



EMPLOYMENT TRIBUNALS

Claimant: Ms I Newsome

Respondent: Brake Bros Ltd Hampshire County Council

Heard at: Bristol (via CVP video hearing) On: 21st July 2022

Before: Employment Judge P Cadney

Representation:

Claimant: In Person
Respondent: Ms D Fawzi-Perrin

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant's claims of sex discrimination are dismissed as having been presented out of time.
- ii) The hearing listed from 05 – 08 December 2022 is vacated.

Reasons

1. By a claim form dated 18th June 2021 the claimant brings claims of sex discrimination. She alleges that she was the victim of sexual harassment by a former manager between spring and autumn 2020. Attached to her claim form was a statement which alleged that the events complained of began in April/May 2020, with the last occurring on 21st October 2020, following which she lodged a complaint/grievance with the respondent.
2. The case came before EJ Livesey on 5th May 2022 for a TCMPh. In the light of the combination of the date of submission of the ET1 and the dates of ACAS Early Conciliation (see below) he

concluded that any act occurring before 22nd January 2021 was out of time. This on the face of it would suggest that all of the claimant's claims had been submitted out of time. Accordingly he listed the claim for a Preliminary Hearing to determine:

- i) Whether the claims were brought in time; and if not
- ii) Whether time should be extended.

Facts

3. The internal timeline is that the claimant lodged her complaint/grievance on 28th October 2020. The outcome was relayed to the claimant on 20th November 2020. It was partially upheld but she was dissatisfied with the outcome and indicated she wished to appeal on 25th February 2021. The appeal was concluded on 22nd April 2022 but was unsuccessful. She resigned on 22nd July 2021 but no claim arises from the termination of her employment.
4. The claimant contacted ACAS on 15th December 2020 and on 16th December was issued with an ACAS Early Conciliation certificate giving those two dates as dates A and B. Given that the primary limitation period did not expire until 20th January 2021 the effect of the ACAS EC certificate would have been to trigger the clock stopping provisions and extend the limitation period by one day. Although neither the tribunal or the respondent has a copy of it (the tribunal does not keep copies of rejected claim forms) the claimant has stated, and I accept, that she submitted a claim form on 26th January 2021. This would in any event have been five days out of time. It appears that she did not include the ACAS early conciliation certificate number on the form and ticked Box 2.3 which contains one of the exceptions to the requirement to have an ACAS EC certificate number to commence the claim, that ACAS does not have the power to conciliate. In respect of a claim for sex discrimination this is incorrect. On 22nd February 2022 the tribunal wrote asking her to clarify why she had ticked Box 2.3. She replied that she had been attempting to resolve this without a tribunal, which at least implied that she had not entered ACAS early conciliation. On 19th April 2021 her ET1/Claim form was rejected as it did not contain an ACAS EC certificate number as was required.
5. Two days later on 21st April 2021 the claimant entered a second period of ACAS Early Conciliation which concluded on 2nd June 2021, the day the second ACAS EC certificate was issued. On 16th June the claimant contacted her conciliator to ask how to make a claim, and was advised how to do so by a different conciliator the same day. On 18th June 2021 she submitted her claim using the second ACAS EC certificate number.

