Case Number: 3303896/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss R Manning	v	H & M Hennes & Mauritz UK Limited

Heard at: Watford via CVP **On**: 24 January 2022

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant: In person
For the respondent: Mr Mark Humphreys, of counsel

JUDGMENT

The claimant's claims, which are of discrimination contrary to section 39 of the Equality Act 2010 ("EqA 2010"), are struck out under rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 because (1) they were made outside the primary time limit of three months, and (2) the proposition that it is just and equitable to extend time for making the claims under section 123(1)(b) of the EqA 2010 has no reasonable prospect of success.

REASONS

Introduction

1 On 1 April 2021 there was a closed preliminary hearing for case management purposes in this case. It was conducted by Employment Judge ("EJ") Tynan. The respondent had (in its response to the claim) applied for an order striking out the claims under rule 37 of the Employment Tribunals Rules of Procedure 2013. EJ Tynan decided on 1 April 2021 that there should be "an open preliminary hearing to determine the following issues:

(i) Whether, pursuant to Rule 37 of the Employment Tribunals Rules of Procedure, all or part of the claim should be struck out on the grounds that it has no reasonable prospects of success;

(ii) Further or in the alternative, whether the Claimant should be required to pay a deposit as a condition of continuing to advance all or part of the complaints detailed in her claim to the Tribunal."

2 That hearing was first listed to take place on 25 August 2021, but it was postponed because there was no judge available to hear it. The hearing was postponed to 24 January 2022. I conducted that postponed hearing.

Order changing the name of the respondent

3 The proper name of the respondent is, I was told by Mr Humphreys without objection by the claimant, as stated above: H & M Hennes & Mauritz UK Limited. Mr Humphreys asked for the name of the respondent to be changed accordingly, and in the absence of an objection by the claimant to that request, I now order that the respondent's name is so changed.

The factual and legal background to the strike-out application

The factual background

4 The application to strike out the claims was pressed by Mr Humphreys only on the basis that the claims were made significantly late and that there was no reasonable prospect of successfully persuading an employment tribunal that time should be extended for making them on the basis that it was just and equitable to do so.

5 The claims were stated in an ET1 claim form which was filed online. The claim form was presented on 12 April 2020. The claimant approached ACAS on 6 February 2020 and the early conciliation certificate was issued on 3 March 2020. Accordingly, as was submitted by Mr Humphreys in his skeleton argument, which he had prepared for the hearing of 25 August 2021 and which the claimant had had in her possession since then, the claim was in time in respect of acts or omissions which occurred only on or after 19 December 2019. Such acts or omissions included any conduct extending over a period within the meaning of section 123(3)(a) of the Equality Act 2010 ("EqA 2010").

6 The respondent is a national (in fact an international) clothes retailer. The claimant was employed by the respondent at what it called a distribution centre, i.e. a warehouse, situated in Wembley.

7 The claim form contained, in box 2 on page 7 of the form (page 8 of the bundle prepared for the hearing before me; any reference below to a page is, unless otherwise stated, a reference to a page of that bundle), a list of the things about

which the claimant complained. Chronologically speaking, the latest of them (as clarified at the hearing before EJ Tynan) was this:

> "Refused work from both the incoming and pick departments – no reasons given."

8 In paragraph (5)(ix) of his case management summary of the hearing of 1 April 2021 (at page 31), EJ Tynan said this about that claimed wrong:

> "In or around September 2019 the Claimant was refused work from the incoming and pick departments. She identified Lee and Parmilla (I believe) as being responsible respectively for this."

9 The claimant was dismissed for redundancy in 2020. The last day of her employment was 25 February 2020. The claimant made no claim to the tribunal in respect of that dismissal.

10 The claims which the claimant did make were about claimed events the first of which took place in 2015. The full sequence of events, as recorded by EJ Tynan in paragraph (5) of his hearing record at pages 30-32, although I now record them in their chronological order, was this:

10.1 "In or around May 2015 the Claimant was told by Shilla Bagga that she could not apply for extra hours, and the given reason was stated to be related to the fact she has children. I understand this to be a complaint of sex discrimination. A further request to be considered for extra hours was likewise ruled out by Ms Bagga in 2017, though on that occasion no reasons were given. The Claimant believes this was also related to the fact she has children."

