



# EMPLOYMENT TRIBUNALS

**Claimant:** Noorul Ann Khan

**Respondent:** Ninety Watches and Jewellery Limited

**Heard at:** London Central (by CVP)      **On:** 8 June 2023

**Before:** Tribunal Judge Andrew Jack, acting as an Employment Judge

## Representation

Claimant: In person

Respondent: Ms J Franklin, counsel

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's application to amend her claim to include a claim for discrimination because of something arising in consequence of disability is refused.
2. The claim for direct discrimination because of race and/or religion is dismissed because it was presented outside of the primary time limit, and it is not just and equitable to extend time, and so the Tribunal has no jurisdiction to hear it.
3. The claim for harassment related to race and/or religion is dismissed because it was presented outside of the primary time limit, and it is not just and equitable to extend time, and so the Tribunal has no jurisdiction to hear it.

# REASONS

## Background and procedure

1. The claimant presented a claim on 6 January 2023. She ticked boxes saying that she was bringing claims for unfair dismissal, discrimination on the grounds of race and on the grounds of religion or belief.

2. There was a case management hearing on 5 April 2023 before EJ Burns. The claim of ordinary unfair dismissal was dismissed following withdrawal of the claim by the claimant (as she did not have the two year's service necessary to bring such a claim). The claims were clarified as being:
  - a. That she was dismissed on 20 June 2022 because of her race and/or religion i.e. was directly discriminated against, contrary to s. 13 of the Equality Act 2010 ('EA');
  - b. That she was subjected to harassment related to her race and/or religion, contrary to s. 26 EA. This related to allegations that:
    - i. in late 2021, Toby Harris, the Facilities Manager described the office as "a mosque" in the presence of the claimant; and
    - ii. on 10 May 2022, the Boutique Manager described his neighbour as a "fucking Paki" to the General Manager, Dean Harding, in the presence of the claimant.
3. The claimant wishes to amend her claim to include a claim of disability discrimination (contrary to s. 15 of the EA) and EJ Burns ordered the claimant to send an application to amend in writing by 26 April 2023. The claimant sent an application to amend her claim on 25 April 2023.
4. EJ Burns ordered that there should be a preliminary hearing. The purpose of the preliminary hearing would be:
  - (a) to determine whether the claimant's amendment application should be granted;
  - (b) at the discretion of the judge conducting the hearing, to determine whether the claimant's claims are in time, or if the judge does not consider it appropriate to determine this for each allegation to consider whether the claimant has reasonable prospects of success of the claims being found to have brought in time; and
  - (c) case management as appropriate.
5. On 3 May 2023 the respondent responded to the application to amend the claim, and applied to strike out the claim on the grounds that it has no reasonable prospects of success.
6. I reserved judgment following the one day open preliminary hearing on 8 June 2023. There was a bundle of 124 pages, and some additional documents from the claimant regarding hospital appointments. There were also five witness statements. The respondent's witness, Tilly Harrison, was in France and (no application having been made to give evidence from abroad) was unable to give evidence. The claimant had planned to cross examine her and, since this was not possible, I have given no weight to her statement. (Neither party applied for an adjournment.) The claimant gave oral evidence and was cross examined. Ms Franklin made closing submissions, and provided a skeleton argument. The claimant also made some remarks in closing, but felt that she had not done justice to her case. I therefore asked her if she wanted to provide written submissions, and she did so. In making my findings of fact I have relied on the evidence as it

stood at the end of the hearing: the submissions of the parties are, of course, not themselves evidence, and I have not treated them as such.

