Case Number: 2500181/2018

EMPLOYMENT TRIBUNALS

Claimant: **Miss G Stewart**

Respondent: **Pendragon Premier Limited**

Heard at: **North Shields Hearing Centre** **On: 26 June 2018**

Before: **Employment Judge P Arullendran**

Representation

Claimant: **In Person**

Respondent: **Mr Sharpe of Counsel**

JUDGMENT ON PRELIMINARY ISSUE

The claimant's complaint of unlawful sex discrimination was not presented to the Tribunal before the end of the period of three months beginning when the act complained of was done. The Tribunal is not satisfied that it would be just and equitable for time to be extended and, therefore, the complaints are out of time and the Employment Tribunal does not have jurisdiction to hear them. Those claims are all dismissed.

REASONS

1) This matter came before me for consideration of a single issue, namely whether the claimant's complaints of unlawful sex discrimination are out of time and, if so, whether it would be just and equitable for time to be extended. The claimant attended in person and the respondent was represented by Mr Sharpe of Counsel. Mr Sharpe prepared a bundle of documents comprising of 73 pages, the majority of which were documents which had been sent by the claimant to the Employment Tribunal on 24 April 2018. Neither side called any witness evidence and there was no dispute about the factual matters which form the subject matter of today's hearing.

2) The claimant's position is that the late payment of an ex-gratia payment by the respondent on 28 February 2018 amounted to an act of sex discrimination. The reason the respondent offered to make a payment in the sum of one month's salary as an ex gratia payment is set out in the respondent's letter dated 15 February 2018, setting out the hearing grievance appeal outcome. This was offered to the claimant as a gesture of goodwill to compensate her for the delay in concluding the grievance appeal and it is not argued by the claimant that she was contractually entitled to this payment. The claimant describes the fact that the ex gratia payment was not paid on time as having a very negative effect on her mental health and, although the claimant has not produced any medical evidence, I note that the respondent has not sought to argue that the claimant's health was not so severely affected by the non-payment and I accept the claimant's word that she was so affected. However, when I asked the claimant whether Arleen Brown, who had made the offer of the ex gratia payment, had discriminated against her on the grounds of her sex, the claimant replied that she had not. The claimant accepted that there may be a number of other non-discriminatory reasons why the payment was delayed, such as poor administration or a break down in communications and there is no evidence in front of me that a failure to pay the ex gratia payment on time was an act of discrimination either by Arleen Brown or anyone else in the respondent company. In all the circumstances, I find that delay to the ex gratia payment on 28 February 2018 does not amount to an act of sex discrimination.

3) I also note that the delay in the ex gratia payment took place after the claimant had submitted her application to the Employment Tribunal on 5 February 2018 and, therefore, this could not form the basis of her claim of sex discrimination as submitted on 5 February 2018, although it is capable of being added as an additional complaint to an existing claim.

4) The last event that the claimant complains of as amounting to an act of sex discrimination took place on 3 May 2017 and, therefore, the three month time limit for presenting a claim to the Employment Tribunal, as set out in section 123 of the Equality Act 2010 would have expired on 2 August 2018. Whilst the Claimant claims to have contacted the ACAS helpline, it appears from the file that she did not enter into early conciliation until November 2017, which is some 3 months after the expiry of the limitation period. Therefore, the claimant's application was submitted six months out of time and the question is whether it is just and equitable for this Tribunal to extend the time for submitting the application to the Tribunal under section 123 of the Equality Act 2010.

5) The claimant's explanation for the delay in submitting her application to the Employment Tribunal between August 2017 and February 2018 are for a number of reasons, namely that she did not know about the Employment Tribunal process, that she had thought to resolve the issue directly with the respondent, that her mental health was such that she could not deal with making a claim to the Employment Tribunal and that she was told by ACAS to wait for the outcome of the internal procedure with the respondent before issuing proceedings in the Employment Tribunal.

6) The claimant finished working at the dealership where she had encountered difficulties with Peter Johnson and Lee Wilkinson on 3 May 2017. She started her new job with another dealership owned by the same parent company on 8 May 2017, with her continuity of employment preserved. She continued working in that new role until 12 July 2017, at which time she started experiencing panic attacks and was signed off sick by her GP until 21 August 2017. On 23 August 2017 the claimant raised a grievance with the respondent, the outcome of which was issued by the respondent on 2 October 2017. The claimant had the opportunity to appeal against the findings of the grievance, which was not found in her favour, however she had a pre-booked family holiday for two weeks and decided, with the advice of her GP, that she would not submit an appeal as it would interfere with her holiday and she asked for an extension to the time limit to appeal against the decision upon return from her holiday. The claimant spoke to ACAS in or around November 2017 and was issued with an early conciliation certificate. The claimant says that she informed the ACAS officer that she wanted her internal grievance reinvestigate by a female investigation officer, on the advice of her employment support worker, and she says she was advised by ACAS to wait for the outcome of the reinvestigation before considering making a claim to the Employment Tribunal. The claimant's position is that she had hoped and had wanted the matter to be dealt with through the respondent's internal procedure at all times. However, when the respondent did not reply to her in mid-January, as promised, the claimant experienced some very negative effects to her mental health and she said she contacted the ACAS helpline on 5 February 2018, which resulted in her submitting the claim form to the Employment Tribunal.

7) The claimant started working with her employment support officer, Tracy, on 20 August 2017 and her role is to assist the claimant with the issues arising in the work place which have a direct effect on her mental health. The claimant says that Tracy knew how to submit a grievance and to contact ACAS, but she did not discuss with her the possibility of submitting a claim to the Tribunal. The claimant says that the reason she decided to make an application to the Employment Tribunal was because of the aftercare she had not received from the respondent and the fact that they had not dealt with her grievance properly or got back to her during the appropriate time limit and, therefore, she felt that the respondent company had acted unprofessionally.

8) The time limit for bringing a complaint to the Employment Tribunal is set out in section 123 of the Equality Act 2010 which states "(1) Proceedings on a complaint within section 120 may not be brought before the end of (a) the period of three 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."

9) It is clear that the claimant's claim was presented outside the period of three months beginning with the act complained of. As set out above, on the claimant's best case, the claim was presented some six months after the time limit expired on 2 August 2017. The Tribunal must then decide whether it considers it is just and equitable to consider the complaint out of time. In considering the claimant's application for an extension, the correct approach for the Tribunal to take is to bear in mind that the Employment Tribunal time limits are to be enforced strictly and to ask whether a sufficient

case has been made out to enable the Tribunal to exercise its discretion in favour of extending time. That is not the same as saying that time should be extended unless a good reason can be shown for not doing so: Robertson -v- Bexley Community Centre 2003 EWCA Civ 5076. In deciding whether or not it is just and equitable to grant an extension of time, the Tribunal must take care first to consider the reasons why the claim was brought out of time and then the reasons why the claim was not presented sooner than it was. However, the failure to put forward a good reason for not having submitted the claim in time (or sooner) does not necessarily mean time should not be extended as all the relevant factors including the balance of prejudice and the merits of the claim must be considered: Rathakrishan -v- Peter Express Restaurants Limited 2016 IRLR 278.

10) There are examples where time has been extended where the Tribunal accepted that the claimant was unaware of her rights, or indeed that she had received incorrect advice from her lawyers such as Hawkings -v- Ball & Barclays Bank Plc 1996 IRLR 258 and Chohan -v- Derby Law Centre 2004 IRLR 685.

11) Frequently, reference is made to the list of criteria contained in section 33 of the Limitation Act 1980 in respect of personal injury claims. The primary limitation periods there of course is three years rather than the three months in the Employment Tribunal. The relevant factors have been known as the Keeble Factors 1997 IRLR 336 which 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 the quest for information
(d) the prominence with which the claimant acted once he or she knew of the facts giving rise to the cause of action
(e) the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action."

12) Although in the context of the "just and equitable" formula these factors frequently serve as a useful checklist, there is no legal requirement on the Employment Tribunal to go through such a list in every case, as set out in the case of Southwick London Borough Council -v- Afolabi 2003 EWA Civ 50 in which it was stated that the Employment Tribunal is not required to go through such a list in every case "provided of course that no significant factor had been left out of account by Employment Tribunal in exercising its discretion".

13) I am satisfied from what I have been told today that there probably still could be a fair trial between these parties of the issues which have been identified as the basis of the claimant's complaints. As a result, the respondent could certainly defend any of the claims, on their merits. I must therefore ask myself what is the prejudice to the claimant in not being able to present her claim to the Employment Tribunal and how is that balanced by any prejudice to the respondent in having to face this complaint so long after the time limit has expired. I note that the claimant is still employed by the respondent, with full continuity of service, at a location where she does not have any contact with the alleged perpetrators and that she makes no complaint

about her treatment at her current place of employment. This is not a case where the claimant is claiming substantial loss of earnings and employment rights because of a discriminatory dismissal, or that she would be prevented from claiming reinstatement/reengagement if time is not extended to accept the claims on a just and equitable basis.

14) Whilst I accept that the claimant has had to deal with some extremely serious and difficult mental health issues over the last year, I am not satisfied that it was reasonable for her to not find out what the time limits were in order to bring a claim to the Employment Tribunal. There is no medical evidence in front of me that would indicate that the claimant was prevented from or could to submit her application to the Employment Tribunal in time because of reasons relating to her health, or that her health issues were such that it affected her ability to submit her claims in time. She clearly had the assistance of an employment support work and her partner, who has accompanied her to the Employment Tribunal hearing today. The claimant was able to raise a grievance and appeal internally using the respondent's procedures and she was able to contact ACAS on at least two occasions to discuss the issues she was facing. As it is the job of the employment support officer to assist the claimant with the specific issues she is facing in the work place, it would be reasonable to expect the employment support officer and the claimant, together, to explore all the avenues of complaint open to the claimant, including making an application to the Employment Tribunal and the time limits involved. The claimant was issued with an early conciliation certificate by ACAS in November 2017 and it is reasonable to conclude from this that she should have been alerted to the next stage in the process, i.e. an application to the Employment Tribunal at the time she received the early conciliation certificate. In the circumstances, I find that it was not reasonable for the claimant to have waited six months before submitting a claim to the Employment Tribunal.

15) Having taken all of those factors into account and having paid particular attention the Keeble Factors referred to above, I am not satisfied in this case that it would be just and equitable to extend time so that the claimant's claim would be allowed to proceed in the Employment Tribunal. Time limits are there to be observed. The respondent was entitled to presume that once the time limit had expired, it will not face any legal proceedings relating to its employment of an employee. Granting an extension of time is the exception rather than rule and it must be just and equitable to do so. It is not just and equitable in this case. The claims are out of time and the Employment Tribunal does not have jurisdiction to hear those claims. Therefore, all of the claims are dismissed.

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Employment Judge Arullendran

_____26 July 2018_____
Date