



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 800007/2023

Preliminary Hearing
Held in Edinburgh
On 18 July 2023

Employment Judge Jones

Mrs Mitford-Baberton

**Claimant
In person**

Heriot Watt University

**Respondent
Represented by:
Mr M Leon, solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Tribunal does not have jurisdiction to consider the claimant's claim of discrimination.
2. The claimant's application to amend her claim is refused.

Background

1. The claimant lodged a claim on 4 January 2023 claiming discrimination on the grounds of pregnancy or maternity. The respondent submitted a response form in which the claims were resisted and it was said that they had been raised out of time.

2. A Preliminary Hearing took place on 1 March at which the claimants claims were discussed. The claimant was ordered to provide further particulars of her claim. She was also invited to give consideration to whether she sought to bring a claim under section 39 Equality Act of unfair discriminatory dismissal.
3. The claimant provided further particulars in an Agenda form following that hearing on 28 March. She intimated at that time that she wished to pursue a claim in terms of section 39.
4. A further preliminary hearing took place on 21 April. At that hearing the further particulars which were set out in the Agenda form were accepted under exception of the claim in terms of section 39. A further hearing was listed to consider the claimant's application to amend her claim to include a claim under section 39 and also determine whether the Tribunal had jurisdiction to consider her claim.
5. A bundle of documents was provided in advance of this hearing. This included a list of issues which was agreed. The claimant appeared in person at the hearing and gave evidence. The respondent was represented by Mr Leon who provided a skeleton argument in writing, the terms of which he summarised orally.
6. Having heard the evidence and considered the documents to which reference was made together with submissions, the Tribunal finds the following facts to have been established.

Findings in fact

7. The claimant was employed by the respondent as a personal assistant to Professor Malin.
8. She went into labour with her third child on 24 August 2021 while she was working from home. Her claim relates to an alleged failure to conduct a risk assessment together with allegations that she had been discriminated against and/or harassed by Professor Malins because of her pregnancy and/or maternity on various dates between August and October 2021.
9. The claimant was due to return from maternity leave in November, but this was extended to December 2021 once she had raised issues of concern

regarding how she had been treated. In the event the claimant did not return from maternity leave.

10. The claimant raised a grievance in relation her alleged treatment on 20 April 2022. That grievance was in part upheld on 16 August.

5 11. The claimant resigned from her employment on 16 August 2022.

Does the Tribunal have jurisdiction to determine the claim?

10 12. In terms of section 123(1) of the Equality Act 2010 ('EqA'), a complaint of discrimination must be made within three months of the act complained of. Section 123(3) provides that where an act complained of forms part of a continuing act, the three-month period commences on the date of the last of the series of acts.

15 13. The claimant accepted that the last possible act she was complaining of was in October 2021. She contacted ACAS on 3 November 2022 and a certificate was issued on 15 December 2022.

20 14. On the face of it therefore, the claim is significantly out of time. The claimant's position was that she had raised a grievance in relation to the issues and that this grievance was not determined until 16 August 2022. She indicated that she contacted ACAS around that time and that she was led to believe that she had three months in which to raise a claim although her evidence was slightly vague on that point.

25 15. While the claimant had raised concerns regarding her treatment by Professor Malins, there was no dispute that the claimant did not raise a formal grievance until April 2022 which was at least six months after the last of the events complained of. The claimant's position was that she wished to return to work and did not want to raise a grievance although she indicated that she was aware from around January 2022 that she would not be able to return to work directly with Professor Malins.

30 16. The Tribunal was satisfied that the matters which the claimant alleged amounted to discriminatory conduct all occurred more than three months prior to her claim being lodged. Therefore, it gave consideration to whether it would be just and equitable to extend the time limit in terms of section 123(1)(b) EqA.

17. In submissions, the respondent's position was that the primary focus of consideration in the exercise of discretion to extend the time limit should be the delay in the claimant lodging the claim. Reference was made to **Bexley Community Centre v Robertson [2003] EWCA Civ 576**, and **British Coal corporation v Keeble [1997] IRLR 336**. In addition, reference was made to **Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132** which was said to be relevant as the claimant's claims were misconceived and lacking in merit.

18. While the reason for the delay in bring a claim is a relevant factor, consideration ought also to be given to the balance of prejudice faced by the parties if the claim is, or is not, allowed to proceed. Clearly there will be significant prejudice to the claimant if she cannot advance her claims. In addition, it did not seem to the Tribunal as was suggested on behalf of the respondent, that the claimant's claims were misconceived or entirely without merit. Indeed, the Tribunal understood that the claimant's grievance had at least in part been upheld by the respondent.

19. However, the Tribunal was mindful of the reasons put forward by the claimant for the delay in bringing her claim. While it was appreciated that the claimant's evidence was that she was under considerable pressure during her maternity leave, and that she had recently undergone counselling, there was no further evidence provided by the claimant, such as medical records or reports. The Tribunal accepted the claimant's evidence that she was under stress, however noted that she did not raise a formal grievance until more than six months after the final act she complained of. While the grievance outcome was not communicated to her until August 2022, around four months after the grievance, the claimant did not raise Tribunal proceedings for almost another five months.

20. The claimant said that she had done some research online but was not aware of relevant time limits. While that evidence was not challenged, it was clear that the claimant was an intelligent woman and it does not require much research to determine that the time limit for lodging a claim is three months. The claim appears on the face of it to have been lodged around 15 months after the alleged acts.

21. While there is considerable prejudice to the claimant in not being able to pursue her claim, balancing the question of prejudice to the respondent in defending a claim of that nature, where memories of relevant events may have dimmed, and taking into account the reasons put forward by the claimant for the delay in lodging the claim, the Tribunal, with some hesitation is of the view that it would not be just and equitable to extend the time limit. In these circumstances, the Tribunal does not have jurisdiction to determine the claim.

10 **Application to amend**

22. The Tribunal then went on to consider whether the claimant's application to amend her claim to include a claim that her resignation amounted to a dismissal for the purposes of section 39 EqA.

15 23. There is no reference in the claimant's claim form to her resignation amounting to a dismissal for the purposes of section 39 or indeed any reference to the reasons for her resignation at all.

24. It was not until the Employment Judge asked the claimant to reflect on this matter at a preliminary hearing that the issue was first raised. The claimant then submitted an agenda form indicating that she did wish to pursue such a claim. That document was not submitted until 28 March 2023, which is 19 months after her resignation.

25. Taking into account the guidance provided in **Selkent Bus Company v Moore [1996] IRLR 661**, the Tribunal is satisfied that this is a new cause of action. The original claim related to discrete allegations of treatment by the claimant's line manager. The claim in terms of section 39 relates to a decision to resign from her employment around a year after the claimant had gone on maternity leave, and four months after the raising of a grievance. The amendment as set out in the agenda form makes reference to the claimant being advised that another job was not an option, which she says took place in April 2022.

26. The claim is therefore a new claim, not foreshadowed in the original claim form. The amendment application was made seven months after the claimant's resignation and is therefore out of time. It would appear that the

8000007/2023

claimant had not given any thought to pursuing such a claim until the Employment Judge sought to clarify the matter with her. The facts relied upon are different from those which form part of the original claim and as the respondent's solicitor indicated would fundamentally change the landscape of the case to be heard.

27. In these circumstances, the application is refused.

Employment Judge: A Jones
Date of Judgment: 21 July 2023
Entered in register: 21 July 2023
and copied to parties