### **Findings of Fact**

7. The claimant was employed by the respondent as a Senior Sales Consultant from 3 August 2020. The respondent sells luxury watches in Mayfair.
8. The claimant had consultations with her GP: on 31 March 2021, regarding stress; on 6 April 2021, regarding anxiety and insomnia; and on 4 May 2021, when she was suffering hair loss and other symptoms (bundle, p. 120-121).
9. The claimant says that the alleged remark about the office being like a mosque was made “possibly late 2021” (claimant’s witness statement, paragraph 15). She says that the context was her praying in the afternoon.
10. The claimant harmed herself in March 2022.
11. The claimant had knee surgery on 6 April 2022. Following this she was absent from work for a number of days.
12. The claimant says that on 10 May 2022, the Boutique Manager described his neighbour as a “fucking Paki” to the General Manager, Dean Harding, in the presence of the claimant. The claimant says that Dean Harding responded “I don’t think you can say that, mate” (claimant’s witness statement, paragraph 25).
13. The claimant was dismissed on 20 June 2022. The respondent paid her in lieu of her two month’s notice period. Her dismissal letter was from Dean Harding, General Manager (bundle, p. 74-75). It stated that her dismissal would take effect “as of today, 20 June 2022”. The claimant says that she was told that the reason for her dismissal was financial uncertainty and challenges in the jewellery industry and that her role had been eliminated.
14. The claimant rang ACAS on the day that she was dismissed, but was told to wait two months. She was told to wait until 3 August to bring a claim as that is when she would have the necessary two year’s service to bring a claim for unfair dismissal, taking into account her notice period. The claimant did not tell the man she spoke to at ACAS that she had been dismissed with pay in lieu of notice, and she did not realise the significance of this.
15. When the claimant spoke to ACAS, the man she was speaking to did mention time-limits. The claimant cannot now recall any details of what he said about time-limits. However he did mention time-limits.
16. The claimant did not intend to file a claim until August. After August she felt conflicted about whether or not to start a claim.
17. On 6 August 2022 the claimant had a panic attack and felt so anxious that she opened the door of a moving car.

18. The claimant saw a post on LinkedIn in November 2022 (claimant's witness statement, paragraph 6). That was the trigger to her claim, as she considered that it showed that the reason she had been given for her dismissal was not true, and that Rebecca Harris had been appointed to what had been her job.
19. Early conciliation commenced on 1 December 2022 and ended on 6 December 2022.
20. The claimant worked at Selfridges in the Christmas season of 2022, until 3 January 2023.
21. The claimant presented her claim on 6 January 2023.
22. The respondent's grounds of resistance are dated 9 March 2023.
23. The claimant took legal advice for the first time after receiving the respondent's grounds of resistance.
24. There was a case management hearing on 5 April 2023.
25. The claimant's new GP referred her to Therapies Talking on 24 April 2023.
26. The claimant applied to amend her claim on 25 April 2023.
27. The claimant is currently receiving cognitive behavioural therapy and beta-blockers for anxiety.
28. The claimant studied law at university, and began a Legal Practice Course (LPC). She is able to do simple legal research.

## **The Law**

### *Time Limits*

29. The starting point is that all of the claims under the Equality Act 2010 which have been bought, and the claim that the claimant seeks bring by way of amendment, may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates: s. 123(1)(a) EA. However the claims may be considered out of time, provided the claim is presented within "such other period as the employment tribunal thinks just and equitable": s. 123(1)(b) EA.
30. For the purposes of s 123 EA, conduct extending over a period is to be treated as done at the end of the period: s. 123(3)(a) EA.
31. 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: *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434, CA, paragraph 25. The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit.
32. The best approach for a tribunal in considering the exercise of the discretion under s. 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: *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] ICR D5, CA, paragraph 37.

33. The relative prejudice which would be caused by extending time is an important factor in the question whether it is just and equitable to extend time beyond three months and should, in the normal course, be considered by the tribunal: *Pathan v South London Islamic Centre* EAT 0312/13
34. In a case in which the claimant relies on their ignorance, the tribunal should consider not only whether the claimant was ignorant of their rights, of how to exercise those rights, or of the time-limits for exercising them, but also whether that ignorance was reasonable. That applies when exercising the discretion under s. 123(1)(b): *Bowden v Ministry of Justice and another* UKEAT/0018/17/LA, para 38.