10.2 "In or around January 2017 the Claimant was removed from 'storing'. When she spoke to her colleague Roberto about this he gave the reason that the department required a strong team of men. The Claimant says that the only woman in the team was given light duties. This is a complaint of direct sex discrimination and/or harassment."

10.3 "In or around July 2018, Suzanne Turner told the Claimant to "fix [her] face". The Claimant understood this to be a reference to her looking sad or angry or similar because she was anxious and depressed. The same day, Ms Turner was in discussion with Fay [who was one of the claimant's colleagues] and as the Claimant passed them Ms Turner made a further adverse comment regarding the Claimant's facial expression. Ms Turner later threatened that she [i.e. the claimant] would be removed from the apprenticeship course. The Claimant considers that each of these comments created an embarrassing, humiliating etc working environment for her and were related to her mental health issues."

10.4 "The Claimant states that she discovered in or around July 2018 that colleagues had been discussing the Claimant and expressing the view that she should not be on the Respondent's apprenticeship scheme on the basis that she "had a bad attitude". The Claimant believes their perception in this regard stems from the fact that she has mental health issues, namely severe anxiety and bouts of depression. The allegation is repeated in the section headed 'Victimisation'. A further allegation in that section that the Claimant's progression at H&M was purposely hindered also forms part of this complaint."

10.5 "The Claimant was told in July/August 2018 that she had been placed on a 'to watch' list because Suzanna Turner wanted 'to get rid of' the Claimant. The Claimant believes that Ms Turner wished to engineer her departure from the Respondent for reasons relating to her mental health issues."

10.6 "Subsequently, in or around August 2018 (rather than July 2018 as stated), the Claimant's colleague Fay asked her during a discussion of the Claimant's mental health issues whether she took drugs. The Claimant considers that this created an embarrassing, humiliating etc working environment for her as it implied that her low mood may be the result of drug taking rather than as a result of mental health issues. The allegation is repeated in the section headed 'Discrimination' together with allegations that during the same conversation Fay made offensive comments about her personality and the way she dressed. The allegation is also repeated in the 'Prejudice' section."

10.7 "At the same meeting Fay confirmed that colleagues didn't believe the Claimant should be on the apprenticeship scheme. Again, the Claimant considers this served to create an embarrassing, humiliating etc working environment for her."

10.8 At a "long term sickness absence [the absence was of 24 weeks; I saw from the page of the claimant's letter at page 49 to which I refer further below that it was from 25 September 2018 to 19 March 2019] meeting on or around 20 February 2019, Dianne had alleged that the Claimant had other issues with housing. I understand this to be a complaint that Dianne was calling into question the reason for the Claimant's absence and thereby creating an embarrassing, humiliating etc working environment for her Claimant."

10.9 "Following [the] period of 24 weeks' sickness absence with anxiety, the Respondent failed to put in place adjustments to support the Claimant's return to work in March 2019, including a phased return and occupational health referral. The Claimant believes that her manager, Dianne intervened to prevent adjustments from being implemented."

10.10 "In or around February or March 2019, Sana [as to whom, see the next subparagraph below] provided the Claimant with limited documents in response to the Claimant's request for a copy of her HR file. The Claimant alleges that Dianne gave instructions or otherwise intervened to prevent full disclosure of her file, albeit she was able to secure a copy of the full file a few days later."

10.11 "The Admin Manager (I believe possibly called Sana) failed to act on the Claimant's concerns about how her return to work had been managed when she raised these informally with her on several occasions following her return from sickness absence in March 2019."

10.12 "In or around September 2019 the Claimant was refused work from the incoming and pick departments. She identified Lee and Parmilla (I believe) as being responsible respectively for this."