6. In respect of the first question of whether the claims were submitted in time; the primary limitation period expired on 20th January 2021. As ACAS EC conciliation did not begin until 21st April 2021 the claimant does not get the benefit of any extension of time. It follows automatically that the claims have been presented out of time. For the avoidance of doubt even if she were able to rely on the first certificate any extension of time would have long passed and the claim would still have been submitted out of time.
7. The respondent has submitted a detailed written submission. In summary it contends that the discretion to extend time should not be exercised in this case for the following reasons.
8. In respect of the question of whether time should be extended, the tests I have to apply are set out in greater detail below, but essentially the respondent's argument is based on the proposition that it is not a proper use of the discretion to rescue the claimant from the consequences of her own errors in submitting the first claim form. It points to the fact that by the 15th of December 2020 the claimant had become aware both of the fact of ACAS early conciliation and the requirement to enter into it. There is no requirement actually to conciliate with the other party and it is perfectly legitimate to do as the claimant did and contact ACAS and effectively immediately terminate the conciliation resulting in a certificate being sent in which day A is the 15th of December 2020 and date B the next day. It does not criticise the claimant for doing this, but submits that the only conclusion that can be drawn is that the claimant by this stage had a relatively sophisticated understanding of the ACAS early conciliation process, and understood that while she needed a certificate to commence proceedings she did not in fact need in reality to conciliate with the respondent at all. Similarly by, at the latest, the 26th of January 2021 she had discovered both the fact of the mechanism for presenting a claim to the tribunal and had in fact done so in respect of the same allegations that form the basis of this claim. For reasons that are not at all clear, in completing the claim form she contended that she did not have an ACAS EC certificate number but that her claim fell within an exemption to that rule as ACAS did not have the power to conciliate in respect of her claims. Whilst she was clearly wrong in failing to provide the ACAS EC certificate number, which would have led to the claim being accepted, and wrong to assert that ACAS did not have the power to conciliate she did submit a claim form within days of the expiry of the primary limitation period.
9. In those circumstances the respondent essentially submits that it would be an improper exercise of my discretion to rescue the claimant from the consequences of her own actions, and that however sympathetic I am to the claimant, that the decision cannot simply be based on sympathy.

10. Moreover they point to the reference to the earlier claim in the second claim form (R Written Skeleton para 12) in which she clearly misrepresents the position, asserting that she had not previously entered into conciliation as she wasn't aware of how the process worked when she clearly had:

"At section 8.2 of her ET1 C provided the second ACAS Certificate reference number but omitted any details of the first conciliation reference. Indeed C stated *"I previously started a claim **however I hadn't been through conciliation** as I wasn't aware of how the process worked. I have since been through conciliation, unfortunately we have been unable to come to an agreement so I would like to proceed to tribunal"*. This of course is untrue as the Claimant had been through the conciliation process between the period 15-16 December 2020".(Respondent's underlining)

11. The respondent submits that the claimant's evidence should be approached with a degree of scepticism. In relation to the first claim either the claimant had herself researched the position and gained an understanding of the process; or she must have been advised by someone else who had; and the assertion in the second claim that she had not previously been through conciliation is demonstrably untrue and must have been known to be untrue by the claimant as she had two separate EC certificates in identical form covering different periods.
12. In giving her evidence the claimant was very tearful and upset. She said that she had no real recollection of how she had come to contact ACAS and had then come to present the first claim form. She did not remember why she had completed it as she had and why she had not supplied the original ACAS EC certificate number. She had not had any legal advice and had not conducted any of her own research on the internet but had advice from a family member. She did not understand the process or the distinction between ACAS and the employment tribunal, and asserted that she had not terminated the first conciliation period but had simply received an e-mail from ACAS doing so, and had no recollection of submitting the original claim form or how and why she had come to do so. She had no recollection of how or why the second claim form had contained incorrect information but vehemently denied that she had been deliberately untruthful.
13. Her evidence essentially is that all stages following the rejection of the original claim form she did what she thought was correct on the advice she received. On being informed that her original claim form had been rejected for the absence of an ACAS EC certificate she within two days contacted ACAS and commenced conciliation during which she genuinely attempted to resolve the issue with at the respondent. Early conciliation finished on the

2nd of June and she understood that in submitting a claim form on the 18th of June that she had had submitted it within time. She did not understand any of the questions she was asked by Ms Fawzi-Perrin as to the technicalities of the process, and at each stage had simply done what she thought and understood was required of her.

