



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102115/2022

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Held at Aberdeen by Cloud Video Platform on 23 August 2022

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Employment Judge J M Hendry

Mrs N MacLennan

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**Claimant
In Person
Assisted by
Ms K Last &
Ms C Attfield
Lipspeakers &
Ms D Glass,
BSL Interpreter**

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Royal Mail Group Limited

**Respondent
Represented by
Ms N Moscardini,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claims for sex or disability discrimination other than possible claims arising from events on 29 March 2022 being time-barred and it not being just and equitable to extend the time limits for presentation of said claims, they are dismissed.

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E.T. Z4 (WR)

REASONS

Facts

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1. The claimant in her ET1 contended that she had been discriminated against on the grounds of her sex and disability. The respondents denied that the claimant had been discriminated against and argued that the majority of the claims made were time-barred and that extending the time limits would prejudice the respondents given the passage of time.

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2. The respondents accepted that the claimant was disabled in respect of being profoundly deaf.

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3. The case proceeded to a preliminary hearing for case management purposes on 20 June 2022. At that hearing the respondents confirmed that they did not accept the “additional conditions” that the claimant said she had namely, ADHD/PTSD and/or depression. The issue of disability was left meantime as the respondents asked for an open preliminary hearing on time-bar. At the preliminary hearing I explained to the claimant what the issues were in relation to time-bar and indicated that she might want to give evidence to the Tribunal about the circumstances surrounding the raising of the claim, what steps she had taken to seek legal advice and so forth.

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4. A hearing was arranged for 23 August to take place by CVP. The claimant wrote to the Tribunal on 15 August querying what was to happen on that date. The Tribunal responded that the hearing on 23 August related to time-bar namely, were the claims presented outwith the three month time limit (from the date of the last act complained of). The letter explained that if it was held that they were out of time the Tribunal could exercise its discretion and allow the claim to proceed on the basis that it was just and equitable to do so. The letter stated:

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“It is anticipated that you will require to give evidence but in the circumstances in which you submitted the claim form and your state of knowledge of Employment Tribunals and time limits at the time.”

- 5 5. Parties prepared and lodged a joint bundle (JB1-91) for the benefit of the Tribunal. The claimant gave evidence to the Tribunal and the Tribunal made the following findings in fact.

Facts

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6. The claimant is Ms Nile MacLennan. She is 29 years of age.
7. The claimant was born deaf at birth. She was taught BSL and can lip read. She wears two visible hearing aids. She suffers daily with tinnitus.
8. The claimant began work with the respondents on the 6 August 2018. Her
15 employment ended on 3 June 2022.
9. The claimant started work as a Postal Delivery Driver with the respondents. She enjoyed the role. In particular she found it pleasant to drive around the countryside. She would enjoy the individual interactions she would have with customers.

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10. The claimant is an intelligent and articulate person. She has good speech which is unusual for someone who is profoundly deaf. The claimant hoped that joining the Royal Mail Group would provide her with a career and was keen to apply for a Trainee Manager’s position which she did in August 2019.

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11. The respondents were aware of the claimant being profoundly deaf as it was in her job applications. In addition, she wore two visible hearing aids. She also raised the matter at the interview for the trainee manager’s post to ensure that she had sufficient support if appointed.

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12. After her interview she was disappointed that there seemed to be little progress in providing her with support to start her new position. It wasn’t until February 2020 before she properly started in her new role. She received no formal training or support. She found there were difficulties with managers

who did not seem to be aware of her deafness and this led to problems communicating with staff. She began to feel excluded.

13. In late 2019 the claimant received a number of unwanted txts from a male manager. The claimant was upset at receiving the txts particularly the txts at pages . The manager's wife was also a manager at the depot in Inverness. The claimant did not know who to turn to or who to speak to. She felt anxious about the situation she found herself in. She decided to keep quiet for the good of her career. She ignored further txts and attempts at contact by the manager concerned. His behaviour made her feel anxious and vulnerable.
14. In April 2020 the claimant asked her Operations Manager and her Line Manager, Hannah Stewart for support and training. The claimant had become concerned that there was no adjustments being made to accommodate her disability at a number of offices. The claimant had become increasingly concerned about what she regarded as a lack of support.
15. The Coronavirus Pandemic started in March 2020. This had an impact on the respondent's business and personally on the claimant. The claimant's mental health began to suffer. The wearing of masks made it impossible for her to lip read.
16. An incident occurred between the claimant and a manager who did not respect social distancing when speaking to her at work. The incident upset the claimant and she left the work premises as she felt unsafe. The claimant told another manager about the incident.
17. The claimant e-mailed Ms Stewart on 30 May reminding her about lack of coaching and training. These and other difficulties continued throughout 2020. The claimant felt there was limited support and no adjustments being offered to her. She asked for communications to be by video to allow her to lip read but this did not always happen. The claimant became anxious and depressed. By June 2021 the claimant was placed on anti-depressants.

18. In February 2022 the claimant was offered an alternative temporary role as a Collections Driver which she accepted.
19. The claimant raised a grievance in late 2020. It progressed to a stage two grievance (JB55). The grievance was not upheld apart from one minor point. The claimant was very upset for the fact that most of her grievances were not upheld. She was upset at the manner in which the manager had dealt with her grievance and felt he had spoken over her and been aggressive and loud. She had felt intimidated. The claimant raised an appeal about the grievance but did not pursue it.
20. The claimant was off work with anxiety and depression around four months following this. Prior to raising the grievance she had spoken to a colleague who had suggested that she contact ACAS. She did this and told the Grievance Manager, Mr Watson that the respondents would be contacted by ACAS. She did this because she had been told that the respondents might take her grievances more seriously. The claimant reverted from being a Trainee Manager to a Traffic Sampler on 14 December 2020.
21. Following her period of absence the claimant's mental health did not fully improve. She continued to work and her employers did not raise any issues with the quality of her work.
22. On 29 March 2022 the claimant was involved in an incident at work in which she found upsetting and intimidating. Because of previous difficulties and the fact that her earlier grievances had not been upheld she did not think there was a recourse through her employers. She had spoken to her Line Manager about the incident but did not believe that she was interested in investigating it. The claimant spoke to her G.P. on the telephone. The G.P. suggested that she take the matter to "court". The claimant contacted ACAS on 5 April. She raised the present claim on 14 April 2022.

Witness

23. I found the claimant to be generally a good historian in relation to events and credible in her evidence although the cross examination related to the claimant's actions in ultimately raising proceedings. The rights and wrongs of the particular events she relied upon were not explored or challenged in accordance with the purpose of the hearing.

Submissions

24. Ms Moscardini's submissions were that there was no continuing act or pattern of behaviour and that the various incidents perhaps with the exception of the alleged lack of training were unconnected. The unwanted txts were, she said, sent in 2019. The respondents had not been alerted to the problem at the time and investigation made. The claimant did not take the matter further. It would be apparent that the respondent would be prejudiced given the lapse of time to be out to the cost of investigating the circumstances now some years after the original events.

25. In relation to the issues of training and reasonable adjustments these relate to historic matters as well. The grievance decision issued in November 2020 covered complaints relating to a lack of training, support and communications problems. This encompasses the claims for reasonable adjustments, direct disability discrimination and indirect discrimination. It was notable that the claimant had taken advice from a colleague and was aware of ACAS. She was in a position to find out more about her rights. She accepted that she used the internet. She could have discussed her position with ACAS and become aware of the time limits. She could have taken legal advice or persevered with seeking assistance from the Trade Unions she was in touch with. The claimant gave up the post of Trainee Manager in December 2020 and these matters relate to that period. Again because of the passage of time it would not be just and equitable to allow these claims late. The final issues involving Mr Mackenzie were raised in time.

26. The claimant asked the Tribunal to take into account the circumstances that she had told it about. The difficulties she had faced being ignorant of her employment rights and being unable to get assistance from the Trade Unions. Her mental health had played a part in these matters and for some months following the rejection of her grievance she was unable to go outside and suffered from increased anxiety. The claimant did see a pattern in all the different matters as she felt there was an underlying failure to recognise her deafness and the impact that had on her mental health.

Discussion and Decision

27. Claims for discrimination under the Equality Act 2010 require to be raised with the Employment Tribunal within three months of the act or omission complained of. This is known as the statutory time limit as it is prescribed by law. Section 123(1)(b) of the EA provides that, subject to the ACAS early conciliation process, a complaint must be made within the three month period or within “such other period as the employment tribunal thinks just and equitable.”

28. This means that a Tribunal must know what other limitation period should apply, if any, it thinks is just and equitable in any particular case. The statute gives no further guidance as to how to apply that test. Over the years various authoritative decisions of higher have set out guidance that should be followed.

29. A number of such cases are reviewed in the Judgment of HHJ Laing, in **Miller v The Ministry of Justice** UKEAT/0003/15/LA at paragraph 10:

“There are five points which are relevant to the issues in these appeals.

*i. The discretion to extend time is a wide one: **Robertson v Bexley Community Centre** [2003] EWCA Civ 576; [2003] IRLR 434, paragraphs 23 and 24.*

*ii. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule (ibid, paragraph 25). In **Chief Constable of Lincolnshire v Caston** [2010]*

EWCA Civ 1298; [2010] IRLR 327 Wall LJ (with whom Longmore LJ agreed), at paragraph 25, put a gloss on that passage in **Robertson**, but did not, in my judgment, overrule it. It follows that I reject Mr Allen's submission that, in **Caston**, the Court of Appeal "corrected" paragraph 25 of **Robertson**. Be that as it may, the EJ in any event directed himself, in the first appeal, in accordance with Sedley LJ's gloss (at paragraph 31 of **Caston**), which is more favourable to the Claimants than the gloss by the majority.

iii. If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence. No authority is needed for that proposition.

iv. What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET (**DCA v Jones** [2007] EWCA Civ 894; [2007] IRLR 128). The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases (*ibid*, paragraph 44).

v. The ET may find the checklist of factors in section 33 of the **Limitation Act 1980** ("the 1980 Act") helpful (**British Coal Corporation v Keeble** [1997] IRLR 336 EAT; the EAT (presided over by Holland J) on an earlier appeal in that case had suggested this, and Smith J (as she then was) recorded, at paragraph 8 of her Judgment, that nobody had suggested that this was wrong. This is not a requirement, however, and an ET will only err in law if it omits something significant: **Afolabi v Southwark London Borough Council** [2003] ICR 800; [2003] EWCA Civ 15, at paragraph 33.

11. **DCA v Jones** was an unsuccessful appeal against a decision by an ET to extend time in a disability discrimination claim. The Claimant had not made such a claim during the limitation period as he did not want to admit to himself that he had a disability. At paragraph 50, Pill LJ said this:

"The guidelines expressed in Keeble are a valuable reminder of factors which may be taken into account. Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found. It is inconceivable in my judgment that when he used the word "pertinent" the Chairman, who had reasoned the whole issue very carefully, was saying that the state of mind of the respondent and the reason for the delay was not a relevant factor in the situation."

30. There is, therefore, no particular feature or element of a case that must necessarily be present to allow the exercise of the discretion. However, some factors are often present. The upshot of refusing to extend time will be that the claimant will not be able to have her claim adjudicated on its merits by the Tribunal. On the other hand, allowing an extension means that a respondent will have to defend the proceedings and risk losing. This is often referred to as the balance of prejudice and the Tribunal must balance parties' competing interests.
31. There is also the importance that is attached to the statutory time limits which should be observed in litigation. The onus is on a claimant to persuade a tribunal that there is good reason why it would be just and equitable to extend time in any particular case.
32. There are some factors that are often in play such as here where the issue of the claimant's ignorance of her legal rights and attendant time limits for raising proceedings has to be considered against the wider background.
33. The texts the claimant received and the situation she found herself in at work in 2019 caused her considerable anxiety particularly as she felt powerless. The claimant is an intelligent and articulate woman and it is surprising that she did not take some steps to look into her rights as an employee by pursuing either internal avenues open to her or by researching her legal rights. She eventually got sound advice from a colleague and through ignoring the approaches being made discouraged them. The respondents were not involved in dealing with any grievance or carrying out any investigation into the matter. They would face expense and difficulty if the matter were to end up in a contested litigation some years after the original events. This is no doubt one reason for the statutory time limits imposed by Parliament. In these circumstances the claimant has been unable to convince me that it would be just and equitable to extend the time limits to allow these claims to proceed.

34. The next group of claims (disability discrimination and a failure to make reasonable adjustments) were the subject of a grievance process and the respondents were able to investigate the complaints. Some records of the position will exist but that grievance itself dealt with matters going back to January 2020 apart from the first use which related to a failure record the claimant's disability properly in 2018. The claimant was at points clearly able to get assistance. She told the tribunal that she had been in contact with both the CWU and the Trade Union that managers belong to. She also spoke to a colleague who told her to contact ACAS. At this point Ms McLennan was on the cusp, as it were, of taking advice about her rights which she thought had been infringed. Ultimately, she did not do so and I struggle to understand why given the impact these matters were having on her. I did not hear any medical evidence that might have assisted her position. The implication of her evidence was that for long periods she was unwell with anxiety and not able or motivated to pursue matters. Against this as Ms Moscardini pointed out she maintained good attendance (save for the period following the rejection of the grievance) with no comments being made about the quality of her work. Ms Moscardini argued that in essence if the claimant was well enough to work she was well enough to pursue her rights in a situation where she felt she had been wronged or badly treated.

35. The last matter that has to be considered is the handling of the grievance and the Manager's behavior at it. It seems odd that the respondent's HR department seem initially to have rejected the grievance she sought to make about the conduct of the actual grievance hearing given that this is a different matter from the merits or substance of the grievance decision. The claimant was also unwell for some months after this. But even taking this into account it was almost a year later, after she had returned to work, that a claim was raised. It is also not completely clear whether that claim relates to a failure to make reasonable adjustments (not talking over the claimant) or harassment under section 26 of the Equality Act by the manager creating an intimidating, hostile, degrading, humiliating or offensive environment for her by talking over

her/shouting/being aggressive. Once again for the reasons articulated I am not convinced that it would be just and equitable for the claim to proceed given the passage of time and the fact that the claimant believed she had been wronged by the behaviours she complains of at the time and yet took no action to find out if there was a time limit to making a formal claim and what her rights were more generally.

36. It is difficult not to have some considerable sympathy with the situation which the claimant now finds herself with the breakdown of her health and confidence. The claims made are not personal injury claims which the Tribunal has no jurisdiction over. A personal injury claim has a time of three years and not three months. It was clear to me that the claimant's expectations were high that with support she could have become a manager tapping into what she thought were the company's extensive resources. We did not hear from anyone in the company nor go into specific details of events but the impression left was that the respondents seemed unprepared to provide the level of support the claimant expected and that the impact of lockdown both on the respondent's business, their ability to free up resources/equipment to assist the claimant and the personal impact lockdown and disappointments at work had on the claimant's mental health led to the unfortunate situation where she felt unable to continue with the trainee manager role.

37. Finally, although we did not discuss the last incident in any detail while not minimising the impact on the claimant who appears by this time to have been acutely sensitised to confrontational situations the matter seems to arise from objectively a relatively minor situation that occurred and a misunderstanding on the part of the manager why the claimant was using her hands in the way he complained of. I would urge parties to try and mediate the matter to allow those involved to gain some insight into the others understanding and position rather than to fight the matter out in a public forum with all the expense and

stress that will incur and where any existing goodwill or relationships may be further damaged.

- 5 **Employment Judge: J M Hendry**
Date of Judgement: 31 August 2022
Date sent to Parties: 31 August 2022