11 The claimant said to me (although she did not give evidence formally; I accepted as true everything she told me informally on 24 January 2022) that she had made complaints to the respondent about the manner in which she had been treated before she stated a grievance formally by sending it to the respondent in September 2019. As for the final event in the sequence set out in the preceding paragraph above, the claimant accepted that she had suffered no loss of pay as a result of being "refused work from the incoming and pick departments".

12 The claimant completed a grievance letter of which there was a copy at pages 45-52. It was dated 10 August 2019. It was in single line-spaced, and detailed. The grievance was apparently investigated by Ms Laura Waskett of the respondent's HR Department as Ms Waskett sent the claimant the letter dated 29 November 2019 at pages 70-78 stating Ms Waskett's conclusions on the grievance. In that letter dated 29 November 2019, Ms Waskett referred to the claimant's grievance letter dated 10 August 2019 as having been received by the respondent's ER department on 30 September 2019. However, on the letter at page 45 there was a handwritten note saying that the letter was "Postmarked 6/9/19". The claimant told me that she had sent the letter at pages 45-52 to the respondent by first class post and that she had initially had no response to it. The following passage from Ms Waskett's letter (the passage was in the opening part of the letter, at page 70) suggests that the letter was received by the respondent rather earlier than 30 September 2019.

> "I write further to the grievance meeting held in accordance with the company grievance procedure on 18th October 2019 at 11:30am in Support Office. You were offered the right to be accompanied at the meeting and you chose not to have anyone present in that capacity. Chryssa Antoniadi, Recruitment and Talent Co-ordinator, was also present throughout as note-taker.

> The purpose of the grievance meeting was for me to discuss the details of your grievance which you raised in a letter to Toni Galli, Country Manager on 10th August 2019 (although not received by the ER department until the 30th September 2019). As a result I conducted a full investigation and collated all the relevant facts."

13 In her grievance letter dated 10 August 2019, the claimant in the following bullet point, which was at the bottom of page 51, referred to having received legal advice:

> "I had made a formal request for my work file and was provided with a few A4 sheets of paper. I had made management aware that I had sought legal advice and 3 days post I was given my entire file."

14 I asked the claimant what sort of legal advice she had sought and how she had received it, she said that she had telephoned the local Citizens Advice Bureau ("CAB") and been put through to a solicitor, who had told her that she had a right to see her own HR file in full.

15 On page 47, i.e. on the third page of her grievance letter of 10 August 2019, the claimant referred to a meeting at which she was told that the reason why she had "not progressed in the company" was because she had been working only 18 hours a week. The claimant continued (the bold font being original):

> "In the previous years I had been told it was due to my inability to be flexible because of the responsibilities I have toward my children. **This conflicts the Equality Act 2010 – part 5 which constitutes to work. This is also discrimination.**"

16 The claimant was ordered by EJ Tynan to write and send to the tribunal and the respondent "her response to the strike out/deposit order application dated 10 August 2020." EJ Tynan continued:

> "It is for the Claimant to decide what form her response takes, but it should include her comments on the following issues:
>
> 2.2.1 Whether she believes her various complaints, or some of them, have been filed with the Tribunal in time;
>
> 2.2.2 If they were not filed in time, the reasons why this was; and
>
> 2.2.3 Why she says (if she does say this) that it would be just and equitable for the Tribunal to extend time for the complaints to be filed."

17 The claimant had made such a statement, and it was at pages 40-42. In the third paragraph (on page 42), this was said:

> "I do not believe my claim has been made out of time. However, if my claim is deemed as out of time, I would like to inform the Tribunal that I acted after being instructed to do so by a Union representative."

18 The statement contained the following further passage (lower down on the same page):

> "1. I was, and still am, quite ignorant to the processes surrounding this matter. I was not aware of this process when I had contacted both ACAS and The Citizens Advice Bureau. I was informed of this process by a GMB union representative, who was at the time representing one of my colleagues regarding her redundancy payment. My colleague had given me the contact details for him as I was unhappy with the outcome of the grievance and wanted advice on what options I had moving forward.
>
> 2. The only route I had been aware of, is the grievance procedure, which would have given H&M the opportunity to salvage the damage caused without any legal intervention. I saw the grievance procedure through to the end (31/01/2020), but was given the option of early redundancy.
>
> 3. Despite my anguish of being overlooked by the members of staff whom I had communicated with at H&M, and on the advice from a GMB Union representative on 7th February 2020, I had made a conscious effort to submit the application to the Tribunal.
>
> 4. Mentally and emotionally, this has been an ongoing battle, which has placed a massive strain on my family and social abilities."

