would have been put to in any event if she had lodged the claim just five days earlier.

Promptness of claimant's action/steps taken to obtain advice

71. Ms Evans-Jones confirmed that the claimant instructed a solicitor prior to her dismissal; but she was unaware that she gave the wrong date of dismissal. It was this error which resulted in the claim being lodged late, because of acting on that wrong date, and not because she was unaware of the three-month time limit.

72. Mr O'Carroll says that works both ways, because her prompt actions shows that she knew how to enforce her rights. She got herself informed at a very early stage and so her failure to comply is therefore less excusable when she obtained advice so early. The promptness of obtaining advice is for her a "double edged sword" because having obtained advice promptly she had even less excuse for late lodging of the claim.

73. I did not agree with Mr O'Carroll that her speedy action to get advice about her rights was indicative of sophistication about her rights. She was clearly angry and upset about being suspended in circumstances which she alleges were unfair, and she had a sense of grievance which she clearly believed required to be redressed.

74. In this case the claimant could not be said to have failed to have acted promptly. Indeed, she had consulted a solicitor on the day after she was suspended, and again after she was dismissed. In any event I do not see this as an important factor in this case, because the focus is not on delay but on the fact that she gave her solicitor the wrong date of dismissal.

Cogency/ effect on the evidence

75. Ms Evans-Jones argued that there could be no impact on the cogency of the evidence in this case, and quite properly, Mr O'Carroll did not argue to the contrary.

Merits (Prospects of success)

76. With regard to the merits of the claim, Ms Evans-Jones argued that the focus is on the merits of the claim and not the merits of the respondent's defence, and must be assessed taking the claimant's pleadings at their highest. On that basis it could not be said that this claim does not have reasonable prospects of success.

77. Mr O'Carroll argued that even taking the claimant's claim at its highest, based on the ET1, the claim is imprecise, lacking reference to the relevant dates. The claimant's pregnancy discrimination claim relates to a single claim regarding an incident with 30 pair of shoes which self-evidently would be impossible for one person to do, as set out in the response.

78. While I accept that the question of prospects of success is a factor to be taken into account, I did not consider it to be a relevant factor in this case. It is quite clear that the claimant has a prima facie case, where she was pregnant and she was dismissed and she has expressed concerns about the procedure relating to her dismissal. I do not consider that the lack of dates in the ET1 is indicative of poor prospects of success.

Conclusions

79. I have come to the view that there are just and equitable reasons to allow this claim to proceed, although late.

80. In summary, I have come to that conclusion for the following reasons: the practical implications of the delay is that the respondent only had five days less notice of the claim; the delay is at most seven weeks; it can have no impact on the cogency of the evidence; there is little or no prejudice to the respondent beyond having to defend this claim; it cannot be said that the claim has no obvious merit; the claimant is young and inexperienced and I accept that she was confused about the dates; and I accept that confusion is legitimately explained by the various stresses she was under at the time.

81. I should add that I did agree with Mr O'Carroll when he argued that the claimant (which I took to be her solicitors) had adopted a high risk strategy in contacting ACAS and lodging her claim at the very last minute. Given the claimant gave her solicitors the wrong date of dismissal, this case is a clear example of a case where that high risk strategy may not have come good, and the claimant's solicitors might like to take note of that.

Next steps

82. This case will therefore proceed to a full hearing. Date listing letters will be sent out to parties to advise of their availability and estimates regarding the length of the hearing.

83. Further consideration should be given to whether it might be possible to have a final hearing by CVP. While it is accepted that the claimant has no access to appropriate technology, the claimant's representative should explore whether it might be possible for the claimant to attend her office, or to gain access to relevant technology at the Tribunal building.

Employment Judge: Muriel Robison
Date of Judgment: 05 March 2021
Entered in register: 11 March 2021
and copied to parties