EMPLOYMENT TRIBUNALS

Claimant: **Miss Danni Edgar**

Respondent: **ERS Medical**

Heard at: **Nottingham by CVP On: 31 May 2023**

Before: **Employment Judge M Butler (sitting alone)**

Appearances

Claimant: **In person**
Respondent: **Miss Kennedy-Curnow, Consultant**

JUDGMENT

The judgment of the Employment Judge is that the claim was submitted out of time but it is just and equitable to extend time to allow the claim to proceed.

REASONS

Background

1. The Claimant submitted two very similar claims on 13 March 2023 and they have now been consolidated. She claims sex discrimination and harassment as a result of a male colleague making unwanted sexual advances to her, exposing himself and sexually assaulting her. Her claim form indicates that she does not consider the Respondent did enough to deal with her complaint or protect her from that colleague after the incident.

2. The last incident on which the Claimant relies took place on 14 April 2022 and it took place in an ambulance in which she and the male colleague were working as ambulance care assistants. It may be that the Claimant will seek to rely on the alleged failures of the Respondent at a later date but that will be considered as the case progresses if necessary.

3. The Claimant did not begin early conciliation until 9 March 2023 and the resulting certificate is dated 13 March 2023. Accordingly, as the claim was not

issued until 13 March 2023, it was well outside the 3 month time limit imposed by section 123(1)(a) of the Equality Act 2010 (EqA) when she began early conciliation. This preliminary hearing was listed to determine whether the claim was out of time and should, therefore, be struck out under rule 37 of the Employment Tribunals Rules of Procedure and, if out of time, whether it is just and equitable to extend time under section 123(1)(b) EqA so that the claim may proceed. If so, further case management orders were to be considered.

4. Miss Kennedy-Curnow did, in her helpful written submissions, pursue another point being that the claim should be struck out as having no reasonable prospect of success or that a deposit order should be made on the ground that it has little reasonable prospect of success but that was not for hearing today. In any event, I consider that I could not decide those matters today for two reasons. The first is that the Respondent has not yet presented a response (having been told not to do so by the Tribunal pending this hearing). The second is that there may well be factual issues which should properly be determined by a full Tribunal. Following the decision in **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330**, it would certainly be inappropriate to strike out the claim on prospects of success at this stage.

5. The Claimant's argument before me was that she had no knowledge of Employment Tribunals or that she could make a claim until she made a second application for universal credit and the relevant officer asked her why she was claiming and he mentioned the possibility of making a claim in the Employment Tribunal when the Claimant told him why she was not working. She further said that she has suffered from anxiety as a result of the assault while at work for which she has been prescribed and continues to take propranolol. She said in cross-examination that, had she known of her right to bring a claim, her anxiety would not have prevented her from doing so.

6. In her written submissions, Miss Kennedy-Curnow submits, inter alia, that it is not just and equitable to extend time, exercising my discretion to extend time should be the exception rather than the rule and extending time now would have an adverse effect on the cogency of the evidence and a fair trial would be less likely.

Conclusion

7. In **British Coal v Keeble [1997] IRLR 336**, five factors to be considered in determining whether to extend time were set out. However, as stated in **Abedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, those five factors are not intended to be an exhaustive list and all relevant factors should be assessed.

8. Following **Robertson v Bexley Community Centre [2003] IRLR 434,** I note that time limits should be considered strictly and exercising my discretion should be the exception rather than the rule. I accordingly set out below the factors I have considered in deciding to exercise my discretion to extend time.

9. Whilst the Respondent essentially argues that a delay will affect the cogency of the evidence and, consequently, the eventual trial being fair, in **Mills and CPS v Marshall [1998] IRLR 494**, the court held that if a party relies on the fair trial argument it should give very specific concrete examples which corroborate that

position. In this case, the Respondent has not set out why a fair trial might not be possible, for example, if staff have left and cannot be traced or documents have been lost. The incidents relied upon by the Claimant are discreet and the documents produced to me show a detailed investigation into her concerns.

10. Whilst it is unusual that a party does not know of the right to bring a claim in the Employment Tribunal through newspapers, television, social media or word of mouth, I have no reason to doubt the Claimant's evidence. She answered questions in a straightforward manner and truthfully indicated that her anxiety would not have prevented her from bringing a claim had she known she could do so. This admission reinforces her argument that she had no knowledge of Employment Tribunals. Further, after becoming aware of her right to present a claim she seems to have acted quickly in starting the early conciliation process and then submitting her claim a few days later.

11. In **Keeble**, the court also considered, as do I, whether the prejudice caused to one party outweighs the prejudice to the other party caused by refusing to extend time. In my view, the balance of prejudice rest with the Claimant who would be denied the right to bring a claim after what may be found to be a particularly unsavoury assault.

12. I am also entitled to consider the prospective merits of a claim as a factor to assess. If a Tribunal accepts the Claimant's account of the assault upon her, there is certainly an argument that there is at least a case for the Respondent to answer (**Rathakrishnan v Pizza Express (Restaurants) [2016] IRLR 278)**.

13. Finally, whilst there is no medical report in the bundle for this hearing, I accept the Claimant's account of her anxiety and treatment. In my view this goes some way to explaining her lack of research into Tribunal claims which was also justified by her apparent complete lack of knowledge of them. It is also supported by the fact that she reported the assault to the police and obtained a crime number. Having taken that step, it seems obvious she would have brought a claim had she known that she could.

14. For the above reasons, I have exercised my discretion to extend time.

_____

Employment Judge Butler

_____

Date 1 June 2023