19 The claimant told me that she had contacted ACAS before starting to write her grievance letter dated 10 August 2019, and she accepted that she had contacted ACAS at the latest on that date. She said that the person from ACAS to whom she had spoken had told her that she "would need to go through the grievance procedure".

20 The claimant appealed against the rejection of her grievance by Ms Waskett. There was a copy of the appeal letter at pages 79-95. It was single line-spaced and detailed, although it was in one sense deficient in that it was undated. It was addressed to Jo Pullen. At page 82, the claimant said this:

> "I had the pleasure of meeting with Miss Laura Waskett on 18th October 2019, where I had been given the opportunity to clarify or expand upon anything which Laura had failed to understand from my grievance letter, dated 10th August 2019."

21 Ms Pullen responded to the claimant's undated grievance appeal letter in the letter dated 31 January 2020 at pages 96-109. The latter letter started: "I write further to the grievance appeal letter on 17th December 2019. You were offered the opportunity to meet with me to discuss your appeal but chose not to." There was plainly a word missing from the first sentence of that passage. Given that the letter at pages 79-95 was undated, that missing word was, presumably, "received".

22 Ms Pullen's letter of 31 January 2020 concluded with this passage (at page 108):

> "I understand that you will shortly leave H&M following the closure of the Wembley DC on 20th March 2020 and that you are currently on unpaid parental leave for four weeks from 30th January 2020 therefore due to return to work at the beginning of March.
>
> On your return in March there will be just three weeks left until the Wembley building closes. If it is your preference not to return then I am happy to pay your remaining three weeks' notice in lieu to you and your employment will terminate on 29th February 2020 and not 20th March 2020.
>
> If you would like to proceed with this please let know no later than 7th February so I can ensure that all of the payments are processed correctly (including your redundancy payment as well).
>
> If you decide to return to work following your parental leave I would be happy to arrange a meeting with yourself and Dianne to clear the air although I appreciate from your email that this is not something that you are keen to do.
>
> This concludes the company's grievance procedure and you have no further right of appeal."

23 When I asked the claimant for her response to Mr Humphreys' submissions, after discussing them with both her and Mr Humphreys, the claimant said that the reason why she did not make a claim until she did was this:

> "I was not in the head space to do it. That is all I have to say."

24 While there was no medical evidence about the claimant's state of mind in the bundle before me, the claimant said this in her letter to the tribunal at pages 42-44 (at page 43):

> "Within the grievance notes, Suzzanne [sic] Turner recalled a discussion we had whereby she noted that I had mentioned to her that I suffer with anxiety. This conversation took place before the incident with Fay. On a separate occasion, Dianne Holland stated that Fay had meant was I taking medication, as opposed to asking me, "am I taking drugs" - which is exactly

what she said. Despite the respondents stating they did not know I suffered from anxiety and/or depression, there is clear, documented correspondence that I had discussed my condition with them."

The legal background

25 Section 123 of the EqA 2010 provides:

> "(1) ... [P]roceedings 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.
>
> ...
>
> (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."

26 In deciding whether it is just and equitable to extend time, the principles discussed in the decisions of the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 and *Caston v Chief Constable of Lincolnshire Police* [2009] EWCA Civ 1298, [2010] IRLR 327 are applicable. As Underhill LJ said in paragraph 37 of his judgment in *Adedeji*:

> '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 (as Holland J [in *British Coal Corporation v Keeble* [1995] UKEAT 413/94)]] notes) "the length of, and the reasons for, the delay".'

