Case Number: 2209042/2022

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
BETWEEN:

L

Claimant

AND

Diageo Great Britain Ltd

Respondent

ON: **21 September 2023**
Appearances:
For the Claimant: **In person**
For the Respondent: **Ms R Snocken, counsel**

RESERVED JUDGMENT ON PRELIMINARY HEARING (heard remotely by CVP)

The Judgment of the Tribunal is that:

1. The claims for notice pay and holiday pay are out of time and the tribunal has no jurisdiction to hear them.
2. It is just and equitable to extend time for the harassment claims which proceed to a full hearing.

REASONS

1. This decision was reserved because the claimant was unable to return to the hearing in the mid-afternoon after submissions.

2. This hearing was due to commence on 23 August 2023. Time was taken up on that date dealing with numerous other matters including a Rule 50 application and the identification of the issues. It was not possible to commence this part of the hearing until 21 September 2023.

3. By a claim form presented on 25 November 2022 the claimant L brings claims of harassment related to sex, sexual harassment, notice pay and holiday pay.

4. The claimant worked for the respondent from 9 November 2020 to 19 July 2022 as a National Account Manager. The respondent is a company dealing with beverage alcohol with a collection of brands of spirits and beer.

The issues for this preliminary hearing

5. The issues for this public preliminary hearing were identified by Employment Judge A Stewart at a case management hearing on 24 March 2023. For the purposes of this public hearing those issues were:

   (i) To consider whether the claims are out of time such that the tribunal has no jurisdiction to consider them.
   (ii) To strike out the claim as having no reasonable prospect of success. The respondent subsequently clarified that they only sought a strike out of the money claims and not the harassment claims. The strike out application was not pursued at this hearing.

Witnesses and documents for this hearing

6. There was an electronic bundle prepared by the respondent of 91 pages

7. The tribunal heard evidence from the claimant.

8. There was a Skeleton Argument from the respondent to which counsel spoke plus an authorities bundle of 8 authorities. There were oral submissions from the claimant. All submissions and any authorities referred to were fully considered, whether or not expressly referred to below.

Time limitation

9. The claimant's dates of service were from 9 November 2020 to 19 July 2022. The claim form (ET1) was presented on 25 November 2022. The dates of Early Conciliation (EC) were from 15 November 2022 to 22 November 2022.

10. The primary time limit expired on 18 October 2022. As the claimant had not contacted ACAS for EC prior to 18 October 2022, there was no extension of time to be added to the primary limitation period.

11. On the face of it the claim was at least 5 weeks and 3 days out of time based on the final allegation relied upon being dismissal on 19 July 2022. The earliest date relied upon was 9 March 2022.

12. On 13 January 2023 the tribunal wrote to the claimant informing her that

the claim was accepted for administration purposes but it appeared that it may have been filed out of time. The claimant was informed that the tribunal may decide that it must be struck out because the tribunal does not have jurisdiction.

Findings on the timing of the presentation of the claim

13. The claimant said that during her employment she did not raise the issues in her claim due to the sensitivity of the matter and because she was fearful of her position with the company. She said it took her time to build up courage to speak about it with her family and fiancé. The claimant accepted in evidence and I find that she began to discuss the matter with her fiancé prior to the end of March 2022.

14. The claimant said that after being disciplined she had "*no choice but to report the incident*" and she took the view that the respondent was engaging in stalling tactics. She said that this delayed her in being able to bring the matter to the tribunal.

15. The claimant set out a chronology in a document attached to her witness statement (bundle page 45). She first presented an email complaint to the respondent on 20 July 2022, this being the day after her dismissal. The email was titled: "*Inappropriate behaviour to me by my Manager".* In that email the claimant also said: "*I have taken legal advice on the offences inflicted on me…."* (bundle page 48).

16. The claimant accepted in evidence that the reasons she gave as to not raising the matter prior to 20 July, such as being fearful of her position within the company or concerns about how she would be treated at work, had all disappeared by 20 July 2022. She was no longer employed by the respondent.

17. The claimant took some legal advice on 19 July 2022, the final day of her employment, through a service that the respondent makes available to its employees. That source of advice was no longer available to her after her dismissal.

18. From 20 July 2022 onwards the claimant relied upon the respondent engaging in what she described as "*stalling tactics*" to prevent her from bringing her claim within time. The claimant said that the expression "*stalling tactics*" was said to her by ACAS on 31 October 2022 and more is said about this below.

19. The claimant received a response to her complaint on 1 August 2022, from the HR Director. It set out a plan of action but not a definitive time line. I find that it is difficult for a respondent to set out a definitive time line at the start of an investigation because they do not know how the investigation will go, what may be brought up or who they may need to speak to and whether they may need to speak to witnesses more than once.

20. The HR Director appointed an investigating officer, Ms McGuone, who contacted the claimant on 4 August 2022. The claimant agreed and I find that there was no "*stalling*" in terms of the investigator making contact with her.

21. The claimant offered 9 August 2022 as a date when she was available for an investigatory interview. This was not convenient for Ms McGuone and was set for the following day, 10 August 2022. This was not a stalling tactic. It was prompt.

22. On 9 August 2022 the claimant informed Ms McGuone that due to a bereavement, she could no longer attend on 10 August. She suggested 15 August. Ms McGuone replied on the same day, to say she was on leave the following week but could do 24 August. This was a prompt response and she gave an understandable reason as to why she could not meet the claimant on 15 August. The claimant was then on holiday in the week of 22 August and offered 30 August.

23. I find that there was no stalling tactic involved in the setting of the meeting on 30 August. Although it took a month to arrange, there were legitimate reasons on both sides.

24. The meeting took place on 30 August and the respondent attempted to send the notes to the claimant on 5 September. It went to an incorrect email address and once this was drawn to the respondent's attention it was resent on 8 September. I find that this was not a stalling tactic. The notes were prepared within a reasonable time frame. I find that the use of an incorrect email address was a mistake and not a stalling tactic, because it was an error that was corrected as soon as it was drawn to their attention. Had the respondent wanted to stall, they might have been better not to have prepared the notes within a few days of the meeting. They did not "*stall*".

25. On 14 September Ms McGuone gave the claimant an update (page 73) to the effect that it would not be until October when they would be able to give an update. This was due to pre-planned leave and witness availability. When replying on 16 September, the claimant took no issue with this.

26. Ms McGuone had not said exactly when in October she would be able to get back to the claimant. Understandably the claimant chased for an update on 11 October 2022. This led to a Zoom meeting on 18 October 2022, this being the expiry date of the primary limitation period. The claimant accepted in evidence and I find that she was given the outcome of her grievance complaint on 18 October 2022. The claimant was aware on this date that her complaint had not been upheld.

27. I find that the respondent did not engage in stalling tactics with a view to ensuring that the claimant missed the time limit for presenting her claim.

This was an investigation into a sensitive matter, the claimant received prompt responses from the respondent's officers and the time it took is fully explained as set out above.

28. The claimant told the respondent on 24 October 2022 that she was unhappy with the outcome of her complaint. She contacted ACAS for the first time on 31 October 2022.

29. The claimant said that during this discussion with ACAS on 31 October 2022 they told her about the three month time limit, and told her this was 3 months minus 1 day. I find that the claimant first became aware of the time limit on 31 October 2022. I also find that having been made aware of the time limit, the claimant was also aware that she was already out of time for the presentation of her claims.

30. After speaking with ACAS on 31 October the claimant did some research online to find out more about the tribunal process and what she needed to do. She searched on the ACAS website. I find on a balance of probabilities that this also disclosed to her the time limit and that this reinforced the fact that she was already out of time.

31. The claimant did not commence Early Conciliation until 15 November 2022. She said that the reason for this was because she had to get things sorted out and had she was "*putting things together*". Whilst it may take longer to prepare a claim form, it is not difficult to start Early Conciliation. I find that the claimant did not have a good reason for the delay in starting Early Conciliation.

32. In relation to the claims for notice pay and holiday pay the claimant says it was not reasonable for her to have been able to present those claims beforehand because "*as with the above matter, I was having to go back and forth*" with the respondent with her queries. The claimant said she had emails to prove this, but she did not produce these for this hearing, either when it was due to start on 23 August 2023 or the resumed date on 21 September 2023, when she had been made aware that the burden was on her to establish that it was not reasonably practicable for her to present the claim in time.

