EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs J Bartlett	AND	Commissioners for Her Majesty's Revenue and Customs

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (By VHS) **ON** 19 March 2021

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: Mrs Bartlett, in person
For the Respondent: Mr T Poole, Queen's Counsel

JUDGMENT

The claims of sexual harassment and discrimination on the grounds of sex were presented out of time and it was not just and equitable to extend time. The Tribunal did not have jurisdiction to hear the claims and they were struck out

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the Claimant's claims of discrimination on the grounds of sex and sexual harassment were presented in time.

Background

2. The Claimant notified ACAS of the dispute on 3 July 2020 and the certificate was issued on 6 July 2020. She presented her claim on 8 July 2020.

3. In the claim form the Claimant set out that in 2016 she raised a grievance against a senior manager for bullying and harassment. The senior manager had fabricated a 'must improve marking' against her. The Claimant's appeal against the marking was dismissed. The Claimant's grievance was not upheld. In 2018 the senior manager and others were investigated, following serious allegations made against them. The Claimant provided a witness statement which included her original complaint and allegations of sexual harassment by the senior manager. The senior manager was dismissed. The Claimant assumed that the Respondent would put things right, but nothing happened. She asked for her grievance to be reopened in March 2020, which was refused, although a procedural review was carried out.

4. In the response the Respondent said that on 21 February 2016, the Claimant said a senior manager had bullied her and she wanted the matter to be dealt with informally. No allegations of sexual harassment were made. In June 2016, the appeal against the marking was dismissed. The Claimant moved roles in April 2016. On 12 July 2016, the Claimant raised a formal grievance against the senior manager, no allegations of sexual harassment were made, which after fact finding was dismissed. The senior manager was later suspended on 1 February 2018 and dismissed in September 2018. On 3 February 2020, the Claimant asked for her grievance to be reopened, the Respondent was not willing to do that, but said it would undertake a procedural review. The Claimant was informed of the outcome of the procedural review on 3 July 2020. The Respondent asserted that any acts of sexual harassment were not carried out during the course of employment and/or that it took all reasonable steps to prevent such actions. The Respondent asserted that the claim was presented out of time.

5. On 16 October 2020, Employment Judge Emerton directed the Claimant to set out further particulars of her claim. In the further particulars the Claimant set out some details of incidents involving the senior manager, between 2008 and 2014, the last detailed incident occurred in late 2013. She said that she had not included allegations of sexual harassment in 2016, because she did not think that she would have been believed. She was told by HR that the senior manager had been dismissed in February 2019. She had waited until February 2020, hoping to hear what the Respondent would do about what she had disclosed. She was told that she was out of time to reopen the grievance and her request continued to be denied, leaving no alternative but to seek an external route.

6. At the start of the hearing, the Claimant confirmed that the last act of sexual harassment or sex discrimination that she complained of, involved the senior manager and occurred at the latest when she moved jobs in April 2016. She explained that the reference to the incident in late 2013 was because that was the last incident for which she had a witness, and other matters occurred when she was on her own. It was agreed by the parties

that I should consider that the last allegation occurred at the latest in April 2016 and determine whether it would be just and equitable to extend time on that basis.

The evidence

7. I heard evidence from the claimant and was provided with a bundle of 65 pages. Any reference in square brackets is a reference to a page in the bundle.

The facts and submissions

8. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

9. The Claimant, between 2006 and at the latest April 2016 when she moved jobs, experienced a number of incidents involving a senior manager, which she considered were inappropriate and sexual harassment. The last witnessed incident was in late September 2013, however the vast majority of incidents occurred when she was on her own with the manager. I accepted that the Claimant found those incidents particularly distressing and embarrassing and that she was concerned that she would not be believed, given the general atmosphere prevailing at HMRC at that time. By the time that she moved jobs the nature of the relationship with the manager had changed, and his conduct was bullying rather than sexual harassment. I also accepted that the manager was aggressive.

10. In 2015 the Claimant was issued with a ‘must improve’ marking, which she believed was engineered by the senior manager. The Claimant’s appeal against the ‘must improve’ marking was dismissed.

11. The Claimant raised a grievance against the manager in July 2016 but did not refer to the sexual harassment, due to embarrassment as to what had occurred and a lack of witnesses. At this time the Claimant was prescribed with anti-anxiety medication.

12. The grievance was not upheld, although there was criticism of the senior manager and it was considered that there were areas of development for him. The Claimant discussed the grievance outcome with her union representative and decided not to appeal the decision. She ceased being a member of the union in 2017.

13. During 2017, other women complained about the senior manager sexually harassing them. In 2018 the Respondent investigated the complaints and

commissioned a report into what it was like to work for HMRC. The report painted a picture of significant low level poor behaviours and abusive and abrasive behaviours. In the investigation into the senior manager's and others' conduct, the Claimant gave details of the sexual harassment and workplace bullying she considered she had experienced. The senior manager and two females were dismissed for gross misconduct in September 2018.

14. In February 2019, the Claimant was informed that the senior manager had been dismissed for gross misconduct. She assumed that the Respondent would deal with the victims by recognition, apology and redress. She did not think it was necessary to commence Tribunal proceedings because the Respondent was aware of what happened and would take remedial action.

15. On 3 February 2020 [p42] the Claimant asked the Respondent to reopen her formal grievance into bullying by the senior manager and the events that followed the complaint, this was clarified in evidence to mean the sexual harassment allegations, although it was not clear from the e-mail.

16. On 28 February 2020, the Claimant was told that it was unlikely that the complaint from 2016 would be re-opened.

17. On 9 March 2020, the Clamant was told that a procedural review into the grievance would take place to see if the procedures were followed correctly.

18. On 8 April 2020, the Claimant was informed that she had no access to appeal the historic decision [p50]. The Claimant considered that the procedural review was inadequate as it only looked at the matters raised in 2016 and not the new evidence.

19. The procedural review, sent to the Claimant on 2 July 2020, found that there was not a procedural error in the determination of her grievance. The Claimant considered that the one of the most hurtful comments in the procedural review was that she was a senior manager and it was a reasonable expectation that she would have sufficient resilience to either to not be or not be unduly affected by e-mails from the senior manager.

20. The Claimant believed that once the senior manager had been dismissed that HMRC would then turn to the victims of what had occurred and provide some form of redress and that she was waiting for internal governance to do its duty. She had not taken advice, but believed that, before she could bring a claim to an Employment Tribunal, she had to complete the internal process with the Respondent. The Claimant accepted that she was aware of the Employment Tribunal and that claims of this type could be brought, because she had seen them reported in the media. It was likely that she was aware of this from at least 2016.

21. The Claimant said in her further information that she was not aware that the Tribunal route was open to her until early 2020. This was clarified as being that at that stage, i.e. from about March 2020, she was aware that there were time limits involved. The Respondent did not have any discussions with the Claimant about bringing claims in the Employment Tribunal.

22. I accepted that the Claimant had faith in the system within the Respondent and that she did not make any enquiries as to the Tribunal route after the investigation in 2018 and that she considered a claim as a last resort.

23. The Claimant was dismayed that the Respondent would not investigate her complaints of sexual harassment. I accepted that the incidents were some of the worst experiences of the Claimant's life and they affected her marriage and friendships.

24. The Claimant submitted that she had been naïve, and that she had lived with the incidents since 2006 and the claim was her last opportunity for someone to have a look at what happened.

25. The Respondent submitted that the length of delay was significant and that the last documented allegation of harassment was in late 2013 but even if there was an incident in 2016 it was still presented many years out of time. It was submitted that there was no real explanation for the delay and that the Claimant could have researched into the time limits. It was submitted that the Respondent was prejudiced because it would have to investigate historic incidents and although some evidence would have been captured in 2018, there was no guarantee that all evidence would have been obtained. Further, several potential witnesses no longer worked for the Respondent, including the senior manager. The Respondent seeks to run defences of 'not in the course of employment' and that it took all reasonable steps to prevent the actions of the senior manager. It was submitted that there would be prejudice caused by the passage of time as it would be reliant on witness testimony and memories are likely to have faded and there was a risk that there was no longer documentary evidence of relevant anti-harassment training which would be necessary to satisfy the Tribunal that such training was not stale at the time of the alleged incidents.

