EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100421/17

Held in Glasgow on 9 February 2018

Employment Judge: Iain F Atack

Miss Kirsty Beaton or Shaw — **Claimant**
Represented by:
Mr McPartland - Solicitor

Tesco Stores Ltd — **Respondent**
Represented by:
Mr G Dunlop - Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:

1. That although the claim was presented outwith the three-month period provided for in Section 123 of the **Equality Act 2010,** the Tribunal is satisfied that in all the circumstances of the case, it is just and equitable to extend time. The claim will accordingly be continued to a Full Hearing of the merits on a date or dates to be agreed with the parties.

2. That this case be conjoined with the claimant's case of constructive unfair dismissal which has been registered as Case Number S/4101675/17.

REASONS

Introduction

1. In her case as pleaded, the claimant complains that she was subjected to harassment under Section 26 of the Equality Act 2010. The respondent denies the claimant's allegations but maintains that the claim was lodged out of time and that accordingly the Employment Tribunal does not have jurisdiction to hear it. This Preliminary Hearing was arranged to consider that issue.

2. The claimant has also brought a further claim against the same respondent, namely a complaint of constructive unfair dismissal. That complaint has been registered as Number S/4101675/17 and is proceeding separately to these proceedings. In the event of the Employment Tribunal considering that it does have jurisdiction to hear the current claim the representatives of both parties requested that both cases be conjoined.

3. The Employment Tribunal heard evidence from the claimant herself and from her partner Mr Ward Westwater. No evidence was led by the respondent. Both parties referred to a joint bundle of documents which had been lodged in connection with the separate complaint of constructive unfair dismissal and references to documents will be by reference to the page number in that joint bundle.

4. From the evidence which it heard and the documents to which it was referred the Employment Tribunal found the following material facts to be admitted or proved.

Facts

5. The claimant was employed by the respondent as a customer assistant.

6. The last day she attended for work with the respondent was 15 December 2015.

7. She did not return to work due to ill-health, until her resignation in February 2017.

8. In January 2016 she contacted the Citizens Advice Bureau ("CAB") regarding complaints she had about the manner in which she felt she had been treated at work.

9. She was advised to contact the respondent's HR Department with a view to having them resolve the complaints.

10. Thereafter the claimant contacted Jillian Harvey, one of the respondent's People Managers to complain about her perceived treatment.

11. At about the same time she contacted ACAS by telephone. The advice she received from ACAS led the claimant and Mr Westwater to believe that they should let the respondent carry out their investigation into the claimant's allegations and on completion of the respondent's investigations had a period of three months in which to lodge a claim with the Employment Tribunal.

12. Mr Westwater also spoke to ACAS during that telephone conversation as the claimant had become distressed and could not continue the conversation.

13. At the request of Jillian Harvey the claimant wrote down details of her complaint, page 70. Those details are dated 20 April 2016.

14. The respondent then carried out an investigation.

15. The results of that investigation were conveyed to the claimant in a letter of 16 August 2016.

16. The claimant was not satisfied with the result of the investigation. Her solicitors sent a letter to the respondent on 13 September 2016, pages 82 - 84, appealing against the decision of investigation.

17. The solicitor who sent the letter was a friend of Mr Westwater. He stated to Mr Westwater that he was not an employment lawyer.

18. On 2 December 2016 the respondent wrote to the claimant with the outcome of their further investigation, pages 90-91. That was the end of the investigation process.

19. The claimant submitted an Early Conciliation notification to ACAS on 12 December 2016. ACAS issued an Early Conciliation Certificate on 28 December 2016.

20. On or about the end of February 2016 Mr Westwater contacted the claimant's solicitors again, having been informed by his friend , who was a partner in the practice, that they now had an employment lawyer.

21. Mr Westwater was told initially there were no available appointments with the employment lawyer for 6 weeks but was given an earlier appointment once he explained his understanding that a claim had to be presented to the employment tribunal within three months of the completion of the respondent's investigation.

