EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102995/2018

Preliminary Hearing Held at Glasgow on 4 May 2018

Employment Judge: I McFatridge (sitting alone)

Mr G A Reid	**Claimant** **Represented by:** **In person**
Tesco Stores Limited	**Respondents** **Represented by:** **Ms Brewis** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the Tribunal does have jurisdiction to hear the claim. The claim will now proceed as accords.

REASONS

1. The claim in this case is one of those where the claimant's claim was struck out due to non-payment of a fee and may now be reinstated following the Judgment of the Supreme Court in the case of ***UNISON v The Lord Chancellor [2015] EWCA Civ 935.***

2. As narrated more fully below the claimant initially submitted his claim on 13 February 2017. It was struck out for non-payment of fee around 7 March

2013. Subsequently in or about November 2017 the Tribunal wrote to the claimant asking him if he wished his claim to be reinstated. The claimant completed and returned the form enclosed with this letter which was received by the Tribunal Service on 15 December 2017. Thereafter, the claim was served on the respondents. They then submitted a response in which *inter alia* they claimed that the Tribunal did not have jurisdiction to hear the claim as it was out of time. Initially the Tribunal sought to fix a closed Preliminary Hearing on 4 May to deal solely with procedural matters with a view to fixing an open Preliminary Hearing to deal with the substantive issues raised by the respondents at a later date. Subsequently however the Tribunal agreed that the open Preliminary Hearing in order to decide the substantive question of whether or not the claim should proceed would take place on 4 May. At the commencement of the case on 4 May I made some enquiries of the claimant as to the nature of the claim being made. The claimant confirmed that his sole claim was a claim of race discrimination. I understood this to encompass direct discrimination and harassment. Within his ET1 the claimant had made reference to having raised various health and safety issues but the claimant confirmed that he was not making any claim of detriment as a result of having made protected disclosures. The claimant also confirmed that at the time he submitted his claim form on 13 February 2017 the last act of detriment on which he sought to rely was his suspension which took place on 15 November 2016.

3. The claimant confirmed that his position was that the discriminatory course of conduct against him had continued and that he had subsequently lodged a claim with the Watford Employment Tribunal. This had been served on the respondents and they were currently in the course of drafting their response. He indicated that his position was that if the present claim was accepted then he would seek to have this claim heard together with the claim currently lodged in Watford. He also indicated that in his view the discriminatory course of conduct against him was still continuing and that further incidents had happened within the previous two weeks. The claimant gave evidence on his own behalf and was cross examined by the respondents' representative. The respondents did not lead any evidence. A joint bundle of productions was lodged. On the basis of the evidence and the productions I found the following essential facts relevant to the matter to be decided to be proved or agreed.

Findings In Fact

4. The claimant commenced employment in the Tesco store in Lerwick on or about 11 October 2014. He was employed as a Night Worker and worked 31 hours per week. The claimant's position generally is that it became apparent shortly after he started work that there were certain work practices which in his mind did not seem right. He felt there were issues regarding staff not being properly trained and not having the proper personal protective equipment. He reported the matter to his manager and eventually the matter was escalated to the Store Manager. It would appear that initially his concerns were met with some positivity and he was appointed a Trainee Manager. It is not necessary to provide further details of his claim however I understand from his ET1 and from what he said at the hearing that he complains of harassment and direct discrimination in that he considers that the way that he was treated amount to less favourable treatment on grounds of race. At the hearing he named as comparator a Magnus Sinclair who was the other Trainee Manager working nights at the time. Grievances were lodged and the claimant was eventually suspended on or about 15 November 2016. The claimant considered his suspension to be unlawful and indeed in his ET1 he states that the respondents have already accepted this. That having been said he considered that he was being unlawfully discriminated against in respect of a course of conduct which continued up to 15 November 2016 and he wished to lodge a claim with the Tribunal. He was at that time being represented by his union. He was aware of the time limit of three months within which he required to make his claim and was keen to get his claim in within three months (less one day) of 15 November. As this date approached his union had not yet made up their minds whether or not they were prepared to support him in the Tribunal proceedings. The claimant submitted an early conciliation application to ACAS and thereafter a claim form was submitted by him and presented to the Tribunal on 13 February 2017.

5. At or around the same time as he submitted the ET1 he completed an application for remission of fees.

6. Shortly after this he was advised that his application for remission of fees had not been accepted and that he required to pay the full issue fee of £250. At

around the same time he was advised that his union were not prepared to support him. The claimant was keen to proceed with his claim but felt that he simply could not afford to pay the fee. As a result he did not do so by the deadline given by the Tribunal and his claim was struck out administratively around 7 March 2017.

7. At the time he considered himself unable to pay the fees the claimant was working for the respondents at the same job as he has now. His pay was slightly higher than it is now. The claimant had greater financial responsibility at the time since his wife was on maternity leave. She has since returned to work.

8. The claimant was unaware of the case of ***UNISON v Lord Chancellor*** until he received a letter from the Tribunal dated 25 November 2017. When the claimant first received this he thought that the Tribunal were looking for more money in fees. When he read the letter he saw that there was a possibility of having his claim reinstated. His position at the time was that the discriminatory conduct of which he complained had continued and that there was absolutely no doubt in his mind that he wished to reinstate his claim if this were possible.

9. The form asked him if he could provide a copy of his ET1 and other documentation. The claimant had put away all documents in connection with his claim in the loft above his house. He went to look for the documentation relating to his claim but could not find this. He spoke to the Tribunal on the telephone and they told him that he should simply return the form to say that he wished his claim to be reinstated. The claimant signed the form seeking reinstatement on 8 December and it was received by the Tribunal on 15 December. The claimant ticked the box to indicate he was not in a position to send in a copy of his ET1.

10. The claimant's claim does not contain a detailed chronological list of the various acts of detriment and or harassment from which he claims he suffered. It does not list the individuals involved or name the managers who dealt with the various grievances and other HR processes with which he takes issue. The vast majority of those who were involved in the matters which the claimant refers to in his claim still work with the respondents at their Lerwick store. One manager who dealt with a grievance has left as has an HR manager who had

some involvement albeit she now still works for the Respondents in another capacity. Another employee who worked nights who has left had little to no involvement in the matters of which he complains.

Matters Arising from the Evidence

11. I had absolutely no hesitation in accepting the claimant as a credible and reliable witness. He was clearly trying to assist the Tribunal by giving accurate evidence to the best of his recollection. It was put to him that he had been asked by the respondents to lodge documentation relating to his application for remission. He accepted that he did have these documents available but had not done so. His understanding was that since these were Tribunal documents they would already be available at the hearing. He also said that he had resisted the respondents' request that he provide his bank statements for a period of 11 months since he felt this was an unacceptable intrusion into his privacy. During the discussion regarding witnesses he indicated that he was happy to provide further and better particulars of his claim. His position was that one of the assistants against whom he had complained had left and one of the managers who had been tangentially involved had also left. He also said that one of the HR people involved had left but was now in a different role with the respondents. His position was that the overwhelming majority of the witnesses involved in the claim still worked for the respondents and indeed that the discriminatory course of conduct was continuing.

Discussion and Decision

issues

12. In advance of the hearing the respondents had written to the Tribunal setting out their position which was that the claim was time barred. It was their position that the claim had only been intimated to them in or about February 2018. Their argument also appeared to be predicated on the basis that the claimant was also claiming that he had suffered detriment as a result of making protected disclosures as well as his claim of race discrimination. It was the respondents' position that it would have been reasonably practicable for the claim to have been submitted earlier than it was.

13. Whilst it may be of only academic importance it was my view that strictly speaking there were two competing legal analyses as to the decision which I was being required to make. The analysis on which the respondents appeared to predicate their time bar plea was that the claimant's claim lodged on 13 February 2017 having been struck out the claimant was now seeking to bring a claim in identical terms which could be taken to have been presented to the Tribunal on the day that the Tribunal received the claimant's application for reinstatement namely 15 December 2017. The alternative analysis which in my view is more compelling in the particular circumstances of this case is that the claimant submitted a claim on 13 February which was then struck out on or about 7 March. The claimant is effectively seeking to reverse the decision to strike out. In this particular case which is a claim of race discrimination the test for extending the time limit is the just and equitable one and in my view there is likely to be little difference in the result no matter which legal analysis is adopted. The matter might however be of some relevance in other types of case. I shall deal with the matter in respect of both approaches below.

14. The respondents' representative made a full submission. Her position was that the claimant on the facts would have been able to afford to pay the issue fee of £250 back in February. He was in employment with Tesco for 31 hours per week. His pay now was actually slightly less than it was then and in May 2018 he had been able to afford to travel to Glasgow to take part in the Preliminary Hearing. I did not find this argument to be correct either on the facts or on the law. Factually I accepted the claimant's evidence that back in February 2017 his wife was on maternity leave and his finances were much worse than they were in May 2018. I also noted his position which was that he had travelled to Glasgow using one of the subsidised flights which the local authority makes available to residents in Shetland on one or two occasions per year. It was also my view that this was irrelevant given the terms of the UNISON judgment. I consider it would be invidious if in cases like this the claimant, having had their claim rejected on the basis of an unlawful fees regime was now to be subjected to a further loss of privacy and the indignity of trying to justify a decision on financial priorities that they made at the time they decided they could not afford to pay the fee. I accepted the claimant's evidence that in his own mind at the time he believed he could not afford to pay the fee. I did not consider that it was appropriate for the Tribunal to make any enquiry beyond this. It appeared to me

that in maintaining this position the claimant was simply stating that he was a single real example of the hypothetical individuals referred to in the UNISON judgment. The respondents also considered that the claimant should have submitted his claims much sooner than he did. In particular they were critical of him for not being aware of the UNISON judgment. The respondents' representative pointed out that ignorance is no excuse for failing to observe the law.

15. In this case the test contained in Section 123 of the Employment Rights Act is that the time limit of three months can be extended if it is just and equitable to do so.

16. The well-known case of ***British Coal Board v Keeble*** suggests a number of factors which the Tribunal ought to take into account when deciding whether or not it is just and equitable to extend time. So far as the reasons for the delay are concerned the reason in this case could not be more conducive to the claimant's success. The reason is that the Tribunal operated an unlawful fees regime which resulted in the claimant's claim submitted in time on 13 February 2017 being struck out. I reject the respondent's assertion that the claimant's ignorance of the UNISON judgment was unreasonable. Not only did I decide that in fact the claimant was unaware of the judgment but I also considered his ignorance entirely reasonable and to be expected. I would consider it unsurprising that an individual working night shift as a Trainee Manager in Shetland was unaware of a Supreme Court judgment which although of considerable importance to employment law practitioners is unlikely to have been something which he had any reason to interest himself in. With regard to the initial failure to pay the fee I consider the respondents' argument based on the suggestion that the claimant could have afforded to pay the fee to be unsupportable. Even if the test were reasonable practicability, which it is not, then the terms of the UNISON judgment would tend to suggest that it was not reasonably practicable for the claimant to pay the fee. It is clear from the claimant's ET1 that the claimant falls into the definition of living in a low to middle income household which the supreme court judgment discusses at para 94. The Supreme Court in declaring the fee regime unlawful found as a fact that such low to middle income households could only meet the fees by sacrificing ordinary and reasonable expenditure for substantial periods of time.

The stark fact is that in paragraph 98 of their judgment the Supreme Court stated

> "the Fees Order effectively prevents access to justice, and is therefore unlawful."

17. So far as the length of delay is concerned I do not consider the period from February to December to be particularly long in the circumstances. Following the UNISON judgment there was clearly going to be a period of time within which the Tribunal administration would require to decide how they were going to deal with the implications of the UNISON judgment. They wrote to the claimant in November and he responded in December. I rejected entirely the respondents' suggestion that he delayed over long in responding to the letter. It would appear that the letter arrived around 25 November and the response is dated 8 December and was received on 15 December. The explanation the claimant gave for this short delay of three weeks; that he wished to get his documents out of the attic space was an entirely reasonable one. So far as the effect of delay on the cogency of the evidence is concerned I was not at all convinced that there would be any particular difficulty. At its highest the evidence was that one or two of the witnesses no longer work for Tesco. Even if they have left Tesco's employment there was nothing before me to suggest their evidence would not be available if it was relevant and required. I also accepted the claimant's evidence that the witnesses who had left Tesco had not been particularly involved in matters relating to his claim and that the vast bulk of the witnesses were still there. I could see absolutely no difficulty with a fair trial taking place.

18. So far as the balance of prejudice is concerned I have to weigh up on the one hand the undoubted prejudice to the claimant if the injustice which he suffered in having his claim unlawfully struck out was perpetuated. On the other hand, all that the respondents are losing is the windfall benefit of not having to defend a claim because the Tribunal struck it out in furtherance of a fees regime which was unlawful.

19. It is clear to me that approaching the matter on the basis that the claim was not presented to the Tribunal until it was resubmitted on 15 December it is

absolutely clear that time should be extended in terms of Section 123 on the basis that it is clearly just and equitable to do so.

20. For the sake of completeness, I should say that if I had approached the matter on the alternative basis that effectively what I was hearing was an application to rescind the order striking out the claim made around 7 March 2017 then the outcome would have been the same. I would be required to approach the matter on the basis of the overriding objective the first part of this is to do justice between the parties. In my view it would then be appropriate to reverse the effect of the fees' regime which the Supreme Court stated to be unlawful in such clear terms.

21. Is it therefore my judgment that the Tribunal has jurisdiction to hear the claim. The parties were in agreement that the next stage would be for the claimant to provide further and better particulars of his claim. I have made an Order to this effect. The claim should then proceed to a further closed Preliminary Hearing to discuss case management. It would be appropriate for this to take place by telephone given that the claimant is based in Lerwick and the respondents' representatives are based in England. One of the matters which will require to be discussed at that point is whether or not the claim should be heard together with the claim which the claimant has recently submitted to the Watford Tribunal. It would be helpful if, prior to the next closed Preliminary Hearing, the parties could provide the Tribunal with a copy of their pleadings in that case i.e. a copy of the ET1 and ET3 since these will not automatically be forwarded to the Glasgow Tribunal.

Employment Judge: **I McFatridge**
Date of Judgment: **11 May 2018**
Entered in register: **14 May 2018**
and copied to parties