#### *Amendment*

35. When exercising the discretionary power to amend, the tribunal must have regard to all the circumstances, and in particular to any injustice or hardship which would result from the amendment or a refusal to make it. Relevant factors include the nature of the amendment, the applicability of time limits, and the timing and manner of the application: *Selkent Bus Co Ltd v Moore* 1996 ICR 836, EAT.
36. When considering applications to amend which raise new causes of action the tribunal should focus on the extent to which the new pleading is likely to involve substantially different areas of inquiry compared with the old. The greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that the application will be permitted: *Vaughan v Modality Partnership* 2021 ICR 535, EAT, paragraph 20.
37. An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim: *Vaughan v Modality*, paragraph 24.2.
38. The question of whether a new cause of action contained in an application to amend would, if it were an independent claim, be time barred, is to be determined by reference to the date when the application to amend is made: *Newsquest (Herald and Times) Limited v Ms Deborah Keeping*, UKEATS/0051/09, paragraph 23.
39. No one factor is likely to be decisive. The balance of justice is always key. *Vaughan v Modality*, paragraph 25.

#### **Conclusions**

##### *Application to Amend*

40. The claimant was dismissed on 20 June 2022. She applies to bring a claim under s. 15 of the Equality Act 2010 that she was treated unfavourably because of something arising in consequence of her mental

impairment (anxiety and depression). She says that as she had more emotional episodes at work, the more unfavourably she was treated.

41. The amendment would bring a new claim rather than merely relabel the existing claims. As the claimant points out, her claim referred to her mental health *after* she was dismissed (bundle, p. 47), saying that she fell into a downward spiral mentally after she had been dismissed. But the factual claim that she suffered from a mental impairment prior to her dismissal is new, as is the legal claim that she was treated unfavourably because of something arising in consequence of her mental impairment.
42. The new claim would be out of time. The claimant was dismissed on 20 June 2022. The primary time limit therefore expired on 19 September 2022, and early conciliation only commenced after that. The application to amend was made on 25 April 2023, some seven months after the expiry of the primary time limit.
43. The claimant says that she omitted disability discrimination from her original claim because she mistakenly believed that she would need medical records and a diagnosis (bundle, p. 46). However that assumption was not the result of incorrect advice. It was an assumption, and not one that it was reasonable for the claimant to make. The claimant studied law at university and is able to do simple legal research. It was not reasonable for her to rely on this assumption without either seeking advice on the point, or at least attempting to research it. However she relied on the assumption and did not seek legal advice on her claim until after 9 March 2023.
44. Since the reason for the delay in seeking to bring the claim is an assumption, and an assumption that it was not reasonable for the claimant to make, I do not consider that it would be just and equitable to extend the period in which a claim could be made to 25 April 2023. So were the amendment to be permitted, the respondent would face a claim that is out of time.
45. The application to amend was made after the case management hearing on 5 April 2023, and complied with the directions of EJ Burns. The case is at a relatively early stage, prior to disclosure and witness statements.
46. If the application to amend is not permitted, the claimant will clearly be unable to bring a claim of disability discrimination. If it is permitted, the respondent will have to face a cause of action that would have been out of time had it been brought as a new claim.
47. Having regard to all the circumstances, and in particular to the injustice or hardship which would result from the amendment and from a refusal to make it, I consider that the balance of justice favours refusing the amendment application.

#### *Time Limits*

48. The claimant has brought claims regarding an alleged remark about the office being like a mosque made “possibly late 2021”, an alleged remark about a “fucking Paki” made on 10 May 2022, and her dismissal on 20

June 2022. She was dismissed with pay in lieu of notice and the effective date of termination is therefore 20 June 2022.

49. The primary time limit for her harassment claim concerning the alleged remark made in late 2021 expired approximately in February 2022. The primary time limit for her harassment claim concerning the alleged remark made on 10 May 2022 expired on 9 August 2022. The primary time limit for her claim that her dismissal was due to direct discrimination expired on 19 September 2022. (Since all of her claims were made after the expiry of the primary time limit for her claim that her dismissal was due to direct discrimination, I do not need to consider whether the claims all relate to a course of conduct extending over a period. Even if they do, the claims relating to earlier events were made late.) Early conciliation only commenced on 1 December 2022. The claimant presented her claims on 6 January 2023, some three and a half months late.
50. The claimant rang ACAS on the day that she was dismissed, but was misadvised to wait until 3 August to bring a claim as that is when she would have the necessary two year's service to bring a claim for unfair dismissal, taking into account her notice period. It was reasonable to follow this advice and wait until August.
51. The man she spoke to at ACAS on the day that she was dismissed mentioned time-limits, so she was aware that there were time limits for bringing claims. The Claimant's oral and written closing submissions argue that the claimant believed her termination date was 20 August 2022, and that this would make the three month time-limit expire on 19 November 2022. That goes beyond the evidence which is that she was told to wait until 3 August to bring a claim, and that time-limits were mentioned. The claimant was therefore aware that there were time-limits. But there is no evidence that she was misadvised that she had until 19 November 2020 to bring a claim. I have found on the basis of the claimant's oral evidence that she did not intend to file a claim until August. Further, ACAS's advice cannot explain why she did not commence early conciliation until 1 December 2022, or file her claim until 6 January 2023.
52. The claimant had a panic attack on 6 August 2022 during which she felt so anxious that she opened the door of a moving car. She was obviously not thinking clearly at the time of her panic attack. However that cannot explain why she did not commence early conciliation until 1 December 2022, or file her claim until 6 January 2023.
53. I have found on the basis of the claimant's oral evidence that she did not intend to file a claim until August, and that after August she did not bring a claim because she felt conflicted about whether or not to bring a claim. I do not consider that her mixed emotions about whether to bring a claim could render it just and equitable to extend the usual period for making a claim.
54. The trigger for the claimant's deciding to bring a claim was her seeing a post on LinkedIn in November 2022. However it is clear that the claimant believed that she had some sort of claim as early as the day of her dismissal, when she spoke to ACAS. She was also aware from that conversation that there were time limits. She considered that the post on

LinkedIn showed that an old colleague of hers had been appointed to what had been her job, and that the reason she had been given for her dismissal was not true. I can see that it may be just and equitable to extend time in a particular case where a claimant only obtains powerful evidence that past events were due to discrimination after the expiry of the usual time-limit. However in this particular case the LinkedIn post appears to have limited probative value. It appears to show that Rebecca Harris had now been promoted to the claimant's old role, and that Rebecca Harris's previous more junior role was now being advertised. These posts were months after her dismissal. Further, these posts could not be said to be the difference between the claimant realising that she could bring a case and her not realising that. As I have said, she was aware as early as 20 June 2022 that she has some sort of claim, and that there were time-limits for bringing a claim. I do not consider that seeing this post in November 2022 could render it just and equitable to extend time.

55. The claimant argues in her closing submission that her mental health issues impacted upon her ability to revisit and write about the distressing events that had taken place while she was employed. The difficulty is that there is a lack of evidence to support her claim. Her medical records do not support it: her medical records show that she had consultations with her GP on 31 March 2021, regarding stress, on 6 April 2021, regarding anxiety and insomnia, and on 4 May 2021, when she was suffering hair loss and other symptoms. The next relevant entry in her medical records is on 24 April 2023, when her new GP referred her to Therapies Talking. There is no support here for the claim that in the period from 20 September 2022 to 6 January 2023 she was so unwell that it would be just and equitable to extend time through this period. I accept that her mental health difficulties go beyond what is recorded in her medical notes. She harmed herself in March 2022, and had a panic attack on 6 August 2022. But she was well enough to work in retail in the Christmas season of 2022. I am not satisfied that her mental health difficulties were so significant in the period September 2022 to early January 2023 that it would be just and equitable to extend time until 6 January 2023.
56. I also take into account the prejudice to the respondent of extending time, and the fact that unless time is extended the claimant will be unable to pursue her claims. Taking account of all the relevant factors, both individually and cumulatively, I do not consider that it would be just and equitable to extend time until 6 January 2023.

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Employment Judge Andrew Jack

Date 21 July 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
21/07/2023

FOR EMPLOYMENT TRIBUNALS