EMPLOYMENT TRIBUNALS

Claimant: **Gemma Gurvidi**

Respondent: **(1) Anna Sims-Hilditch**
(2) Hugh Sims-Hilditch

Heard at: **Southampton Employment Tribunal via CVP** **On: Friday, 29th October 2021**

Before: **Employment Judge Mr. M. Salter**

Representation:
Claimant: In person.
Respondent: Mr. A. Roberts, counsel.

JUDGMENT

The Claimant's claim 1401227/2021 was presented out of time. For the purposes of her claims of:

(a) unfair dismissal, it was reasonably practicable to have been presented within time; and
(b) discrimination and harassment under the Equality Act 2010, it was not presented within such other period as the tribunal considered just and equitable.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reasons given orally at the final hearing on Friday, 29th October 2021. My judgment was sent to the parties on 8th December 2021, and the Claimant made a formal request for written reasons on the 21st December 2021.

2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: https://www.gov.uk/employment-tribunal-decisions. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

BACKGROUND

The Claimant's case as formulated in her First ET1

3. The Claimant's complaint, as formulated in her Form ET1, presented to the tribunal on 13th November 2020 (1406042/2020) (The First ET1)[[15] , is in short, she was unfairly dismissed and was subject to sex discrimination. On 20th November the claimant emailed to the tribunal an addition document setting out various allegations. This claim was accepted against Mrs Anna Sims-Hilditch only ("the First Respondent"). It is accepted that the Claimant was employed from 3rd September 2018 until her dismissal on 6th October 2020 [18 §5.1]. She was employed as a "House rider/groom" [18 §5.2]

The Respondent's Response to the First ET1

4. The First Respondent, at the time the only Respondent, entered her response that was dated the 5th January 2021 and denies the allegations: accepting the Claimant was dismissed but that this was on grounds of redundancy [35]

5. A Notice of Hearing was then sent to the parties listing the matter for a Preliminary hearing on 22nd July 2021.

The Claimant's Second ET1

6. On 25th March 2021 the Claimant presented a second ET1 this time against Mr Hugh Sims-Hilditch, ("the Second Respondent") alleging the same matters (1401227/2021)("the Second ET1")[54]

The Respondent's Second Response

7. In his Form ET3, dated 18th June 2021, the Second Respondent denied the claims in same terms as the First Respondent.

Relevant Procedural History

8. The matter came before E.J Gray on 22nd July 2021 for a Preliminary Hearing during which a list of issues was determined and today's hearing set down for:

   (a) Consideration of time limits;
   (b) Consideration of the Claimant's correct employer;
   (c) What status the Second Respondent has if not an employer; and
   (d) Respondent's application to strike out or seek deposit order.

9. On 22nd October 2021 the Respondents wrote to the tribunal indicating they accepted the First Respondent would be vicariously liable for the Second Respondent on the basis of agency. They therefore considered there were two issues to determine:

   (a) Jurisdiction
   (b) Further particulars

THE PRELIMINARY HEARING

General

10. The matter came before me for that preliminary Hearing. The hearing had a one-day time estimate.

11. The Claimant represented herself and both Respondents were represented by Mr A. Roberts of counsel.

12. This was a remote hearing which was not objected to by the parties, being conducted entirely by CVP video platform. A face-to-face hearing was not held because it was not practicable and no-one requested the same it was conducted using the cloud video platform (CVP) under rule 46.

13. The parties agreed to the hearing being conducted in this way.

14. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no significant difficulties.

15. The participants were told that it was an offence to record the proceedings.

16. Evidence was heard from the Claimant via video link. I was satisfied that she was not being coached or assisted by any unseen third party while giving her evidence.

Particular Points that were Discussed

17. As the Claimant was representing herself I took time to explain to her:

    (a) that whilst I would do my best to ensure she was on an equal footing with the Respondents who was represented, and whilst I am able to present her case for her
    (b) that she would get an opportunity at the end of the hearing to make submissions, if she wanted to, to tell me why she should win her claim;

DOCUMENTS AND EVIDENCE

Witness Evidence

18. I heard evidence from the Claimant. I did not hear any evidence from the Respondents. The Claimant had produced a witness statement that I had read in advance of her giving evidence [208].

Bundle

19. To assist me in determining the matter I have before me today an agreed bundle consisting of some 215 pages prepared by the Respondent. This was vastly in excess of the bundle limit Ordered by Employment Judge Gray, who, understandably, limited the bundle to 50 pages.

20. This bundle was added to after submission had been completed and whilst I was considering my decision, when the Claimant emailed the tribunal a further document concerning her advisors.

21. The parties had exceeded the bundle limit as, in attempting to refine the issues, they had generated voluminous documentation and versions of this documentation.

