



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102241/2022

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Held at Aberdeen on 5 August 2022 by Cloud Video Platform

Employment Judge N M Hosie

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Ms L McAllister

**Claimant
In Person**

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Serco Limited

**Respondent
Represented by
Mr D Hogg -
HR Partner**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is time-barred and it is dismissed for want of jurisdiction.

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REASONS

1. The claimant brought complaints of disability discrimination (discrimination arising from disability, in terms of s. 15 of the Equality Act 2010 and a failure to make reasonable adjustments in terms of s.s.20 and 21 of the 2010 Act; and sex discrimination (direct discrimination) in terms of s.13 of the 2010 Act). These 30 complaints are detailed in the Note which Employment Judge Jones issued following a case management preliminary hearing on 28 June 2022. Her Note is referred to for its terms. Following that hearing, the claimant intimated that she wished to withdraw her age discrimination complaint and it was dismissed.

2. The claim is denied in its entirety by the respondent; in addition, the respondent's 35 solicitor has taken a time-bar point.

Preliminary hearing

3. This case called before me, therefore, by way of a preliminary hearing to consider the time-bar issue and to determine whether I should exercise my discretion and allow the claim to proceed, if out of time. The hearing was conducted by video
5 conference using the “Cloud Video Platform”.

The evidence

4. I heard evidence from the claimant at the preliminary hearing. A joint bundle of documentary productions was also submitted (“P”).

The facts

105. Having heard the claimant’s evidence and considered the documentary productions, I was able to make the following findings in fact, relevant to the time-bar issue, with which I was concerned. The claimant commenced her employment with the respondent as a Prison Custody Officer (“PCO”) on 2 September 2008. She remains in the respondent’s employment but in the role
15 of an “Operational Support Officer” (“OSO”). She has osteoarthritis which the respondent accepts is a disability within the meaning of s.6 of the 2010 Act.

6. Following an alleged “high level of absences” caused by the claimant’s osteoarthritis, the respondent engaged in an ill-health capability procedure, the outcome of which was that the claimant transferred to the OSO role. Agreement
20 was reached that she would transfer to this role on or about 5 March 2021; she started to work as an OSO on 10 May 2021; by agreement with the respondent, her salary as a PCO did not end until 9 June 2021.

7. The claimant was unhappy at this transfer which she considered to be a “demotion” but she felt that she had no option and she continues to work as an
25 OSO.

8. She had suggested that she remain in the PCO role but be allowed to work in the gate area of the prison, with amended duties. This was refused by the respondent. However, she maintains that, in similar circumstances, a number of male colleagues were allowed to work in the gate area AS PCOs; she claims that

if she had been male she would have been permitted to remain in the role of PCO with amended duties. This is the basis for her sex discrimination complaint.

Trade union advice and grievance

9. The claimant had the benefit of advice from the Community Trade Union throughout the capability process. She was dissatisfied with their advice and in April 2021 she joined the GMB Union. However, she was advised that the GMB would not be able to give her advice until she had been a member for at least six months. That was why she waited until 8 October 2021 to submit her grievance. Her grievance letter was copied to her union representative at the GMB (P.250-258). There was a Grievance Hearing on 16 November 2021 which the claimant attended with her trade union representative (P.284-290). On or about 13 December 2021, she was advised that her grievance had not been upheld (P.212-214).
10. On 21 December 2021, she submitted an appeal against the outcome of her grievance (P.216-224).
11. On or about 18 January 2022, she was advised by the respondent that her appeal had been unsuccessful and that this was the end to the grievance process.

Early conciliation

12. On 12 February 2022, the claimant applied to ACAS for an Early Conciliation Certificate; this was issued on 26 March 2022 (P.3).
13. On 25 April 2022, the claimant submitted her ET Claim Form (P.4-15).
14. The claimant found out about the procedure for bringing an employment tribunal claim by way of an internet search at the end of January 2022. She has access to the internet by way of a "tablet" and her mobile phone.
2515. It was only then that she discovered that there was a three-month time limit.

16. She said in her evidence that around that time she spoke with her trade union representative and informed him that she had applied for an Early Conciliation

Certificate. She claimed that it was only then that her representative advised her that her claim was “out of time”, as there was a three-month time limit.

17. Having accepted the OSO role, albeit that she was unhappy to do so, she continued to work in that role and still does so. In the lead up to Christmas 2021, she was off work for around three weeks due to ill-health and annual leave. In March 2022, she was signed off work for 10 days as she had contracted Covid.

Respondent’s submissions

18. The respondent’s representative spoke to written submissions which are referred to for their terms. These were included in the bundle. The following is a brief summary.
19. He referred to the three month time limit for bringing complaints of this nature in s.123 of the 2010 Act and submitted that each complaint, still being advanced by the claimant, was out of time.
20. So far as the date of the “act complained of”, when the three month period starts to run, was concerned, this was either 5 March 2021 when the claimant agreed to being transferred to the OSO role; 10 May 2021 when she started to work in the role; or in June 2021 when she received her last salary payment at the PCO rate.
21. In any event, she did not apply for an ACAS EC Certificate until 12 February 2022 and did not submit her claim form until 24 May 2022. Accordingly, her claim was out of time, *“by between 5 months 3 days and 8 months, 7 days”*.
22. So far as the sex discrimination complaint, in particular, was concerned, the respondent’s representative addressed each of the claimant’s named comparators in his written submissions (pages 4-6). The claimant advised that so far as “Jim Kingsley” was concerned, he was only relevant to her age discrimination complaint which had been dismissed.
23. The respondent’s representative denied that there was any “ongoing” discrimination.
24. Finally, he submitted that although the claimant might not have had knowledge of employment tribunal procedures, she had the benefit of professional advice

from two trade unions throughout all the procedures prior to bringing her claim; and she was able to search the internet and establish her rights.