26. The Claimant also raised that another colleague had brought a claim and time was extended. It was clarified that the claim was brought in 2018, relating to events in May 2017, and that the grievance was determined in June 2018.

The Law

27. There 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 direct discrimination and sexual harassment. The protected characteristic relied upon is sex.

28. 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.

29. 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.

30. The relevant law relating to early conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunals to hear relevant proceedings, is as follows. Section 18 of the Employment Tribunals Act 1996 (“the ETA”) defines “relevant proceedings” for these purposes. This includes in Subsection 18(1)(b) Employment Tribunal proceedings for unfair dismissal under section 111 of the Employment Rights Act 1996 [s 163 ERA for reference for entitlement to a statutory redundancy payment] [and for the discrimination at work provisions under section 120 of the Equality Act 2010].

31. Subsection 18A(1) of the ETA provides that: “Before a person ("the prospective claimant)" presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.” Subsection 18A(4) ETA provides: “If - (a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or (b) the prescribed period expires without a settlement having been reached, the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant." Subsection 18A(8) ETA provides: “A person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).

32. Section 140B EqA provides:

(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).

But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 140A.

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.]

33. Where the EC process applies, the limitation date should always be extended first by s. 140B(3), and then extended further under s. 140B(4) where the date as extended by S.140B(3) is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate to present the claim (Luton Borough Council v Haque [2018] ICR 1388, EAT). In other words, it is necessary to first work out the primary limitation period and then add the EC period. Is that date before or after 1 month after day B (issue of certificate)? If it is before the limitation date is one month after day B, if it is afterwards it is that date.

34. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service IRLR 434 CA 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. However, this does not

mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable (Pathan v South London Islamic Centre EAT 0312/13).

35. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 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.

36. 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.”

37. In exercising its discretion, tribunals may have regard to the matters contained in s. 33 of the Limitation Act 1980 (as modified by the EAT in British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT). S. 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case and in particular,
    a. the length of and the 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 knew the facts giving rise to the cause of action.
    e. the steps taken by the claimant to obtain appropriate professional advice.

38. In Department of Constitutional Affairs v Jones [2008] IRLR 128, CA, the Court of Appeal emphasised that these factors are a ‘valuable reminder' of what may be taken into account, but their relevance depends on the facts

of the individual cases, and tribunals do not need to consider all the factors in each and every case. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal did not regard it as healthy to use the checklist as a starting point and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to a very broad general discretion. The best approach is to assess all 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 reasons for the delay. If the Tribunal checks those factors against the list in Keeble, it is well and good, but it was not recommended as taking it as the framework for its thinking.

39. In terms of prejudice, I was referred to Miller v Ministry of Justice UKEAT0003/15, in which it was observed that there were two types of prejudice including forensic prejudice a Respondent may suffer if the limitation period is extended by many months or years, caused by fading memories, loss of documents and losing touch with witnesses. It was further said that "*if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of discretion, telling against an extension of time. It may well be decisive."*

40. The Court of Appeal in Apelogun-Gabriels v London Borough of Lambeth [2001] EWCA Civ 1853, held, approving Robinson v Post Office [2000] IRLR 804, that delaying commencing proceedings while awaiting the outcome of domestic proceedings is only one factor to be taken into account. The EAT in Robinson had held that there was not a proposition of broad applicability such that when there is an unexhausted internal procedure that delay to await its outcome necessarily furnishes an acceptable reason for delaying to present the claim.

41. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other (Pathan v South London Islamic Centre EAT 0312/13).

42. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, a claimant's failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice

Conclusions

When should the claim have been presented, and was it out of time?

43. The last alleged act of discrimination was, at the latest, in April 2016, therefore the claim should have been presented by July 2016, The Claimant notified ACAS of the dispute on 3 July 2020, which post-dated the primary limitation date and therefore she did not get the benefit of any extension of time for the early conciliation period. The claim was presented on 8 July 2020 and was therefore presented approximately 4 years out of time.

Was it just and equitable to extend time?

44. If time was not extended, the Claimant would be prevented from bringing her claim. She also would not be able to fully ventilate her concerns about what she says the senior manager had subjected her to. I accepted that it is very difficult for people to speak out about such allegations, particularly when they are coupled with feelings of humiliation and embarrassment. The incidents adversely affected the Claimant and I accepted that they were particularly distressing and had an impact on not only her work life, but also her life outside of work.

45. However, in the present case the allegations spanned between 2008 and April 2016. To extend time would require the Respondent to investigate matters which were between 4 and 12 years old, although it seemed that the incidents of alleged sexual harassment/discrimination were fewer by 2016. The vast majority of the allegations did not involve documentary evidence and were not witnessed. This would cause a significant difficulty for the Respondent to investigate some of the allegations. Further a number of potential witnesses no longer worked for the Respondent, including the alleged perpetrator. Given the circumstances of the perpetrator's departure it was highly unlikely that he would assist the Respondent in any investigation. I was not provided with any documentation setting out the evidence and explanations given at the time of the 2018 investigation. It was also unlikely, given the effluxion of time that all relevant documents were still in existence. The Respondent would be significantly hampered in trying to investigate whether the alleged incidents occurred. Further the Respondent would be significantly hampered in trying to investigate whether it could maintain a defence that the incidents did not occur during the course of employment, as this would depend on witness testimony and further there would be the same problems associated with trying to establish a reasonable steps defence.

46. In the present case, which would be much dependent on oral testimony, the Respondent was at a significant forensic prejudice in defending the claim.

47. The delay in bringing the claim was at least 4 years. During that time the Claimant was aware of the Employment Tribunal and that she could bring a claim of this type. She was under a misapprehension that she needed to exhaust the internal processes before she could bring a claim, but this was a personal misunderstanding rather than anything caused by the Respondent. The Claimant could have made enquiries on the internet as to what she should do, but she did not. I accepted that, until the investigation in 2018, the Claimant was reluctant to speak out, however she was able to do so during the investigation and explained what she said the senior manager had done. However, there was no real explanation as to why nothing had been done in relation to her claim, between being told in February 2019 that the senior manager had been dismissed and February 2020, other than that she expected the Respondent to have done something. I was not satisfied that such an expectation was reasonable. There was no suggestion that the Respondent had said it would do anything in relation to the allegations or that it had discussed any possible claim with her. The Claimant had not asked the Respondent for her complaint to be reopened during that time or for anything else in relation to the information she had disclosed. The Claimant was aware that the incidents she complained of were sexual harassment and she knew that the Employment Tribunal could hear such claims, but had not made enquiries as to what she should do. The delay was exacerbated when she realised in March 2020 that there were time limits, but still did not present her claim.

48. I took into account that time limits should be exercised strictly in bringing claims to the Employment Tribunal and it was for the Claimant to establish that it was just and equitable to extend time. I also took into account the impact of what happened to the Claimant and the courage it would have taken for her to speak up in 2018 and that if time was not extended that she would be prevented from bringing her claim. However, in this case the matters alleged were incidents which were more than 4 years old when the claim was presented, did not have independent witnesses and it was unlikely there would be contemporaneous documentary evidence to assist with determining what happened. The Respondent dismissed the senior manager in September 2018 and was highly unlikely to be able to adduce evidence from the alleged perpetrator, the only witness other than the Claimant, in relation to the majority of the incidents. Further it would be hampered in running its other defences due to employees having left its employment and that given the wide date range of the alleged harassment documentation was likely to have been lost. The Claimant's delay was significant and was not well explained, although I accepted it was partly due to a misappreciation as to when she could approach the Tribunal. The allegations were presented very much out of time and the Claimant did not persuade me that the prejudice to her outweighs that to the Respondent, or that taking into account the delay and the reasons for it that it was just and equitable to extend time.

49. Accordingly, the claim was not presented within the statutory time limit, it was not just and equitable to extend time and therefore the Tribunal did not have jurisdiction to hear the claim. The claim was therefore struck out.

Employment Judge J Bax
Date: **19 March 2021**

Judgment sent to Parties: **25 March 2021**

FOR THE TRIBUNAL OFFICE