22. The claimant submitted her ET 1 on 1 March 2017.

23. On 2 June 2017 ACAS sent an email to the claimant's solicitor, page 103. That email stated :-

> **"It is likely that the claimant would have been advised to follow internal procedures firstly, however the three-month time limit would not pause during this time so if not concluded then the claimant would have to start the Early Conciliation and the tribunal process within the 3 month period of any potential claim."**

Submissions

Claimant

24. Mr McPartland referred me to the following cases:-

Berry v Ravensbourne Trust EAT/149

British Coal Corporation v Keeble EAT/1 43/94

Chohan v Derby Law Centre UKEAT/0851/03/ILB

Bahous v Pizza Express Restaurants Ltd IUKEAT/0029/11/DA

25. Mr McPartland referred me to Section 123 of the **Equality Act 2010** which sets out the statutory test for the time-limit in bringing a claim, under that Act, before the Employment Tribunal. He also referred to Section 33 of the **Limitation Act 1980** which set out a checklist which he said an Employment Tribunal ought to consider when deciding upon matters of time bar.

26. He submitted that in the ordinary course of events, the claimant having not attended at work after 15 December 2015 and allowing for Early Conciliation, the claim should have been submitted around April 2016. The reason it was not submitted at that stage was because of the advice given to the claimant. She had been advised by the CAB to speak to the respondent's HR Department which she had done. ACAS had told her that she required to wait until the respondent had investigated the position and then had 3 months in which to lodge the claim.

27. He submitted with regard to the cogency of evidence that both the claimant and Mr Westwater were able to speak to the facts relating to this case and that as the respondent had conducted a thorough investigation, and had taken statements from eleven witnesses that would mitigate the effect of the passage of time and that the evidence would not be less cogent if the claim was allowed to proceed.

28. The claimant had fully co-operated with the respondent after raising her concerns with them. The investigation had taken 10 months to complete even although the complaint related to events which had taken place over two weeks in one store.

29. It was the claimant's position that she had been informed that the time limits for presenting the claim to the Employment Tribunal began to run at the end of the process. Once she received the final outcome letter from the respondent on 2 December she had contacted ACAS with regard to Early Conciliation on the 12th. It was clear that that the claimant had been working to the time limits she understood to have been given to her by ACAS.

30. The claimant had not considered herself to be in receipt of legal advice in 2016, but if she had been and if the solicitors had made a mistake that ought not to defeat her contention that the claim should be heard. Mr McPartland referred to the cases of **Bahous v Pizza Express Restaurants**

Ltd (above), paragraph 25 and to **Chohan v Derby Law Centre** (above) at paragraph 19.

31. He submitted that the Employment Tribunal should find it just and equitable to extend the time limit as the claimant had relied upon advice from ACAS and could not be faulted for following such advice although it was incorrect. In his submission the respondent would not be prejudiced by allowing the case to proceed and it would be just and equitable for it to be allowed to do so.

Respondent

32. For the respondent Mr Dunlop referred to the following cases:-

Habinteg Housing Association Ltd v Holleron UKEAT/0274/14/BA

Bexley Community Centre v Robertson [2003] EWCA Civ 576

British Coal Corporation v Keeble EATM 13/94

Apelogun-Gabriels v Lambeth London Borough Council and Another [2002] ICR 713

33. Mr Dunlop submitted that the claimant had ceased going to work about 15 December 2015 and that having received a decision upon her grievance she had consulted solicitors. It was the solicitors who appealed the decision. The claimant's only claim was for harassment and she was not complaining about the grievance or the way in which it was handled. It was clear that any harassment, the existence of which was denied, must have taken place prior to 15 December.

34. The claimant had taken advice from the CAB and from ACAS and also consulted a solicitor. To find the claimant's evidence credible it would be

necessary to believe that all three of these advisers had given erroneous advice. He submitted that either the claimant had misunderstood the advice or she was not telling the truth.

35. He referred to page 103 of the bundle, being an email from ACAS, and submitted that was exactly the sort of advice it was expected ACAS would give. ACAS would know about the time limits and would be aware of jurisdictional challenges.

36. It was clear that when the solicitors wrote the letter of 13 September 2016 they were acting for the claimant and holding themselves out to be her Law agents. They should have advised the claimant of the appropriate time limits.

