Case No. 1401273/2022

EMPLOYMENT TRIBUNALS

Claimant: **X**

Respondent: **Z**

Heard at: Southampton **On:** 13 April 2023

Before: Employment Judge Self

Appearances

For the Claimant: Mr P O'Callaghan - Counsel

For the Respondent: Ms O Dobbie - Counsel

JUDGMENT

1. The names of individuals in this Claim will be anonymised pursuant to Rule 50 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1.

2. Upon all claims being lodged outside of the relevant statutory time limit and upon it not being just and equitable for the time limit to be extended, all claims are dismissed.

WRITTEN REASONS

(As requested by the Claimant by e-mail on 13 April 2023)

1. On 5 April 2022 the Claimant lodged a Claim at the Employment Tribunal in which she asserted that she had been discriminated against on the grounds of her race, sex and disability. The Claimant had undertaken Early Conciliation against the Respondent between 11 February 2022 and 24 March 2022.

2. The Claimant had been employed by the Respondent as a Customer Service Advisor and her dates of employment were given as being 31 October 2015 to 10 May 2021. The Respondent asserts slightly different dates than that, with the effective date of termination being 17 May 2021, but nothing turns on that difference between the parties.

3. On 18 May 2022 the Respondent lodged their Response and within that asserted that the Tribunal did not have jurisdiction to hear the Claim because none of the allegations were made within the statutory time limit for discrimination claims set out at section 123 of the Equality Act 2010 (EqA) and it would not be just and equitable for time to be extended pursuant to section 123 (1) (b) of the EqA.

4. On 10 January 2023 the matter came before me by way of a Telephone Case Management Hearing. At that hearing the Claimant withdrew her claim for disability discrimination and a Judgment was made dismissing that Claim upon withdrawal. The Claimant accepted that her claim of race and sex discrimination which comprised of acts on 20 May 2018 and 16 December 2018 had been lodged outside of the statutory time limit and I listed a Public Preliminary Hearing to consider whether the statutory time limit should be extended on the ground that it was just and equitable to do so. In addition the Respondent had applied for the Claim to be struck out as having no reasonable prospect of success or alternatively for a Deposit Order to be made as it averred that the Claim had little reasonable prospect of success and that was listed to be considered as well.

5. By chance the Public Preliminary Hearing was also listed in front of me and I had produced to me a bundle of documents (well in excess of the page limit agreed and ordered at the March hearing) and witness statements from the Claimant in support of her Claim and from Mr B on behalf of the Respondent who were both available to be cross examined. The Claimant also produced a witness statement from Ms T which the Tribunal considered although she did not attend to give evidence. Her statement provided evidence on the substantive issues in the case and not on anything that could provide any assistance in relation to the preliminary issues under discussion. Finally the Respondent's counsel provided a skeleton argument for consideration.

6. The Claimant had previously sought witness orders in relation to Mr M and Ms M-F. The initial application was on 21 February 2023 and on 21 March 2023 EJ Bax asked for further information as to what precisely they could assist with. By return counsel for the Claimant responded setting out that they could give evidence re factual maters relating primarily to a short period after the December incident and also "material relevant to the Claimant's mental state". That application was never dealt with and was repeated on 11 April at 1710. The application was not renewed before me nor was a postponement of the

hearing sought in order to secure Witness Orders. The Claimant was professionally represented. Accordingly the hearing proceeded. In any event neither witness was a medical professional and so it was unclear how much assistance they could give as an untrained observer and over what period. No draft statements were submitted.

The Law

7. Section 123 (1) of the EqA 2010, so far as is material reads as follows:

(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.

8. The discretion for tribunals to hear out-of-time claims within whatever period they consider to be ‘just and equitable’ is a broad one. While employment tribunals have a wide discretion to allow an extension of time under the ‘just and equitable’ test, it does not necessarily follow that exercise of the discretion is a foregone conclusion. Indeed, the Court of Appeal made it clear in **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, that when employment tribunals consider exercising the discretion, ***‘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 the discretion is the exception rather than the rule.’***

9. The onus is therefore on the Claimant to convince the tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

10. Section 123 EqA does not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for ‘just and equitable’ reasons. Previously, the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980 — **British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT**. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, 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 cooperated with any requests for information; the promptness with which the claimant 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.

11. Subsequently, however, the Court of Appeal in **Southwark London Borough Council v Afolabi 2003 ICR 800**, CA, confirmed that, while the checklist in S.33 of the Limitation Act 1980 provides a useful guide for tribunals, it need not be adhered to slavishly. In other words, the checklist in s.33 should not be elevated into a legal requirement but should be used as a guide. However, the Court went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay and whether the delay has prejudiced the respondent

12. In **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA**, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 EqA ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

13. Case law suggests that it will be important for the party seeking an extension of time to provide an explanation for the delay. There is no justification, however, for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard. However, there is no requirement for a tribunal to be satisfied that there was a good reason for the delay before it can conclude that it is just and equitable to extend time.

14. The fact that a claimant is unaware of his or her right to make a tribunal complaint or the time limits could be a reason to extend time. Although the discretion is wide, it will apply only where the claimant's ignorance is reasonable.

15. Also account can be taken of a Claimant's incapacity to bring a claim within the statutory time limit through medical grounds or for other reasons. Medical evidence would be helpful in such a case.

The Facts

16. The Claimant was working part time at the Respondent whilst undertaking a law degree on the dates that the alleged acts of harassment took place but when she finished her degree in 2020 she started working for the Respondent full time.

17. The Claimant put forward two reasons why she did not submit her claim in time. Firstly she stated she was too ill to bring a Claim and secondly she was ignorant of the time limits. She also asserted that the illness affected her ability to research the time limits.

18. I have seen and heard evidence in relation to the Claimant's mental health issues over the material period. The issue is not whether she suffered from mental health issues per se but whether she did so and they were of such a nature / severity to effectively prevent her from bringing a claim within the statutory time limit or alternatively were such that it rendered her ignorance of the time limits reasonable.

19. The medical notes supplied do not cover the full period as they only start in December 2018. At that point the time limit had come and gone in relation to the May incident but for the purposes of this hearing I am satisfied that the two acts can be linked, notwithstanding some 7 months between them, so as to form an act continuing over a period with the similarity between the two allegations and the same perperator. Time runs, therefore from the December 2018 incident.

20. On 1 April 2019 the Claimant was seen by her GP following an overdose on 23 February 2019 and she stated that she was not sure whether she would try again in the future. She was prescribed Fluoxetine which is an anti-depressant. There are occasional attendances at the GP at which mental health is not the issue and mental health is not mentioned again until 1 February 2021 where she stated that she was not taking any medication but was suffering with low mood and anxiety. In short there is little within the medical records to suggest any major incapacity over this period

21. On 18 February 2021 the Claimant's mental health was assessed and the test administered suggested the Claimant had moderately severe depression and moderate anxiety (147). The Claimant undertook some counselling from February to May 2021.

22. In her statement the Claimant provides details about the time following the incident in December 2018 and indicates that she had bad mental health from then until she took her overdose but makes no further comment about her mental health for the remainder of the period until the last paragraph where she states that:

"From 2018 to 2021 I was hyper focused on trying to get dark thoughts of committing suicide out of my head, anything else besides this was unimportant to me. I was in survival mode as all I wanted was to be at peace with my past. I have tried to forget about my experiences and have tried my hardest to heal from the inside out but I've come to realise in order for me to fully move on with my life I need justice".

23. In addition the Claimant stated that:

    "I have had no legal support and have been on my own until I first contacted ACAS in February 2022, it was only then that I was made aware of the time limits."

24. The period in issue is from 16 December 2018 until the date the Claimant put in the claim on 5 April 2022. The Claimant's attendance at her GP during this period for mental health problems is related to a relatively short period. Many people suffer from depression and anxiety but are still able to function on a day-to-day basis, especially on medication. The Claimant was, during that period, still able to be well enough to study for and pass a law degree as well as working a significant number of hours for the Respondent. It would have been open to the Claimant to provide a medical report which addressed specifically her capability during the period in question to lodge a claim or her ability to research what was required to bring a Claim. The Claimant has not done so and the medical evidence I do have, plus what she was able to do over that period are not supportive at all of the level of incapacity that the Claimant suggests

25. Whilst I accept that the Claimant was suffering from mental health problems from time to time over the three years between the alleged discriminatory act and lodging the claim, I have no medical evidence to suggest that the Claimant was incapable of lodging a claim because of that. Indeed because of what the Claimant was able to achieve over this period (gaining a law degree and working regularly) I do not accept at all that her mental health was such that a Claim could not be lodged.

26. Further I find it inconceivable that the Claimant did not know nor could reasonably have found out that there was a time limit for bringing claims. The Claimant accepted that she had access via the university to all of the major law publishers from which she could readily have gained necessary information on how and when to lodge a claim.

27. Googling "discrimination at work" brings up a host of sites including the CAB and Gov.UK websites which indicate that you can bring a claim to an Employment Tribunal and sets out time limits clearly. The Claimant accepted that she was computer literate. I am wholly unable to reconcile the capability to pass a law degree with the alleged incapability to research time limits to

bring an employment tribunal claim. I also find it difficult to believe that the Claimant did not believe that there was any need to bring a claim within a certain time with her law background.

Conclusions

28. I am quite satisfied on the evidence I have heard and upon the submissions given that time should not be extended in this Claim as it would not be just and equitable to do so.

29. The Claimant has given explanations for why she did not bring the Claim in time and I reject her evidence. There is no cogent or persuasive evidence that the Claimant's medical condition prevented her from either issuing a claim or researching what the time limits may be. I do not accept that the Claimant, a law student in the course of passing her degree, was unable to research discrimination claims over such a lengthy period so as to fail to bring her claim in time. She had the tools and the knowledge to do so. Indeed anybody with a basic working knowledge of searching on the internet would have easily found out the process for bringing claims.

30. Accordingly I do not accept that the Claimant has put forward an acceptable reason for why her claim is both delayed, and further, delayed for such an inordinate length of time. Of course that is not the end of the matter but it is a relevant consideration to weigh in the balance. The delay is substantial.

31. I am quite satisfied that such a delay would affect the cogency of the evidence and that memories will have, in all likelihood dimmed because of the time since the actions complained of. That is additionally so because drink seems to have been involved in the original incidents. Further evidence that might be relevant and could have been obtained with a timely complaint / Claim, such as CCTV footage and social media posts will now not be available. A number of potential witnesses no longer work for the Respondent

32. Further the alleged perpetrator of the harassment is no longer an employee of the Respondent but certainly was for some time after the events. He has indicated that he does not wish to be involved in any Employment Tribunal and that reluctance to cooperate prejudices the Respondent's position greatly. I accepted the evidence of Mr Brady that he had a telephone conversation with the alleged perpetrator. Whilst I accept that a witness order could be sought, even that prejudices the Respondent in taking a proof of evidence etc. given the clear desire not to be involved

33. So far as prejudice is concerned the Claimant will suffer prejudice if I do not extend time as her claim will be dismissed. Having said that on my findings the Claimant had the opportunity and the ability to lodge the Claim in time or

with a very short delay and so on my findings the prejudice she will suffer is self-inflicted. I take into account the seriousness of the situation

34. Balancing all of the above I conclude that it would not be just and equitable for time to be extended taking into account the length of the delay, the prejudice that would cause to a fair hearing, the failure to provide a cogent reason for the delay and that the balance of prejudice weighing far more heavily against the Respondent.

35. The Tribunal does not have jurisdiction to hear this Claim and it is dismissed.

Employment Judge Self
Date: 9 June 2023

Sent to the Parties:
12 June 2023

For the Tribunal Office