525. Accordingly, the respondent's representative submitted that it would not be "just and equitable" for the Tribunal to exercise its discretion and extend the time limit.

Claimant's submissions

26. The claimant submitted that there was "ongoing discrimination" so far as her sex discrimination complaint was concerned and that three of her comparators were 10 still working at the "gate house" as PCOs, although they were unfit to do the full PCO duties. She also disputed that John Montgomery was employed as an OSO as the respondent's representative alleged. **Discussion and decision**

Is the claim out of time?

1527. The general rule is that claims of work-related discrimination, under the Equality Act 2010 ("the 2010 Act"), must be presented to the Employment Tribunal within the period of three months starting with the date of the act complained of (s.123(1)(a)).

28. It was clear that the "act complained of" in this case was when the claimant felt 20 that she had no option other than to accept the OSO role. She agreed to this on or about 5 March 2021. In my view, that is the date of the act complained of and the three month period starts to run from then.

29. Nor was I persuaded that there is "ongoing discrimination", as the claimant alleged in relation to her sex discrimination complaint. The "act complained of" is 25 clearly her alleged "demotion" to the OSO role. That was agreed on 5 March 2021; she started in the role on 10 May 2021; by agreement, her PCO salary ended on 10 June 2021. In any event, the claim was out of time by some considerable margin.

Tribunal's discretion to extend the time limit

30. The three-month time limit for bringing a discrimination claim is not absolute: Employment Tribunals have a discretion, in terms of s.123(1)(b) of the 2010 Act, to

extend the time limit for presenting a claim where they think it is, "*just and equitable*" to do so.

Relevant case law

31. In determining whether I should exercise my discretion and allow the late submission of the claim, I found the guidance in ***British Coal Corporation v. Keeble & Others*** [1997] IRLR 336 to be helpful. I also found the guidance of the Court of Appeal in the recent case, ***Adedeji v. University Hospital Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23, to be of assistance. In that case, the Court reviewed a number of recent cases involving the list of Limitation Act factors cited in ***British Coal*** and said this: -

"The best approach for a Tribunal in considering the exercise of the discretion under s.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."

20 Advice

32. It was significant that the claimant had the benefit of trade union advice throughout the capability procedure which led her to take on the OSO role and her grievance procedure. It is reasonable to assume that such advisors will be familiar with Employment Tribunal procedures and the three month time limit.

25 Indeed, the claimant gave evidence that when she advised her trade union representative that she had applied for early conciliation that he advised her at that time that her claim would be out of time. She said in evidence, "*I feel I was let down as I was never told about time-bar. Yes, I was in regular contact with the Union from 8 October 2021. I joined the GMB in April 2021. They couldn't give me advice for six months. That's why I waited until October to put in my grievance*".

33. She had also had advice prior to this, throughout the capability process, which led to her agreeing to take on the OSO role, from the Community Trade Union.

534. The quality of the advice she received is a matter between the claimant and her advisors. It is not something an Employment Tribunal can adjudicate on. However, the fact she had access to such expert advice is relevant to the exercise of the Tribunal's discretion.

35. Nor was there any impediment to the claimant submitting her claim in time. For the most part, she was fit to do so and, by her own means, she was able to search the internet and readily obtain information which enabled her to submit her claim form. I accepted her evidence that it was only at that time that she became aware of the three month time limit, but by then it was too late. However, she could have been advised of the time limit, in good time, and she could have established this herself by reasonable enquiry on the internet.

Prejudice

36. Were I not to exercise my discretion to extend the time limit then the claimant will be prejudiced as her claim will be dismissed and it was clear she felt very strongly about the way she had been treated. On the other hand, were I to allow the claim to proceed then the respondent will be prejudiced in having to defend the proceedings and considerable expense will be incurred.

37. While I was mindful that the just and equitable "escape clause" is much wider than that relating to unfair dismissal claims which require a claimant who has submitted a claim form out of time to show that it was not "reasonably practicable" to comply with the normal time limit, I was also mindful of such cases as **Robertson v. Bexley Community Centre t/a Leisure Link** [2003] IRLR 434. In that case, the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under s.123(1)(b) of the 2010 Act:-

30 *"There is no presumption that they should do so unless they can justify a 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 the discretion is the exception rather than the rule."* (my emphasis).

38. In all the circumstances of the case, therefore, and having regard to the fact that the claimant had the benefit of trade union advice; her ability to obtain readily information concerning Employment Tribunal procedures and time limits; the

length of the delay, not to mention the need for finality in litigation and potential prejudice to the respondent, I had little difficulty in arriving at the view that it would not be just and equitable to exercise my discretion and extend the limit.

1039. Accordingly, the Tribunal does not have jurisdiction to hear the claim as it is timebarred and it is dismissed.

Employment Judge: N M Hosie

Date of Judgment: 9 August 2022

Entered in register: 11 August 2022

and copied to parties