37. Mr Dunlop submitted that the investigation had been completed by August 2016 even although the grievance continued to a second stage. The solicitors owed the claimant both a delictual and a contractual duty to advise her of appropriate time limits for presenting the claim.

38. He also submitted that the Tribunal had to consider both the reason for and the extent of the delay, which was a two stage test. The onus of proof was upon the claimant in requesting the Tribunal to exercise its discretion and stated the exercise of discretion was the exception rather than the rule.

39. In his submission it would not be just and equitable to extend the time limit after such a lengthy period of time. He did not accept there would be no prejudice to the respondent if the discretion was exercised and suggested that two of the potential witnesses for the respondent might be at risk of redundancy and they might not wish to attend the Tribunal Hearing or be hostile witnesses. He argued there was no reason to exercise the discretion to allow the claim to be received late and it should be dismissed.

Decision

The Law

40. Section 123 of the **Equality Act 2010** provides, so far as relevant, as follows :-

> **"123 Time Limits**
>
> **(1) [Subject to[sections140A and MOB] J Proceedings on a complaint within section120 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."**

41. The issue for the Employment Tribunal in this case was whether it would be just and equitable to allow the claimants claim to proceed as it was not in dispute that the claim been lodged after the end of a period of 3 months from the date of the act complained about.

42. In the case of **Bexley Community Centre v Robertson** (above) Auld LJ stated at paragraph 25:-

> **"It is also of importance to note that the 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."

43. In this case the claimant had last worked for the respondent on 15 December 2015 before being absent due to ill-health. Clearly any harassment which may have taken place could only have taken place prior to 15 December 2015. The claim was not lodged with the Employment Tribunal until 1 March 2017. Very clearly it was lodged considerably outwith the three-month time limit set down in Section 123 of the **Equality Act.**

44. The claimant's position was that she had been told by ACAS that she should allow the respondent to carry out their investigations and would then have 3 months to lodge her claim. Although she had contacted the CAB there was no evidence that they had given her any advice one way or another about time limits. The advice from the CAB was that she should contact the respondent's HR department and try to resolve the matter. There was evidence that Mr Westwater had spoken to a friend of his who was a lawyer and as a result the letter at page 82 of the bundle was sent, appealing against the outcome of the investigation. Whilst there was evidence that the solicitor had said he would send the letter but was not an employment lawyer, there was no evidence that any advice was sought from or given by that solicitor at that time, of any applicable time limits.

45. The only time the claimant consulted an employment lawyer was in February 2017 when she learnt that there was now an employment lawyer working in the practice where Mr Westwater's friend was a partner. Although Mr Westwater was initially told that there were no appointments with the employment lawyer for a period of about six weeks he obtained an earlier one by advising, as he understood, that the claim had to be lodged within three months of the completion of the respondent's investigation, which was by then complete.

46. In the case of **British Coal Corporation v Keeble** (above) the EAT held that the task of the Employment Tribunal in considering whether or not to exercise discretion might be illuminated by perusal of Section 33 of the **Limitation Act** 1980, where a checklist is provided for the exercise of a not dissimilar discretion by common law courts. The checklist 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 the length, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has co-operated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. Although the **Limitation Act** does not apply in Scotland, the checklist is nevertheless useful and Employment Tribunals ought to consider it - **Chohan v Derby Law Centre (** above).

47. I considered first of all the length of and the reasons for the delay. The claimant had sought advice from the CAB and from ACAS. Whilst it seemed unlikely that ACAS would have given the advice that both the claimant and Mr Westwater claimed had been given that was nevertheless their clear evidence. They would not be shaken in cross examination and I concluded that it was more likely than not that that was the advice which they believed they had been given. Both the claimant and Mr Westwater were credible witnesses and I could not conclude that they were lying.

48. There was no evidence that the matter of time limits had been discussed on any of the occasions when the claimant had met the CAB. There was no evidence that the solicitors who sent the letter of 13 September had been asked to do any more than write the letter appealing against the findings of the investigation. There was evidence that Mr Westwater had been told by his friend, who was a partner in the firm involved, that he, the friend, was not an employment lawyer. There was no evidence that the solicitors had

been asked about or given any advice regarding the time limits for presenting claim to the employment tribunal.

