



EMPLOYMENT TRIBUNALS

Claimant: Miss Bawej
Respondent: Yingshang Huang

Heard at: Watford Employment Tribunal
On: 10 May 2024
Before: Employment Judge S Matthews

Representation

Claimant: In person
Respondent: Mr. Downey (Counsel)

JUDGMENT having been sent to the parties on 25 June 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This claim was issued on 2 October 2023 and relates to the claimant's unfair dismissal on the grounds of her pregnancy which occurred on 17 February 2019.
2. A claim in respect of that dismissal has been before the tribunal; the respondent in that case was Huang's Grill Limited (Case number: 3313273/2019). In that case Judgment was given at a liability hearing on 1 September 2021 in favour of the claimant. It was held that she had been discriminated against on the grounds of pregnancy. Her claim for unfair dismissal and wrongful dismissal (she was not paid her notice period) also succeeded. Settlement was agreed in the sum of £35,492.31 on 23 June 2023.
3. The respondent in this case (the current respondent) is a director of Huang's Grill Limited (the respondent company); he is a director currently and he was a director at the relevant time. The claimant has brought this claim against the current respondent because the compensation agreed has not been paid.
4. On 19 May 2022, after the Judgment on liability but before the remedy agreement, the directors, including the current respondent, applied to strike the respondent company off the register. An objection was filed, and the respondent company remains on the register. The respondent remains as a director, but he says the company has no assets.
5. The claim is based on the same discrimination and dismissal as the case

against the respondent company. The claimant says that the respondent was the person behind the decision to dismiss her and she therefore has a cause of action against him.

6. On first sight, under s.110 of the Equality Act 2010 the claimant does have a cause of action against the current respondent. However, the action is subject to the employment tribunal rules on time limits for bringing a claim. In this case the limitation period in conjunction with the Acas conciliation extension means that anything that happened before 26 May 2023 is out of time. As this is a case concerning discrimination, s.123 of the Equality Act 2010 applies. Claims should be brought within three months of the act complained of or such further period as the tribunal thinks is just and equitable.
7. At the beginning of the hearing we discussed the issues to be decided. The claimant has withdrawn her claim against the current respondent for unfair dismissal, wrongful dismissal and holiday pay. Her claim for discrimination against the current respondent remains.
8. The issues to be decided are whether the claim should be struck out for no reasonable prospect of success. On the face of it, the claim is out of time by more than four years and the tribunal does not have the jurisdiction to hear it.
9. The tribunal can extend time if it is just and equitable to do so. When setting out the issues, I said that if I found in this hearing that there was no reasonable prospect of the tribunal exercising that discretion, then that will mean that the claim has no reasonable prospects of success.
10. I had the benefit of submissions from the claimant and the respondent. The claimant very helpfully set out her submissions in writing.
11. Counsel for the respondent referred to the principle of merger arguing that the cause of action is merged into the Judgment against the respondent company and is therefore now extinguished. He referred me to case law (referred to under 'Legal Principles' below) but, ultimately, I did not find the cases relevant to the issues. The issue here is whether there is a reasonable prospect of success.

Legal Principles

12. Section 110 of the Equality Act (EA) 2010 deals with liability of employees for discrimination:

110 (1) A person (A) contravenes this section if—

- (a) A is an employee or agent,
- (b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
- (c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

13. Counsel for the respondent referred to the cases of Fraser v HLMAD Ltd [2006] EWCA Civ 738 and Zavarco plc v Nasir [2021] EWCA Civ 1217. These cases relate to the doctrine of merger. They are cases where the same respondent was sued twice and can therefore be distinguished on the facts.

14. The time limit for discrimination claims is set out at s.123 of the EA 2010, (subject to ACAS early conciliation provisions):

123 (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.

15. Rule 37 (1) (a) of the Employment Tribunal Rules of Procedure provides that all or any part of a claim or response may be struck out if it is 'scandalous or vexatious or has no reasonable prospect of success'.

16. British Coal Corporation v Keeble [1997] IRLR 336) sets out a list of factors that can be taken into account when deciding whether to exercise discretion to extend time. The factors are (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

17. The Court of Appeal in London Borough of Southwark v Afolabi 2003, ICR 800 CA stated that the 'Keeble checklist' should not be adhered to slavishly and should be used as a guide. In that case a claimant had brought a race discrimination claim nearly nine years after the expiry of the statutory time limit and the Court of Appeal decided that the tribunal did not err in law in deciding it was just and equitable to extend time, provided that it left no significant factor out of account in exercising its discretion. However, the Court went on to say 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 reason for the delay; and whether the delay has prejudiced the respondent (for example, by preventing it from investigating the claim while matters were fresh).

18. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal clarified that there was no requirement to apply the Keeble checklist or any other check list under the wide discretion afforded tribunals by s123(1), although it was often useful to do so. The only requirement is not to leave a significant factor out of account (paragraph 18). Further, there is no requirement that the tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account, (paragraph 25). Nevertheless it is important not to lose sight of the fact that the burden is on the claimant to persuade the tribunal to extend time.

19. The relative prejudice to the parties and having regard to the overriding objective to deal with cases fairly and justly will always be considerations in exercising judicial discretion.

Conclusions

20. The claim is clearly out of time. The issue I need to decide is whether there are reasonable prospects of the tribunal exercising their discretion to extend time under s. 123(1) (b) of the Equality Act 2010. I am not deciding whether to exercise discretion and therefore I did not hear sworn evidence; I am deciding whether there are reasonable prospects of the claimant successfully persuading the tribunal to exercise discretion.
21. Although I did not hear evidence from the claimant, she stated at point 25(b) of her written submissions that she was unaware that she could make a claim against the respondent personally at the time she initially issued proceedings. I am sure an outside observer would have a great deal of sympathy with the claimant in this situation. Nevertheless, time limits do have to be strictly observed and the burden is on the claimant to persuade the tribunal that it should exercise its discretion. Exercise of its discretion is the exception rather than the rule, although the tribunal does have a wide discretion.
22. In deciding whether a tribunal would exercise its discretion I considered the factors in the Keeble case which the claimant helpfully referred to in her submissions. That is not a checklist, but it includes some factors that can be taken into account.
23. Firstly, I considered the length of the delay and the reason for the delay. The delay is over four years which is a substantial period of time. The claimant referred me to Southward v Afolabi where there was a nine-year delay but that is a case where new documentation came to light. That is not the case here. In this case it was the claimant's ignorance of the law that caused her to delay issuing against the current respondent. That in itself does not exempt the claimant from the requirement to bring her claim within the time limit.
24. The claimant would say that the current respondent has not cooperated with her in enabling her to enforce the Judgment. That is not what is meant in the Keeble factors by failure to cooperate. The Keeble factors refer to cooperation relating to the claim, not to the enforcement of the Judgment.
25. Looking more widely at all the circumstances, the claimant has brought this claim because of difficulties in recovering the compensation agreed with the respondent company. She has a Judgment against the respondent company and the company is still in existence. The respondent company has no funds to pay the claimant. Unfortunately, employment tribunal awards do sometimes go unpaid in these circumstances.
26. The overriding issue the tribunal will take into account in deciding whether to exercise discretion is the balance of prejudice. The claimant will be deprived of pursuing a possible cause of action if time is not extended; the current respondent will be required to defend himself against serious allegations that he personally discriminated against the claimant.
27. The claimant's case is that most of the pertinent facts will have been decided in the Judgment against the respondent company. Counsel for the current respondent made the point that the tribunal would need to make careful fact findings about whether the current respondent was personally liable for the discriminatory treatment of the claimant. Although the claimant has pointed me to paragraph 24 regarding Mr Huang not being a reliable historian, that is not the same as a finding that he was personally responsible for acts of

discrimination. There was clearly substantial involvement in events by Ms Kim. The tribunal would need to carefully go through the events in 2019 and decide what part was played by the current respondent.

28. After four years there is a real risk that Ms Kim would not recollect events in sufficient detail or be willing to cooperate with the parties in giving a statement. She did not give evidence in the hearing against the respondent company in 2021. It will be difficult for the tribunal to decide exactly what happened. There is a real risk of prejudice to the current respondent. I balance that against prejudice to the claimant; while deprived of a cause of action against the current respondent, she has already pursued and obtained Judgment against the respondent company in relation to the same events. I find that the balance of prejudice lies in favour of the current respondent.
29. Accordingly I find that the claimant does not have a reasonable prospect of persuading the tribunal to extend time and the claim is struck out for having no reasonable prospects of success.

Employment Judge S Matthews

Date: 22 July 2024

Judgment sent to the parties on
23 July 2024

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For the Tribunal office

Recording and Transcription

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