22. My attention was taken to a number of these documents as part of me hearing submissions and as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

SUBMISSIONS

Respondent

23. Mr Roberts made helpful submissions addressing both discretions that I have to consider. In particular he:

    (a) highlighted that a claimant cannot hope to satisfy that discretion to extend time unless she first produced evidence as to why a claim was not filed within the ordinary time limit
    (b) accepted there was no, as he called it, "forensic prejudice" to the Respondent, but asked me to consider the "limitation prejudice" the Second Respondent would face in having to respond to a claim that was presented out of time;
    (c) raised the Claimant's contradictory positions as regards her knowledge of her ability to present a claim against the Second Respondent;
    (d) pointed out the lack of any evidence in the claimant's statement over the reason for the length of the delay before she presented her clam
    (e)

Claimant

24. The Claimant made oral submissions which I have considered with care but do not rehearse here in full. In essence, the claimant emphasised the quality of the advice she said she received from her advisors

MATERIAL FACTS

General Points

25. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the Claimant n evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.

26. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

27. The Claimant was employed by the Respondent until DATE when she was dismissed. The reason for that dismissal and the events leading up to it do not concern me at this stage. What is clear is that it was accepted she was employed until DATE.

28. The Claimant then engaged a legal consultancy who describe themselves as experienced in employment law. It is clear from that correspondence those advising the Claimant had the intention of commencing proceedings against both Respondents [1], and that they had in mind claims under the Employment Rights Act 1996 and Equality Act 2010. I was taken to correspondence passing between those instructed by the Claimant and the Respondents for the period. 11th September 30th September 2020 [1-14].

29. The claimant told me she had seen this correspondence in advance of the hearing and litigation. She stated that there may have been parts of the letter she did not understand, but she did not seek clarification of these as “she thought it sounded good”.

30. The claimant progressed through ACAS Conciliation and obtained a certificate in the name of the First Respondent only.

31. On 13th November 2020 the Claimant entered the First ET1 [15]. In this form she names both Respondents in box “Respondents Details” 916 §2.1] she does not identify a second or subsequent Respondent in the form [17 §2.5 and onwards]

32. The Claimant accepts the First ET1 was accepted against the First Respondent only.

33. At some point after this a friend of the Claimant informed her that she could bring a claim against the Second Respondent as well and so, on 25th March 2021 the Claimant presented the Second ET1, this identified the Second Respondent in §2.1 and the First Respondent in 12.5 [55 and 56].

THE LAW

Statute

34. So far as is relevant the Equality Act 2010 states:

> **123 Time limits**
> (1) Subject to section 140B 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 of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
> (b) such other period as the employment tribunal thinks just and equitable.
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

35. So far as is relevant the Employment Rights Act 1996 states:

> **111 Complaints to employment tribunal.**
> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
> (2) Subject to the following provisions of this section, an **e**mployment tribunal shall not 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.

CONCLUSIONS

General

36. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

Credibility

37. Giving all due leeway to the Claimant as a litigant in person, I must say that i found her evidence on occasions unconvincing and contradicted by the contemporaneous documentation, for instance:

    (a) her evidence that her advisors were not employment law specialists, when this is clearly what they advertise themselves as being; and
    (b) in her Second ET1 the claimant states [65] that "at the time [of the First ET1] I did not realise I could include both of them on my claim as I thought I was only able to claim against my direct employer" was also untrue in light of the pre-litigation correspondence, the Claimant's evidence to me and also the fact she had tried to present the First ET1 in the name of both the First And Second Respondent.

Findings on the Issues

Issue 1: was the Claim Presented in Time?

38. The correct limitation period would have been 5th January 2021. Subject to any variation of that date for the period spent in ACAS Conciliation.

39. The claim was not presented until 25th March 2021 [54].

40. The parties accept that the Second ET1 was not presented in time.

Unfair Dismissal

Issue 2: If Not, was it reasonably practicable for the Claim to have been presented in time?

41. It is for the claimant to show that it was not reasonably practicable to have prese ted his claim in time. "reasonably practicable" means reasonably feasible: Dedman v British Building and Engineering Appliances [1974] ICR 53; Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119.

42. I determined that it was reasonably practicable for the claimant to have presented the second claim in time. I did so for the following reasons:

    (a) she was aware of the tribunal and its jurisdiction to hear her complaints;
    (b) she was aware that the First ET1 had not been accepted against the Second Respondent;

(c) there was no reason for the claimant not to have presented the claim late: she was no incapacitated or unaware of the tribunal regime, process or claim she could have brought;

(d) any failure by her that lead to any misunderstanding about the process was not reasonable in light of her having seen the letters and received the advice from her advisors, but not enquiring further and thinking the advice "sounded good" and not questioning it any further.

Issue 3: If not, was it presented within a reasonable time there after?

43. If I was called upon to answer this question I would have found the claim was not presented within a reasonable time thereafter. Around a month passed between the expiry of the limitation period and the presentation of the Second ET1. No explanation, that I was prepared to accept as being reasonable, was given by the claimant for this delay.

Discrimination

Issue 4: If not, is it conduct extending over a period?

44. On the facts this does not assist the claimant as the last act, her dismissal, falls outside of the limitation period.

Issue 5: if not, was it presented within such other period as the employment tribunal considers just and equitable?

45. I am, therefore in situation where I must consider the discretion contained within s123 o the Equality Act 2010.

46. Whilst Employment Tribunals have a wide discretion to allow an extension of time under S.123, this does not however mean that the extension is automatic. The Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA, that:

> *'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 the discretion is the exception rather than the rule.'*

47. It would be wrong to think that exceptional circumstances are necessary, all that is required is that it is just and equitable to extend time: Pathan v South London Islamic Centre EAT 0312/13

Factors in General

48. In s123 Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list, and whilst a useful guide of some

factors can be found in s33 of the Limitation Act 1980— British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT: for tribunals, however,, this is only a guide to some potentially relevant factors: Southwark London Borough Council v Afolabi [2003] ICR 800, CA. These include:

(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 has cooperated with any requests for information;
(d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
(e) the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Particular factors

49. There is no set list of factors that should be considered, however the following appear relevant to me:

Length of Delay

50. The length of the delay is not short, but equally is not considerable. I do not consider that this alone is a factor that assist me, and, in light of my conclusions about any resulting prejudice (below) do not consider it further.

Explanation for the delay

51. The Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA held that the discretion under S.123 EqA for an employment tribunal to decide what it 'thinks just and equitable' is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant.

52. The lack of a reason may, however, be a factor to consider.

53. I do not consider the Claimant had a reason for the delay, or no reasonable reason. She was aware of the Tribunal process and the possibility of bringing claims of discrimination having already successfully presented such claims.

54. It is clear her clam was not accepted against the Second Respondent. I have dealt with the issue of delay from the period of time the First ET1 was presented to the Second ET1's presentation above.

Incorrect advice

55. Whereas incorrect advice by a solicitor or a wholly understandable misconception of the law is unlikely to save a late tribunal claim in an unfair dismissal case the same is not necessarily true when the claim is one of discrimination — Hawkins v Ball and anor [1996] IRLR 258, EAT and *British Coal Corporation v Keeble and ors* (above). Having seen the correspondence in the bundle it appears the advice the claimant received was correct as to the possibility of presenting claims against separate respondents. I do not accept the Claimant's account given in re-examination, that she was not advised well enough by her advisors.

Ignorance of rights

56. The fact that a claimant is unaware of his or her right to make a tribunal complaint is also much more likely to save an out-of-time discrimination claim than an out-of-time unfair dismissal claim: Director of Public Prosecutions and anor v Marshall [1998] ICR 518, EAT.

57. Although the discretion is wide, it seems that it will apply only where the claimant's ignorance is reasonable. In Perth and Kinross Council v Townsley EATS 0010/10, I have explained above that I did not consider

Strength of case:

58. I did not hear any submissions on the strength of the claims, and so have not considered this as a factor being that the claim is likely to turn on the oral evidence of the parties at tribunal..

Balance of prejudice

59. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent and what prejudice would be caused to the Claimant in not permitting the claim to be presented out of time.

60. There is no prejudice to the claimant in this matter if I were not to exercise the tribunal's discretion: the First ET1 is factually and legally identical to that she wished to present in the Second ET1. Further the First Respondent has confirmed that she was not intending to advance the s109 Equality Act 2010 defence and accepts liability for in relation to any proven acts of discrimination committed by the Second Respondent.

61. Equally, there is no particular prejudice identified to me by the Respondent. Whilst some prejudice will always be caused to the employer if an extension of time is granted given that the case would otherwise be dismissed. However, the prejudice caused needs to amount to more than simply that. In this matter the Second Respondent will be called as a witness and the First Respondent will have to prepare her defence to these claims whether or not her husband is the Second Respondent, there would also be no additional cost in defending this claim if there was one or two Respondents.

62. Understandably, the Respondent did not contend that the cogency of any evidence would be affected by the delay as they faced the First ET1 that had been presented din time and so the cogency of evidence will be the same for the First ET1 and the Second ET1

63. I consider therefore that the balance of prejudice is neutral.

Conclusions on the Issue of Jurisdiction

64. Having made these findings and reminding myself it is for the Claimant to show that the tribunal should find the claim has been presented within such other period as I think just and equitable, I decline to exercise the discretion and accordingly the tribunal has no jurisdiction to hear the Second ET1, claim 1401227/2021.

Employment Judge Salter

Friday, 24 December 2021
Date

Notes

Judgments and reasons for the judgments are published, in full, online atwww.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.