14. The burden of proving that it is just and equitable to extend time to enable a claim to proceed is on the person seeking the extension. In Robertson v Bexley Community Centre t/a Leisure Link (2003) IRLR 434, the Court of Appeal stated that when employment tribunals consider exercising the discretion under s123 Equality Act 2010, *'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 claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'*
15. Some relevant factors can be derived from s33 Limitation Act 1980 (as identified in British Coal Corporation v Keeble (1997) IRLR 336). S 33 Limitation Act 1980 requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, to:
 - (a) *the length of and reasons for the delay;*
 - (b) *the extent to which the cogency of the evidence is likely to be affected by the delay;*
 - (c) *the extent to which the party sued had co-operated with any requests for information.*
 - (d) *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.*
 - (e) *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.*
16. However, the ET has a broad discretion and those factors should not be applied mechanistically; as is set out in Adedeji v University Hospitals Birmingham NHS Trust (2021) EWCA Civ 23:- *"Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for*

tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy... " and "Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion... 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 "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking".

17. In addition at Paragraph 24 Underhill LJ stated that the self-direction that there was "...a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals" is a correct statement of the law.
18. I have set out the factors I have taken into account below but for the avoidance of doubt the claimant does not rely on the ongoing internal investigation as an explanation of the delay in presenting the claim. Self-evidently a claim had been presented in January 2021 following the obtaining of the ACAS EC certificate in December 2020. Secondly any claim by the claimant of ignorance as to her rights is at least very difficult to establish given that she was able to obtain an ACAS EC certificate within the primary limitation period, and although she lodged her initial claim a few days out of time there is no evidence that it could not have been lodged earlier, and therefore that there was any impediment to her having presented the claim in time.
19. Accordingly in my judgement this is a case in which there is no good reason for the late presentation of the claim, which although not determinative is a factor I am entitled to take into account.
20. One of the issues which I am bound to take into account it is the question of the relative prejudice or hardship. As set out above the respondent conducted an internal grievance investigation and interviewed a number of witnesses as to the events of which the claimant complains. There is therefore relatively contemporaneous written evidence as to those events. It does not however follow that there is no prejudice to the respondent in permitting the case to proceed to hearing, in that oral evidence would still be required as to the events as the tribunal would have to make findings of fact and would not be bound by the conclusions of the internal investigation or the evidence given to the internal investigation. In addition in this case it will be necessary for the tribunal to make findings not simply about what was or was not said but of the extent to which there was a degree of participation and acceptance of a level of sexualised

conversation. Whilst therefore this is a case in which the respondent does not stress the evidential prejudice to it, it is not a wholly irrelevant consideration.

21. This is in some ways a difficult case to resolve as the starting point is a somewhat unusual one. There is no explanation before me as to why the claimant asserted in her original claim form that she did not have an ACAS EC certificate number and that ACAS did not have the power to conciliate when she had already entered into conciliation only a month earlier and did have a certificate. Equally it is difficult to understand why when the tribunal queried her assertion, that she did not reply that in fact she did have an EC certificate number. Equally the assertion in the second claim form that the claimant had not previously entered into conciliation is plainly incorrect. There is simply no explanation before me of any of those matters. That gives the tribunal the difficulty that the burden lies on the claimant to demonstrate that it is just and equitable to extend time, in circumstances in which it should never have been necessary to have submitted a second claim, and in which the circumstances in which the first claim was in the form it was is entirely unexplained.
22. Looked at overall the primary factors in the respondents favour are that there is no good reason for the delay in that the reasons for it are essentially entirely unexplained, and that the claimant has essentially placed nothing before the tribunal from which the tribunal could properly exercise the discretion to extend time, but simply throws herself on the mercy of the tribunal.
23. The primary factor in the claimants favour is the relative absence of prejudice, and the fact that there is relatively contemporaneous written evidence in the records of the internal investigation.
24. Whilst this is not been an easy case to resolve, given that the burden is on the claimant to demonstrate that this case should be an exception to the ordinary rule that claims must be presented within the primary time limit, and given that the claimant has not been able to advance any explanation as to why it was not, weighing the factors set out above in the balance I am not persuaded on the information before me that any such extension is justified.
25. Accordingly I am bound to dismiss the claimant's claims as having been presented out of time.

Note; online publication of judgments and reasons

The ET is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at:

<https://www.gov.uk/employment-tribunal-decisions>.

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

Employment Judge Cadney
Dated: 25th July 2022

JUDGMENT SENT TO THE PARTIES ON
08 August 2022 By Mr J McCormick

FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS