



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms A Mire

**Respondent:** Chopstix Limited

**Heard at:** Cardiff (by video)

**On:** 28 June 2021

**Before:** Employment Judge G Cawthray

## Representation

**Claimant:** In person

**Respondent:** Mr MacMillan, Counsel

# REASONS

Following a request from the Claimant for written reasons in this case, please find the reasons set out below.

## Issues

1. The Claimant accepted that she had not presented her claim in the primary time limit. The Claimant also confirmed that she was not relying on any continuing act. Therefore, the issues I had to determine in relation to time are whether the claims were brought within a further period that the tribunal thinks is just and equitable.
2. This involves deciding:
  - a. Why were the complaints not made to the Tribunal in time?
  - b. In any event, is it just and equitable in all the circumstances to extend time?

## Evidence

3. I was provided with a bundle of 63 pages.
4. The Claimant gave evidence, having affirmed, by reference to two written witness statements which I read and considered.

5. The Claimant also gave oral evidence in response to questions from the Respondent and from myself.
6. The Respondents did not call any witnesses and did not present any witness evidence themselves.
7. I heard oral submissions from both parties.

### **Facts**

8. The Claimant was employed from 6 November 2019 to 23 July 2020 as a kitchen assistant.
9. The Claimant's employment was terminated due to redundancy.
10. The Claimant brings claims of sexual harassment, direct race discrimination and direct age discrimination. The alleged incidents of sexual harassment involved an alleged perpetrator, K, and took place in December 2019.
11. The allegations of race and age discrimination are put on the basis that the Respondent did not take her concerns about K's behaviour seriously. The precise date of these allegations is not entirely clear. At the Telephone Case Management Preliminary Hearing on 3 February 2021, it was recorded within the CMO that the less favourable treatment took place in December 2019, but at the latest would appear to be around 7 January 2020, following discussions with the Claimant in early January 2020.
12. The Claimant states that the harassment from K took place over 3 separate incidents between 10 and 24 December 2019. I have made no finding of facts on whether or not these incidents took place, as that is not the purpose of today's hearing.
13. Shortly after the alleged incidents the Claimant discussed her concerns regarding K's action towards her with two colleagues, Cledeson and Vanessa. They advised her to talk to management.
14. In December 2019 the Claimant approached Iacob Strajean, and shortly after Irena Stratjen, and stated she was uncomfortable working with K. The Respondent's position, as set out in the Grounds of Resistance, is that the Claimant did not provide any further details. In response to my questions the Claimant said she informed Iacob and Irena that K was groping her and making sexual advances towards her. The Claimant said that she wanted to see their verdict. The Respondent's position, again as set out in the Grounds of Resistance, is that the Claimant was asked if she wished to discuss her

concerns and submit a formal grievance. The Claimant states she was not told about the right to bring a formal grievance. No witness evidence was provided by the Respondent and I am unable to make a finding of fact precisely on what the Claimant said to management and what was said in response. However, I do find that the Claimant did explain that she had some concerns about working with K.

15. In January 2020 the Claimant attended a meeting following her absence from work.
16. The Claimant did not raise any formal grievance.
17. K left the Respondents employment at some point in January 2020.
18. The Claimant contacted various law firms from mid-January 2020, to see if they could assist her as she was aware that harassment was inappropriate. Her enquiries lasted several months. the Claimant was confused by the fee information provided to her and concerned she may have to make payment.
19. One law firm directed the Claimant to ACAS. The Claimant cannot recall when that was.
20. Following the national lockdown commencing on 23 March 2020 the Claimant started to feel anxious from around mid-April. The Claimant also experienced sleepless nights and migraines. She attended A & E in mid-April in relation to her migraines and was given medication, which resolved the sleeplessness and migraines quickly. The Claimant continued to feel anxious until around September 2020. The Claimant did not attend her GP in relation to her anxiety, was not formally diagnosed and was not prescribed any medication for anxiety. No medical evidence was provided by the Claimant.
21. The Claimant had a number of telephone conversations with Acas, she estimates between 5 and 7. She first contacted ACAS towards the end of June 2020. The Claimant was told by ACAS in an early conversation, it is not clear which or when, about the operation of time limits and that her claim was out of time and that a preliminary hearing would be required in which she would have to apply for extension. This information was provided to the Claimant before 1 July 2020.
22. The Claimant was provided with an EC certificate on 1 July 2020. The Claimant was still employed at this time. No information was provided on when the Claimant was notified of her redundancy.
23. The claim form was presented on 6 July 2020.

24. The Claimant cannot recall why she waited until 6 July 2020 to submit her claim to the Tribunal.

### Law

25. Section 123 of the Equality Act 2010 sets out the time limit for bringing harassment and discrimination claims in the Tribunal. It provides that complaints of discrimination should be presented within three months of the act complained of:

*(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*
- (b) such other period as the Employment Tribunal thinks just and equitable.”*

26. Section 123(1)(b) provides that where a discrimination claim is prima facie out of time it may still be brought “*within such other period as the Tribunal thinks is just and equitable*”. This provides a broader discretion than the reasonably practicable test for other claims, such as unfair dismissal.

27. The time for presenting a claim is extended for the duration of ACAS Early Conciliation.

28. However, where the ACAS EC process was started after the primary time limit had already expired the ACAS “freezing” of the time limits does not operate to assist a Claimant (*Pearce v Bank of America EAT 0067/19*).

29. Time limits should be adhered to strictly (relevant case being *Robertson v Bexley Community Centre 2003 EWCA CIV 576*.)

30. The burden of proof is on the Claimant.

31. The case law on the application of the “just and equitable” extension includes *British Coal Corporation –v- Keeble [1997] IRLR 336*, in which the Employment Appeal Tribunal (“EAT”) confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in *Keeble*:-

*“that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –*

- (a) the length of and reasons for the delay;*

- (b) *the extent to which the cogency of the evidence is likely to be affected by the delay;*
- (c) *the extent to which the party sued had cooperated with any request for information;*
- (d) *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
- (e) *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.”*

32. However, this list of factors is a guide, not a legal requirement. The relevance of the factors depends on the particular case.

33. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194 the Court of Appeal noted that the tribunal has a wide discretion and the Tribunal was not restricted to a specified list of factors.

34. The most important part of the exercise is to consider the length and reasons for the delay and balance the respective prejudice to the parties.

35. In *Robertson –v- Bexley Community Centre (T/A Leisure Link)* 2003 [IRLR 434] the Court of Appeal considered the extent of the discretion. The Employment Tribunal has a “wide ambit”. At paragraph 25 of the judgment Auld LJ said:-

*“it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”*

36. Subsequently in *Chief Constable of Lincolnshire -v- Caston* [2010] IRLR 327 the Court of Appeal in confirming the Robertson approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

37. In *Department of Constitutional Affairs -v- Jones* [2008] IRLR 128 the Court emphasised that the guidelines expressed in Keeble are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case. Other factors may be relevant too. At paragraph 50 Hill LJ said:-

*“The factors which have to be taken into account depend on the facts, and the self directions which need to be given must be tailored to the facts of the case as found”.*

38. I considered the principles derived from case law in relation to the merits of a claim.

### **Conclusions**

39. The Claimant agreed that her claims had been presented outside the time limit and therefore that was not an issue which I needed determine.

#### Length of delay

40. In relation the claims of sexual harassment, the last date of alleged harassment was 24 December 2019. This means that the primary limitation date and the date on which ACAS Early Conciliation should have commenced was 23 March 2020. In relation to the direct race and age discrimination, the alleged less favourable treatment was not later than 7 January 2020, meaning the primary time limit would be 6 April 2020 for such claims.
41. The Claimant did not enter ACAS Early Conciliation until 1 July 2020, which is outside the primary time limits, and three months after the primary time limit. The Claimant did not submit her claim until 6 July 2020.
42. The law is clear that EC extension only applies when Early Conciliation is entered into before the expiration of the primary time limit.
43. With a primary time limit of only 3 months, a delay of a further 3 months is significant. This is not a case where the claim was just a few days late.

#### Reasons for delay

44. The Claimant was aware of the facts that gave rise to the claims in December 2019 and January 2020, indeed the Claimant's oral evidence was that she gave a detailed account of the alleged harassment to her managers. The Claimant's position is that one of the reasons for the delay was that she was fearful of losing her job, and that she could not be without income and was without family support. The Claimant was not told by any member of the Respondent not to bring a complaint and had no knowledge of any employee being treated poorly due to raising concerns in the workplace. I acknowledge that raising concerns in the workplace, and in a tribunal, can be a daunting process, and this can in some cases account for delay in concerns being raised, both internally and externally. However, based on the Claimant's own evidence today, this does not appear to be the case – the Claimant stated that she told Iacob and Irena of her concerns in close proximity to the alleged events.
45. I have taken into account the Claimant's assertion that she felt her mental health prevented her from bringing a claim. I accept and understand the pandemic and the first lockdown was stressful time, particularly for the Claimant being 19 and living far from home. However, there was no medical