27 While the following passage from *Harvey on Industrial Relations and Employment Law* ("*Harvey*") (paragraph PI[279.02]) was not directly relevant, it was relevant in so far as it made it clear that if a claim is made outside the primary time limit for example because the possibility of making it became known only once that time limit had expired, it is incumbent on the claimant to act with reasonable swiftness:

> "Where a claimant asserts ignorance of the right to make a claim, the same principles that are relevant to the 'not reasonably practicable' escape clause (see para [197]ff above) apply when considering a just and equitable extension (see *Bowden v Ministry of Justice* UKEAT/0018/17 (25 August 2017, unreported), para 38; *Averns v Stagecoach in Warwickshire* UKEAT/0065/08 (16 July 2008, unreported)). Accordingly, the assertion must be genuine and the ignorance – whether of the right to make a claim at all, or the procedure for making it, or the time within which it must be made – must be reasonable. It is not enough, in a case where ignorance is relied upon, for a tribunal to conclude that a claimant has not acted reasonably and promptly without specifically addressing the alleged lack of knowledge (see *Averns* at para 23). Nor is it correct to say that the only knowledge that is relevant when considering an extension of time is knowledge of the facts that could potentially give rise to a claim, not knowledge of the existence of a legal right to pursue compensation in respect of those facts; as a matter of law both kinds of knowledge are relevant and should be taken into account (*Bowden* at para 44 ...)."

28 Paragraph 22 of the Employment Appeal Tribunal's judgment (given by Elias P) in *Averns*, was in these terms:

> "As we have said, there is a broader discretion which can be exercised with respect to the just and equitable extension although the onus is still on the claimant to demonstrate good reason for the extension, as Mr Justice Langstaff recently had cause to observe in *Department of Constitutional Affairs v O'Brien* UKEAT/0139/07."

29 The judgment of Langstaff J in the latter case states the applicable approach in this regard in the following opening paragraphs:

> '1. Time limits are draconian. However, they are not contrary to Article 6 of the Convention of Human Rights, provided that there is a means of ameliorating the necessary harshness. A time limit of three months is familiar territory to many of the claims which come before the Employment Tribunal jurisdiction.
>
> 2. In this claim, the harshness of a three-month cut off, for what might otherwise be a perfectly good claim, is ameliorated by the provision that a Tribunal may hold that it is just and equitable for the claim to proceed, notwithstanding the expiry of the relevant time limit. However, it is plain from the very nature of time limits that they are intended to have general application, subject only to legitimate exceptions; and it must follow that good reason must be shown for such exceptions.
>
> 3. Thus, in giving judgment in the case of *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, Auld LJ at paragraph 25 said:

> "A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time."

4. But that statement comes in the course of a paragraph which needs to be read with paragraphs 23 and 24. The Court was considering whether or not a panel of this Tribunal was entitled to overturn the decision of an Employment Tribunal which had held that an Applicant was out of time to bring a complaint of race discrimination.

5. It may be that the statement which I have quoted is comment rather than ratio though Mr Swift, who appears for the Appellant today, contends it is the latter, but it seems to me entirely consistent with general principle. It seems to me that although the words in which it is cast suggest an absence of jurisdiction, the essence of what Auld LJ was saying (and with which Chadwick LJ and Newman J for their part agreed) was that any delay in bringing proceedings must be justified. It follows too that the extent of such a period must be justified. It cannot simply be a case of a time limit having been passed with good reason, and having been passed that no further amount of delay, however short or however long, for good reason or not, is relevant.'

30 In paragraph PI[283] of *Harvey*, this is said:

> "*Internal appeals*. Delay caused by a claimant invoking an internal grievance or disciplinary appeal procedure prior to commencing proceedings may justify the grant of an extension of time but it is merely one factor that must be weighed in the balance along with others that may be present: *Robinson v Post Office* [2000] IRLR 804, EAT, approved by the Court of Appeal in *Apelogun-Gabriels v London Borough of Lambeth* [2001] EWCA Civ 1853, [2002] IRLR 116. Thus the claimant in *Robinson v Post Office*, who delayed making a disability discrimination claim whilst he pursued an internal disciplinary appeal, was refused an extension of time as he knew of the time limit for bringing a race discrimination claim and refused to take his union's advice to lodge the application in time. In *Apelogun-Gabriels* the Court of Appeal expressly rejected the suggestion, emanating from Morison J's judgment in *Aniagwu v London Borough of Hackney* [1999] IRLR 303, EAT, that there is a general principle that an extension should always be granted where a delay is caused by a claimant invoking an internal grievance or appeal procedure, unless the employers could show some particular prejudice."