33. The claimant agreed that her pay claims were separate matters from her harassment claims. I find that even if the claimant had to engage in some email correspondence about her holiday pay and notice pay, this was not a sensitive matter and she did not give a good reason for the delay in presenting those claims.

34. In terms of the holiday pay claims, there was a dispute between the parties as to when was pay-day. The claimant said it was around 27th of the month, the respondent said it was mid-month. I had no payslips to assist on the matter.

35. If, as the claimant says, she should have been paid her holiday pay on

27 July 2022, being the first pay-day after termination of employment then her holiday pay claim is about a month out of time.

36. The claim for notice pay crystallises on termination of employment being 19 July 2022. Even if the notice pay did not fall due until pay day, the claim is also about a month out of time.

37. I find that prior to 31 October 2022, the claimant took no steps to appraise herself of her rights or do any research online or otherwise as to what she might need to do to bring her money claims or whether there might be any time limit to consider.

38. Although in oral evidence the claimant gave another reason for the delay as not being well, she accepted that she had not mentioned this in her witness statement. It was put to her that if this had a significant impact, she would have put it in her statement. She said: "*Yes, I believe so*". I find based on this answer, that the claimant's health did not significantly affect her ability to present her ET1.

The relevant law on the time point

39. Section 123 of the Equality Act 2010 provides that:

> *(1) ……..proceedings on a complaint within section 120 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.*
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*

40. The just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant - ***Bexley Community Centre (t/a Leisure Link) v Robertson 2003 IRLR 434***.

41. The decision of the Court of Appeal in ***Apelogun-Gabriels v London Borough of Lambeth 2001 IRLR 116*** makes clear that there is no general

principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing. It is one factor to be taken into account.

42. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96.*** This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The CA said: "*The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed*" (paragraph 52).

43. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

44. There has been a tendency in time limit cases to consider the factors set out by the EAT in ***British Coal Corporation v Keeble 1997 IRLR 336*** reflecting the provisions of section 33 of the Limitation Act 1980 in relation to extending time for personal injury claims. This has been cautioned against more recently by Lord Justice Underhill in the Court of Appeal in ***Adedeji v University Hospital Birmingham NHS Foundation Trust 2021 ICR D5,*** where he said (at paragraph 37): "*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."*

45. The discretion is a wide one and was considered by the EAT in ***Miller v Ministry of Justice EAT/0003/15.*** Laing J said:

> *"the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive"*

46. For the claim for holiday pay, as a claim for an unlawful deduction from wages, section 23(2) of the ERA provides that subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. Subsection (4) provides that where the employment tribunal

is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

47. In terms of the time limit to bring a claim for notice pay, it is also the reasonably practicable test under Article 7(c) of the Employment Tribunals Extension of Jurisdiction Order 1994.

48. What is reasonably practicable is a question of fact and therefore a matter for the tribunal to decide. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. There is a duty upon her to show precisely why she did not present the complaint within time. It is a question of what was reasonably practicable and not a discretion to extend time.

49. The reasonably practicable test is much stricter than the just and equitable test – see ***London Underground Ltd v Noel 1999 IRLR 621.***

50. The term "reasonably practicable" has been held to mean the same as "reasonably feasible" - ***Palmer and Saunders v Southend-on-Sea Borough Council 1984 ICR 372, CA.***

Conclusions on the time point

51. The respondent submitted that in terms of the issues identified at a Case Management Hearing on 23 August 2023, the most significant issue is the one of sexual harassment which, on the claimant's case, took place on 9 March 2022 and this is substantially out of time.

52. The claimant relied upon there being a continuing act through to 19 July 2022 when she was dismissed.

53. I have found above that the reasons relating to what might happen to her at work, had all disappeared as from 19 July 2022 with her dismissal. This is underlined by the fact that she made her first complaint to the respondent on 20 July 2022 by email. I have also found that the respondent did not engage in stalling tactics to try to prevent the claimant from bringing her claim within time.

54. I have found that the claimant has not given a good reason as to why she did not present her claim promptly after finding out on 31 October 2022 that she was already out of time. It took her about 2 weeks after that to commence Early Conciliation and the ET1 was not presented until 25 November 2022.

55. The claimant said that she was unable to afford legal advice and she felt like a "*lone voice*" against a large organisation. She said that it had been a traumatic time for her since the alleged incident on 9 March 2022, followed by the loss of her job. She thought she was doing the right thing

by following it up with the company through an internal process. She said she had tried her best and she still finds it traumatic to this date.

56. The claimant was unable to continue with the hearing after making her submissions. She said in an email sent in the afternoon that her wellbeing had "*gone downhill*" from the morning's proceedings, she was unwell and was no longer able *"to take in information or speak coherently".* This was treated as a postponement application in relation to the remainder of this hearing and the application was granted.

The money claims

57. I deal firstly with the claimant's money claims, for holiday pay and notice pay as identified at the case management hearing on 23 August 2023. The claimant said in the hearing today that she had more in the way of money claims but these have not yet been made clear or particularised and may require an application to amend. So far as the notice pay and holiday pay claims are concerned, the tribunal is dealing with the reasonably practicable test.

58. As I have found above, there were no health issues preventing the claimant from presenting her claim. She did not take any steps prior to 31 October 2022 to find out about her rights or what steps she may need to take. The money claims are separate to the harassment claim and this was accepted by the claimant.

59. The claimant commenced Early Conciliation on 15 November 2022 and presented her claims for holiday pay and notice pay on 25 November 2022. She knew about the time limit from 31 October 2022. She has not explained why it was not reasonably practicable for her to present her money claims by 18 October 2022 and I find that it was reasonably practicable for her to do so.

60. For this reason I find that the claims for notice pay and holiday pay are out of time and the tribunal has no jurisdiction to hear them.

The harassment claims

61. In terms of the just and equitable test, the lack of a good reason for presenting the claim in time is a factor to be taken into account. It is not determinative.

62. The claimant described herself as traumatised by what she says she experienced on 9 March 2022 and following, in terms of alleged acts of harassment including sexual harassment. I agree that having to go over events which the claimant finds traumatising, must be difficult for her.

63. It is necessary to consider the prejudice to the respondent if the claim is allowed to proceed. The respondent submitted that as well as the obvious prejudice of having to meet the claim, there was significant forensic

prejudice as well – see ***Miller*** (above).

64. The respondent relies on the alleged perpetrator of the harassment, referred to as G, no longer being in the respondent's employment. I accept this makes it more difficult for the respondent but they did not say that they were unable to contact G. The respondent is in contact with G so I find that they are able to obtain information from him to assist them with the defence of the claim. The respondent has not submitted at any point that they are unable to call G to give evidence as to what did or did not happen between himself and the claimant.

65. The respondent also relies on the issue of delay and the potential effects of this. From enquiries made during this hearing, it is unlikely that the full merits hearing will take place before the summer of 2024, so much of it will be over 2 years from the events in question. I find in relation to this that the respondent has been aware of the claim since late 2022 so they have been in a position to prepare and make enquiries from about 6 months after the events in question. They have also dealt with an internal complaint which has generated documents including interviews with witnesses and that internal complaint took place within a few months of the events in question. These documents will help to refresh the memories of the relevant witnesses.

66. The respondent also says that in terms of the complaint that pressure was piled onto the claimant after a return to work on 31 March 2022, the relevant emails have been deleted. The respondent says they have a deletion policy after 90 days. Both parties will be in the same position of having to deal with this orally.

67. I have taken into account the delay and the fact that the respondent will have to face a claim that might otherwise be time barred. In terms of the forensic prejudice relied upon by the respondent I find that it is just and equitable to extend time.

68. Harassment and particularly sexual harassment, if proven, is a very serious and traumatising matter. The respondent is not without G's input. There was a relatively swift investigation, which I have found was not the subject of stalling tactics. Documents were produced in connection with that investigation which will assist with recollection and memory. This will include either witness statements or meeting notes prepared by Ms McGuone from interviews with those involved. If the emails are no longer available in terms of whether or not pressure was piled upon the claimant after her return to work on 31 March, both parties will be in the same position of having to rely on their oral evidence.

69. I find that in the claimant has shown that it is just and equitable to extend time for the harassment claims. Any forensic prejudice relied upon by the respondent was not enough to go against the exercise of the discretion.

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Employment Judge Elliott
Date: 22 September 2023

Judgment sent to the parties and entered in the Register on:22/09/2023
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_____ for the Tribunal