49. Having understood that she had three months in which to lodge the claim after the respondent had completed its investigation, that is exactly what the claimant did. She received the letter from the respondent dated 2 December 2016 concluding the grievance and on 12 December she submitted the Early Conciliation form to ACAS. The EC certificate was issued on 28 December and the claim lodged on 1 March 2017.

50. The respondent had carried out a thorough investigation into the grievance raised by the claimant and had interviewed eleven witnesses. I considered that the evidence of those witnesses would still be cogent notwithstanding the delay as they had made witness statements at the time of the grievance.

51. The claimant had co-operated with the respondent in the investigation.

52. Once the claimant had received the final outcome letter she sent the Early Conciliation form to ACAS and the claim was lodged within three months of what the claimant considered was the conclusion of the investigations into her complaints which she believed to be the starting time for the three month period to begin.

53. The claimant's actions were consistent with her belief that she had a period of three months after the grievance was completed to lodge her claim

54. I also considered the prejudice which each party was likely to suffer if the claim was not allowed to be received late. The claimant would suffer by not having her claim heard if the discretion was not exercised in her favour. The respondent has already investigated the allegations made by the claimant and reached conclusions following those investigations. There were no new allegations and I did not consider that the respondent would be put at any particular disadvantage if the claim was allowed to proceed. It was only in

the course of submissions that Mr Dunlop mentioned a possible problem of two witnesses potentially being at risk of redundancy. The respondent presumably had statements relating to those witnesses which could be produced if the witness was unwilling or unable to attend. I was not persuaded that the speculative problem relating to two witnesses would in fact cause the respondent any material prejudice.

55. I rejected Mr McPartland's submission that the claimant had not been in receipt of legal advice in 2016. The letter written on her behalf dated 13 September 2016 refers to the claimant on several occasions as being *"our client'.* The solicitors were clearly holding themselves out as acting for the claimant at that time.

56. I did not find that the solicitors had been asked to do anything further than write that letter but in case I am wrong in that and they were asked about time limits in relation to submitting a claim it is relevant to consider that situation.

57. In the case of **Chohan (** above) the EAT in setting out the relevant legal principles for their decision stated at paragraph 16:-

> **"The failure by a legal adviser to enter proceedings in time should not be visited upon the claimant or otherwise the defendant would be in receipt of a windfall: Steeds v Peverel Management Services Ltd [2001] EWCA Civ 419 p 38-40".**

58. At paragraph 19 the EAT stated:-

> **"Where the issue turns upon the steps taken by the applicant to obtain and act upon legal advice, Steeds v Peverel indicates that wrong advice, or the existence of an implied case against negligent solicitors, ought not to defeat an applicant's contention that the claim ought to be heard."**

59. Also in **Bahous** (above) the EAT held that in the case before it the Tribunal had fallen into error in visiting upon the claimant the failure by his solicitor to enter proceedings in time.

60. From these authorities it can be seen that the failure by a legal adviser to lodge proceedings in time is not to be automatically visited upon the claimant. In this case I accepted Mr Westwater's evidence that he had been told by his friend, who was a solicitor, that he was not an employment lawyer. I accepted that he had not given Mr Westwater or the claimant advice regarding time limits and there was no evidence he had been asked about them. If however the solicitor had failed to give accurate advice to the claimant I did not consider in the circumstances of this case that any such failure should be automatically be visited upon the claimant. Taking all the circumstances into account I considered it was, in this case, just and equitable to exercise my discretion and to allow the claim to proceed notwithstanding the late lodging of the claim.

61. Having reached that conclusion I agreed to the parties representatives' motion to combine this case with the claim of constructive unfair dismissal which has been registered as S/4101675/17. The cases will proceed to a Full Hearing on their merits.

Employment Judge: I Atack
Date of Judgment: 26 February 2018
Entered in register: 08 March 2018
and copied to parties