EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Ms Justyna Blazewicz	AND	Bidvest Noonan (UK) Limited (1) Mr Gareth Rowley (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Plymouth **ON** 25 August 2021
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **Ms Janusz, Legal Consultant**
For the First Respondent: **Mr A Watson, Solicitor**
For the Second Respondent: **No Response Entered, Did Not Attend**

JUDGMENT

The judgment of the tribunal is that the claimant's claim was presented out of time and is hereby dismissed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims were presented in time.
2. I have heard from the claimant. I have heard submissions on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
3. The Facts:
4. The claimant Ms Justyna Blazewicz was employed by the first respondent as a cleaner at IKEA in Exeter from 28 March 2018 until 16 October 2020 when she resigned her employment. Her complaint is one of sexual harassment between November 2019 and 10 February 2020. The allegations of sexual harassment are against the claimant's previous Site Manager, Mr Gareth Rowley, who is the second respondent.

5. The claimant raised a formal grievance on 3 February 2020, and she attended a grievance hearing to pursue her grievance on 25 February 2020. The claimant accepted in evidence that she had researched the position concerning her employment on the Internet, and she had also taken legal advice. She was unclear as to exactly whether this was before or after the grievance meeting on 25 February 2020, but she confirmed that it was about that time. She also confirmed in her evidence that she knew at about that time that there was a time limit of three months for bringing proceedings before the Employment Tribunal.
6. The claimant asserts that she thought that the three months' time limit would commence only upon receipt of the outcome of her grievance, but she was not clear as to exactly what advice she received, from whom, or when.
7. The second respondent Mr Rowley was then summarily dismissed on 9 April 2020. The matter of the grievance appeared to assume less importance as a result of the lockdown caused by the national Covid-19 pandemic. Following her grievance, the claimant took a period of annual leave, and then sickness absence. Some of that included furlough leave. The claimant accepts that between 25 May 2020 and 7 September 2020 she was absent on unpaid leave. The claimant and the first respondent exchanged emails and the claimant felt unable to return to work because of her childcare commitments. This eventually resulted in an investigation meeting under the respondent's disciplinary procedure and by email dated 8 October 2020 the claimant was informed that the respondent was investigating allegations that the claimant had taken unauthorised leave, and other allegations of falsification of sickness records and unsustainable absence levels. The claimant resigned employment by email dated 16 October 2020 complaining about the stress caused by her previous Site Manager (the second respondent Mr Rowley) and the first respondent's investigations into her absences. The claimant accepted in her evidence that this was the first time she had mentioned that she was feeling stressed.
8. During this exchange of emails it had earlier become clear that the respondent had not confirmed the outcome of the claimant's grievance. This was remedied by email dated 4 August 2020 by which the claimant was informed that her allegations of sexual harassment and inappropriate behaviour by her site manager Mr Rowley had been upheld.
9. The claimant subsequently sought further advice from her current advisers. Again she was vague in evidence as to when this had taken place, and exactly what advice was given. The claimant made contact with ACAS under the Early Conciliation provisions on 10 September 2020 (Day A). The Early Conciliation Certificate was issued on 14 September 2020 (Day B). The claimant issued these proceedings on the same day, namely 14 September 2020. The first respondent entered a response within time arguing that it has a full defence to the claim under section 109(4) of the Equality Act 2010, and that it was not responsible for the actions of Mr Rowley.
10. There was then a case management preliminary hearing on 11 May 2021 during which the claimant's claims of harassment were particularised, and an order was made to join Mr Gareth Rowley as the second respondent to the claimant's claims. Mr Rowley has not entered a response to the claims.
11. There are six specific allegations of harassment of a sexual nature, which are all against Mr Rowley. One of them on 20 January 2020 is admitted by the first respondent as having been done by Mr Rowley the second respondent. The other allegations between November 2019 and 10 February 2020 are not admitted by the first respondent. The claimant does not contend that there was any continuing act of discrimination after her last allegation on 10 February 2020.
12. Having established the above facts, I now apply the law.
13. <u>The Law:</u>
14. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges sexual harassment. The protected characteristic relied upon is sex, as set out in sections 4 and 11 of the EqA.
15. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

16. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
17. I have considered the following cases, namely: British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; London Borough of Southwark v Afolabi [2003] IRLR 220 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.
18. Relevant Timings:
19. In this case the last act of harassment complained of was on 10 February 2020 and there is no allegation of any continuing act of discrimination after this date. The normal three months' time limit therefore expired at midnight on 9 May 2020. However, the only act conceded by the first respondent occurred on 20 January 2020, and if this is correct, the normal three months' time limit would have expired earlier at midnight on 19 April 2020. The claimant made contact with ACAS under the Early Conciliation provisions on 10 September 2020 (Day A). The Early Conciliation Certificate was issued on 14 September 2020 (Day B). The claimant issued these proceedings on the same day, namely 14 September 2020, some four (or five) months out of time.
20. Harassment Claim
21. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are that she misunderstood the position that the three month time limit only commenced after being notified of the result of her grievance, and/or that she was suffering from stress.
22. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.
23. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular … "The length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."
24. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: "[18] … It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."
25. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend

time, and the onus is on the claimant in this regard: "It is also important to note that 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 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". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

26. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.
27. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.”
28. Decision:
29. It is not the claimant’s claim that she was negligently advised by her first advisers to the effect that time would only begin to run from notification of her grievance decision. She merely states rather vaguely that she understood that this was the position. However, she has also conceded that she investigated the position with regard to Tribunal time limits on the Internet, and she received specialist legal advice which included advice on the time limits, at a time towards the end of February 2020. The claimant also accepts that she obtained alternative advice at about the time that the grievance result was received in early August 2020, but has given no explanation as to why she waited a further six weeks or so before making contact with ACAS under the Early Conciliation provisions.
30. Although the claimant now suggests that she was suffering from stress, this was never raised with the first respondent by the claimant in their exchange of emails until the very end of her employment when she chose to resign her employment rather than face a disciplinary investigation.
31. The first respondent says that it is prejudiced by the delay. It relies on the statutory defence and the input of the second respondent Mr Rowley. He has now failed to respond to these proceedings in his absence and any further delay will prejudice the respondent.
32. The burden of proof is upon the claimant to establish the reasons for the delay and to persuade the Tribunal that it will be just and equitable to extend time. In this case the claimant has not given a satisfactory explanation as to why she failed to issue proceedings within three months of the last at complained of, and she has also failed to give a satisfactory explanation as to why she waited a further six weeks between notification of the grievance outcome and making contact with ACAS.
33. I have considered the balance of prejudice between the parties. The claimant will clearly be prejudiced if the claim is dismissed as being out of time because she will be unable to pursue her claims, whereas the first respondent will still be able to defend the proceedings if an extension is granted. However, the respondent is also prejudiced because of the delay and the apparent absence after this time of Mr Rowley the second respondent.
34. I have considered all these matters in the round, but on balance I conclude that the claimant’s claims were presented out of time and it would not be just and equitable to allow

an extension of time. As noted above, it is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that 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 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". I have not been convinced by the claimant that it would be just and equitable to extend time. The claimant's claim was therefore presented out of time and it is hereby dismissed.

35. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 11; a concise identification of the relevant law is at paragraphs 14 to 17; how that law has been applied to those findings in order to decide the issues is at paragraphs 18 to 34.

Employment Judge N J Roper
Date: 25 August 2021

Judgment sent to Parties: 05 October 2021

FOR THE TRIBUNAL OFFICE