My reasons for concluding that there was no reasonable prospect of persuading an employment tribunal that it is just and equitable to extend time

31 The final event in respect of which the claim was made occurred (see paragraph 10.12 above) "[i]n or around September 2019". That event was being "refused

work from the incoming and pick departments" which (see paragraph 11 above) caused the claimant no financial loss.

32 The claimant was (see paragraphs 12 and 15 above) at the latest by 29 September 2019, but probably by 6 September 2019, aware of the provisions of the EqA 2010.

33 The claimant approached ACAS at the latest on 10 August 2019: see paragraph 19 above. She had also before then (see paragraphs 13 and 14 above) sought advice from a CAB and been given legal advice by a solicitor about the legal obligations of the respondent in regard to the giving to her of a copy of her HR file.

34 The claimant was able to write a very long and detailed letter appealing the rejection of her grievance; it was either sent by the claimant, or (more likely) received by the respondent, on 17 December 2019: see paragraphs 20 and 21 above. She was also able (see paragraph 20 above) to attend a grievance hearing on 18 October 2019.

35 Given that the claimant failed to approach ACAS until (see paragraph 5 above) 6 February 2020, the primary time limit in respect of any conduct of the respondent which occurred during September 2019 expired on 31 December 2019.

36 The claim form was filed eventually on (see paragraph 5 above) 12 April 2020. That was in the circumstances at least three months and 12 days out of time in respect of the latest of the claimed acts of discrimination.

37 There was a gap of about six months between the final claimed act of discrimination, namely as stated in paragraph 10:12 above, and the one preceding it, which was (see paragraph 10:11 above):

> "The Admin Manager (I believe possibly called Sana) failed to act on the Claimant's concerns about how her return to work had been managed when she raised these informally with her on several occasions following her return from sickness absence in March 2019."

38 The persons whom the claimant alleged had discriminated against her in September 2019 were different from the person alleged to discriminated against the claimant in March 2019, and there was no apparent connection between the two claimed events.

39 In those circumstances,

39.1 the claimant was aware in August 2019, but if not then, at the latest in the first part of September 2019, of the correct Act under which she had to make her claim;

39.2 she had by that time received advice from ACAS about the circumstances;

39.3 she had also by that time approached and received legal advice from the CAB, albeit about her right to see her HR file, but plainly that was in relation to the circumstances which led her eventually to make her claim, and in any event it showed that she was willing and able to seek advice from a competent advisory organisation;

39.4 there was in my view no reasonable prospect of arguing successfully that there was any connection between the final two claimed acts of discrimination, so that there was no reasonable prospect of successfully claiming that there was here conduct extending over a period which ended with the final claimed acts of discrimination (as set out in paragraph 10:12 above);

39.5 those claimed final acts of discrimination were claimed to have occurred in or around September 2019;

39.6 the claim was not made until 12 April 2020 and therefore it was made more than three months after the expiry of the three-month time limit; and

39.7 the claimant was plainly able (see paragraph 34 above) to make detailed representations to the respondent towards the end of that primary time limit period of three months.

40 The real reason why the claimant did not make her claim in time appears (see paragraph 23 above) to have been that she was not in what was, as far as she was concerned, the right frame of mind to make it until she finally did (on 12 April 2020) make it.

41 In all of those circumstances, I came to the conclusion that there was no reasonable prospect of the claimant satisfying an employment tribunal that it was just and equitable to extend time for the making of her claims. I was accordingly obliged to strike them out under rule 37(1)(b) of the Employment Tribunals Rules of Procedure 2013.

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Employment Judge Hyams

Date: 25 January 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE