



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121897/18

Held at Kirkwall on 19 June 2019

Employment Judge N M Hosie

Martha Kirby

**Claimant
In Person**

Orkney Island Council

**1st Respondent
Represented by:
Mr E Stafford -
Solicitor**

Rachel Ware

**2nd Respondent
Represented by:
Mr E Stafford -
Solicitor**

John Trainor

**3rd Respondent
Represented by:
Mr D Gunn - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is time-barred and is dismissed for want of jurisdiction.

ETZ4(WR)

REASONS

1. The claimant brought complaints of direct discrimination and harassment on the basis of the protected characteristic of “age”. The claim was denied in its entirety by the respondents. Their solicitors also maintained that the claim was time-barred and that, in any event, it should be struck out as having “*no reasonable prospect of success*”.
2. After various procedures for case management purposes, the case came before me by way of a preliminary hearing to consider the issues of time-bar and the “prospects” of the claim succeeding.

The Evidence

3. In relation to the time-bar issue, I heard evidence from the claimant and also from Sheona MacGregor, Housing Officer with Orkney Island Council (“OIC”) and trade union representative.
4. Their written statements were included with the joint bundle of documentary productions which was produced (P105-112) and (P113-115). There was also included with the documentary productions a written statement from the claimant’s husband, Nigel Chambers (P94-104).
5. Helpfully, there was also included with the documentary productions a table setting out the claimant’s allegations against the 1st and 2nd respondents and their responses (P64-78), along with a “Cast List” (P49-51).
6. The respondents’ solicitors had also prepared a “List of Issues” for the preliminary hearing which I was satisfied was comprehensive (P59-63).
7. So far as the issue of the “prospects” of the claim succeeding was concerned, it was not necessary for me to hear any evidence as, for the purposes of the preliminary hearing, I took the claimant’s averments at their highest value. In other

words, I accepted for the purpose of the exercise, that the claimant would be able to prove all that she avers.

Submissions by the Solicitor on behalf of the 1st and 2nd Respondents

8. In support of his submissions the respondents' solicitor referred to the following cases:-

Harden v (1) Wootlif (2) Smart Diner Group UKEAT/0448/14/DA
Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327
Robertson v Bexley CC [2003] IRLR 434
Apelogun-Gabriels v London Borough of Lambeth [2002] IRLR 116
Sougrin v Haringey Health Authority [1992] ICR 650
Hewage v Grampian Health Board [2012] IRLR 870
Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332
Madarassy v Nomura International plc [2007] ICR 867

Time-Bar

9. So far as the 1st respondent was concerned, the respondents' solicitor submitted that there were two aspects of the claim namely the claimant's "demotion" when the claimant was redeployed to a lower graded post in the course of a restructure in 2012; and an alleged failure to properly investigate the claimant's formal complaint under the respondents' Dignity at Work Policy on 9 June 2017 (P79-85).
10. The claimant complained about the "flawed process of the investigation" in October 2017 (P77).
11. The claim form was not presented until 22 October 2018. Accordingly, both these complaints were submitted outwith the 3 month time limit.
12. So far as the 2nd respondent was concerned, the last incident averred occurred on 7 June 2017. The claimant was signed off work in November 2017 and has not returned. This complaint, therefore, is also out of time.

13. The respondents' solicitor submitted, therefore, that the issue for the Tribunal was whether it should exercise its discretion and allow the complaints to proceed on the basis that it was, "just and equitable to do so".
14. With reference to **Robertson** and **Caston**, the respondents' solicitor submitted that the onus was on the claimant to establish that it is just and equitable to extend time.
15. He also submitted, with reference to **Apelogun**, that while delay in an internal procedure may be a factor that was not so in the present case as the claimant had raised an Employment Tribunal claim in the past and knew the procedure.
16. The respondents' solicitor also referred to the claimant's, "*experience with various bodies*" (P95). She had also been able to proceed with a Dignity at Work complaint. She knew the outcome of the complaint on 22 September 2017 and she had all the information she required at that time to bring a claim against the 1st and 2nd respondents.
17. The claimant was then signed off work on 3 November 2017. She could have submitted a claim then. She had support of her trade union.
18. The respondents' solicitor also submitted that there would be a serious concern as to the cogency of the evidence in respect, for example, of events which occurred in 2011 and 2012, were I to allow the claim to proceed to a hearing.
19. It was also submitted, with reference to **Sougrin**, that the claimant's redeployment was not a continuing act.
20. While the claimant had been unwell and had been signed off work since 3 November 2017, there was a "short period" in February 2018 when she intimated a desire to return to work. He submitted that this was a "window" for her to submit her claim, but she failed to do so.

Prospects

21. In support of his submission that the claims against the 1st and 2nd respondents had no reasonable prospects of success the respondents' solicitor referred me to his detailed responses to the claimant's allegations (P64-78).

Submissions by the 3rd Respondent's Solicitor

22. The claimant was advised of the outcome of her Dignity at Work complaint by letter from the 3rd respondent on 22 September 2017 (P90/91). On the basis of **Harden**, he submitted that this was the "last possible date" on which the claimant could rely. As he understood it, this was not disputed. Accordingly, the claim against the 3rd respondent was significantly out of time.
23. He also submitted, with reference to **Harden**, that the 3rd respondent should not be prejudiced by the fact that the 1st respondent had taken a long time to address her complaints. This was, "*not of the 3rd respondent's doing and should not be held against him*".

"Length and Reason for the Delay"

24. The 3rd respondent's solicitor submitted that this was the most important factor.
25. So far as the alleged comment by the 3rd respondent that the claimant should consider "retirement" was concerned, the primary facts were known to the claimant at the time; she was also aware of the outcome of her Dignity at Work complaint and the 3rd respondent's decision on 22 September 2017.
26. The 3rd respondent's solicitor referred to the claimant's stated position in October 2017 that, "*it all made sense*". Clearly she realised then that she had the basis for a Tribunal claim.

27. The 3rd respondent's solicitor also expressed concern about the cogency of hearing evidence about matters which had occurred such a long time ago especially the conversation on 9 June 2017 in respect of which there are no contemporaneous notes. Further, this was not an issue until the claim form was submitted.

Prejudice

28. The 3rd respondent's solicitor submitted that this was also a significant factor. Were the Tribunal to exercise its discretion and allow the claim to proceed, the 3rd respondent would have to defend a claim in relation to allegations about a conversation which was undocumented and a decision of an investigation which occurred a considerable time ago.

“Any Other Remedy”

29. The claimant also has a claim against the 1st respondent.

30. The 3rd respondent's solicitor associated himself with the submissions by the 1st and 2nd respondents' solicitor in relation to the claimant's ability to bring a timeous claim, notwithstanding her ill health.

31. He submitted, therefore, that it would not be just and equitable, in all the circumstances, to extend the time limit. The claim against the 3rd respondent should be dismissed.

Prospects

32. In support of his submission that the claim against the 3rd respondent has no reasonable prospect of success, the solicitor referred me to the principles in ***Law Society and Ors v Bahl*** [2003] IRLR 640, at paras 80-90.

33. So far as the alleged comment about the claimant retiring was concerned, the respondent's solicitor submitted that this was no more than a Line Manager commenting on the claimant's options. He submitted the 3rd respondent was "*trying to empathise with her*". He submitted the comment did not give rise to a detriment.
34. So far as the investigation into the incident with the 1st respondent on 7 June 2017, was concerned, the respondent's solicitor submitted, with reference to **Madarassy**, that the claimant had not established a *prima facie* case.
35. He denied the allegation that there was "*some sort of conspiracy*" and referred to the "*terms of reference*" (P86).
36. In short, the respondent's solicitor submitted that the allegation about the comment by the 3rd respondent that the claimant should retire was concerned, it was significantly out of time and had no reasonable prospect of success.
37. So far as the complaint about the investigation of the claimant's Dignity at Work complaint was concerned, this was also well out of time. The claimant was aware of the outcome on 22 September 2017(P90/91). It also has no reasonable prospects of success.

Claimant's Submissions

38. The claimant acknowledged that she had submitted an Employment Tribunal claim in 2012 but explained that it was withdrawn without any orders or a Judgment being issued.

39. She claimed that since 2012 she had been subjected to continuous discrimination by OIC and its employees and that as a consequence she had incurred a *“financial detriment”*.
40. She also submitted that the actions by OIC had *“opened the door”* for the 2nd respondent to discriminate against her. It had, *“set the stage for bullying”*.
41. She had brought her concerns to the attention of her managers on several occasions and in June 2017 she made a formal Dignity at Work complaint. However, the discrimination had continued. The investigation did not conclude until October. She complained formally about the investigation. She maintained that the process and *“lacklustre investigation”* were motivated by age discrimination.
42. It was only in December 2017 that Jamie McVie was appointed to consider her complaint. He did nothing for several months to take the matter forward. Ann Harrison was then appointed
43. The 3rd respondent, Mr Trainor, was not the claimant’s Line Manager. He was her Line Manager’s, Line Manager. He should not therefore have been speaking to her about *“retirement”*. He could have speeded up the investigation process.
44. She claimed she was isolated, there was a lack of meetings and she was ignored. This was all part of the continuing discrimination she alleged. She submitted that she had been discriminated against *“over many years”*.
45. She submitted that she brought her Employment Tribunal claim when she was in possession of new facts from Maureen Swannie’s investigation. She had been unwell. She submitted that she only had a *“very narrow window”* to submit her claim.

Discussion and Decision

46. I was satisfied that the submissions by the respondents' solicitors that all aspects of the claim were out of time were well-founded. The claim form was submitted on 22 October 2018. The claimant was demoted in October 2012; the last alleged act by the second respondent was on 7 June 2017; she complained of the flawed investigation in October 2017 (P77); she alleged that the comment by the third respondent about her retiring was made in June 2017; the claimant was signed off work in November 2017 and has not been able to return. While the claimant maintained that she waited until the respondent's internal procedure was exhausted before bringing her Tribunal claim, cases such as ***Apelogun***, established that the time limit starts to run when the act complained of was done. The claimant received intimation of the outcome of her Dignity at Work complaint on 22 September 2017 (P90/91). Nor was I persuaded, as the claimant alleged, that there was continuing discrimination extending over a period of time and ending within 3 months before she submitted her claim form. In my view, what was alleged was a series of distinct acts, the last of which occurred several months before she submitted her claim.
47. The claims have not been brought, therefore, within the period of 3 months starting with the date of the act to which the complaint related, in terms of s.123 of the Equality Act 2010 ("the 2010 Act").

Just and Equitable Extension

48. However, the 3 month time limit for bringing a discrimination claim is not absolute: Employment Tribunals have discretion to extend the time limit for presenting a complaint where they think it "*just and equitable*" to do so – s.123(1)(b) of the 2010 Act. Tribunals thus have a broader discretion under discrimination law than they do in unfair dismissal cases as the Employment Rights Act 1996 provides that the time limit for presenting an unfair dismissal claim can only be extended if the claimant shows that it was "*not reasonably practicable to present the claim in time*".
49. In determining whether I should exercise my discretion in the present case and allow the late submission of the claim I found the guidance in ***British Coal***

Corporation v Keeble and others [1997] IRLR 336 to be helpful. In that case the EAT suggested that Employment Tribunals would be assisted by considering the fact as listed in s.33 of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts and personal injury cases and requires the court to consider certain factors.

Prejudice

50. Were I to decide not to exercise my discretion to extend the time limit then the claimant will be prejudiced as her claim will be dismissed. On the other hand, were I to allow the claim to proceed, then the respondents will be prejudiced in having to defend proceedings and considerable expense will be incurred not only in conducting the proceedings, but also in further investigating and addressing matters which occurred some years ago. Were I to exercise my discretion and allow the claim to proceed, by the time the case reaches a final hearing witnesses will be required to recall events which happened several years ago.

Alternative Remedy

51. Were I to decide not to exercise my discretion and dismiss the claim in its entirety, the claimant is unlikely to have any other remedy open to her before an employment tribunal.

Conduct of the Claimant

52. Although the claimant was signed off work due to ill health for a lengthy period prior to her dismissal, she had the support of her husband and also her trade union.

53. It was clear that the claimant is an intelligent articulate person. She had been able to submit a detailed Dignity at Work complaint.
54. She was also aware of how to initiate Employment Tribunal proceedings as she had raised a claim back in 2012. Even if she was not aware of the 3 month time limit, it could have been ascertained by reasonable enquiry.
55. Also, the delay in addressing her complaint and the claimant awaiting the outcome is not in itself sufficient to justify a just and equitable extension. Parliament deliberately has not provided that the running of time should be delayed until the end of the domestic process. Reasonable enquiry would have established this.

Length of delay

56. Clearly, this was a significant factor. While I was mindful that the claimant maintained that she had waited until the respondent's internal investigation process was completed, were I to exercise my discretion witnesses would be required to recall events that occurred several years ago. In my view, the concerns expressed by the respondents' solicitor as to the cogency of the evidence were well-founded. In my view, there would be a serious concern as to whether there could be a fair hearing were I to exercise my discretion and allow the claim to proceed.
57. While I was mindful that I had a wide discretion to extend the time limit and that the just and equitable "escape clause" is much wider than that relating to unfair dismissal claims, I was also mindful of such cases as **Robertson** in which the Court of Appeal stated that when Employment Tribunals consider exercising this discretion:-

*"There is no presumption that they should do so unless they can justify a 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**" (my emphasis).*

58. In my view, despite her ill health, there was no impediment to the claimant submitting her claim in time.
59. I arrived at the view, therefore, in all the circumstances and weighing all these factors in the balance, that it would not be just and equitable to exercise my discretion and extend the time limit. Accordingly, the claim is out of time and is dismissed for want of jurisdiction.

Prospects

60. For the sake of completeness, I record that, taking the claimant's averments at their highest, I was not persuaded that the various elements of the claim had no reasonable prospect of success.
61. Cases such as *Anyanwu v Southbank Students Union and others* [2001] UK HL 14 ICR 391 make it clear that as discrimination cases tend to be "fact sensitive", strike out should only be ordered: "*in the most obvious and clearest cases*". In my view, the present case does not fall into that category and had I not been of the view that it was time-barred I would have allowed the claim to proceed to a hearing.
62. I also wish to record that, although I have come to this view, I have considerable sympathy for the claimant. I fully anticipate that she will feel aggrieved and frustrated at not having her case heard. It was very clear that she feels very strongly about the way she alleges she had been treated by the respondents over a very lengthy period indeed. She has provided specific allegations of the way she says she was treated, by the second respondent, in particular. The problem is that even if she could prove what she alleges, she allowed it to go on for too long.
63. Time limits are there for a good reason and I am bound to say that I had little difficulty, in the particular circumstances of this case, arriving at the view that it would not be just and equitable to exercise my discretion.

Employment Judge:
Date of Judgment:
Date sent to parties:

NM Hosie
21 October 2019
22 October 2019