evidence before me. On the Claimant's own evidence her anxiety and sleeplessness/migraines did not start until mid-April, after the expiration of the primary time limit, and after she had already taken steps to obtain legal advice. She also explained how the migraines and sleeplessness resolved quickly in mid-April following her obtaining medication and attending A & E. The Claimant carried on feeling anxious until around September 2020. However, between April and September the Claimant still took steps to pursue her enquiries with law firms, liaised with ACAS and submitted her claim. I therefore conclude that her ill health was not a reason for delaying in submitting her claim.

46. The Claimant maintains that she did not know about the process to submit a claim and the deadlines in the Employment Tribunal until she spoke with ACAS at the end of June 2020. The Claimant also states that a reason for the delay was due to the fact that she did not understand the fee information provided by lawyers. I was not given a complete evidential picture throughout the period but the Claimant clearly felt she had been wronged and was aggrieved enough in mid-January 2020 to make prompt enquires with law firms. I do not accept that the fee information or the lack of understanding about the arrangements proposed by law firms is a good reason for delay. The Claimant could have raised questions or undertaken her own further research before the three-month time limit expired. Ignorance will only be a reason to extend if it is reasonable. Having felt aggrieved and taken steps to source legal advice I do not think that ignorance throughout the entire primary time limit was reasonable.
47. Further, the Claimant could not account for the delay in submitting her claim between 1 July 2020 and 6 July 2020. She provided no explanation for the delay, and did not act as promptly as she could following the information from ACAS. I took into account that the Claimant was an intelligent and educated person and that she was under an obligation to investigate her legal rights and her obligations in respect of the time limits which apply to claims in an Employment Tribunal.
48. The Claimant had reasonable opportunity to research her legal rights. Indeed, she did take steps by consulting with lawyers and later ACAS. The fact the Claimant was unaware of the time limit does not usually provide a reason for extending time, save for in particular circumstances. It is for the Claimant to persuade the Tribunal that it would be just and equitable to extend time, and in the absence of medical evidence to support the Claimant's assertion of her mental health in the period immediately after the events in December 2019 and January 2020, she has not done so.

Prejudice to parties – cogency of evidence - impact on delay

49. In considering the balance of prejudice and hardship, it is the case the Claimant will lose her right to bring a claim. However, there is no part of her claim that is in time, and the allegations go back to December 2019, some 18

months ago. The loss of the right to bring a claim is a consequence of the time limit provisions, which are intentionally short.

50. As pointed out by the Respondent, K, the alleged perpetrator, left the Respondent's employ some 18 months ago, which is likely to make obtaining witness evidence very difficult, if not impossible. Further, the allegations involve matters and unrecorded conversation in December 2019 and January 2020, and all witnesses, including the Claimant as demonstrated today, will be negatively impacted by the delay and the ability to recall matters. I have no information on whether any of the other witnesses for the Respondent are still employed.

#### Merits of case

51. The strength of a claim may be a relevant factor in deciding whether it is just and equitable to extend time, but even where a case is strong, time may not be extended. I have not made findings of fact in relation to the alleged conduct of K towards C, but if it took place, it would appear to be a claim that may have reasonable prospects. The direct discrimination claims are more difficult to understand and it hard to see the link with age and race. It is still necessary to consider whether there is a satisfactory explanation for why the claims were not presented in time.
52. From the evidence as a whole the picture emerges of an individual that chose to raise matters with her manager, and chose not to pursue her complaint internally further. Yet she was aware of the inappropriateness of harassment in the work place and promptly took steps to contact law firms. The Claimant choose not to instruct a legal advisor and didn't undertake any further research of her own. I do not accept that any ill-health from mid-April 2020 acted as a barrier in bringing a claim. Delay will prejudice all parties, but particularly the Respondent in seeking to obtaining evidence from K.
53. Putting matters together overall, and taking into account all these factors, and applying the test set out in the legislation, my judgment is that the Claimant has failed to show it would be just and equitable to extend the time limit.
54. As I have concluded, that the claims are out time, they will not continue.

Employment Judge G Cawthray

Date: 10 September 2021

REASONS SENT TO THE PARTIES ON 23 September 2021

FOR EMPLOYMENT TRIBUNALS Mr N Roche