



# EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104420/2020

Mrs L Bloomfield

Claimant

Represented by:

Self

Nordfields Properties Ltd

Respondents

Represented by:

Graham  
(Consultant)

## JUDGMENT

1. The Respondents' application for reconsideration of my rule 21 judgment is granted and that judgment is set aside.
2. The claimant's claims for sex discrimination are time barred as described in the reasons below.

## REASONS

1. This is the hearing of an application by the respondents that I reconsider the judgment entered under rule 21 of the tribunal rules and to apply for

time to be extended, in order that their ET 3 should have been presented within the time limit under the rules.

2. I heard evidence from Mr Shields which was to the effect that the tribunal's communication including the claim form must have been misfiled in the office of the respondents and it was not discovered there until 19th of October. The communications from the tribunal and in particular the claim form had probably been misplaced in the office of the respondents. He described a number of reasons why that might be, in particular that there had been a new set of staff working in the office after the (pandemic) lockdown in September and that his best theory as to what had happened was that the post had been put on a table and then got lost amongst some trade journals and other magazines to which they were found stuck when they were eventually discovered.

3. I have to consider whether as a matter of discretion there is a good explanation for the delay that occurred and in my view there is.

4. I remind myself of the proper test to adopt.

5. First I am being asked to reconsider the earlier judgement and I take the view that there is plainly an arguable case for her doing so. I then go on to consider whether I do reconsider at that judgement and in doing so I consider whether there is a proper explanation for the delay. Having had the opportunity to hear Mr Shields, and the claimant having had the opportunity to cross examine him on any points of relevance that she saw fit, I have to consider whether what the relevant factors are and weigh and balance them against each other. I have to reach a conclusion which is to be objectively justified on the grounds of reason and justice and so I need to consider the length of delay.

6. First of all I do not consider that the amount of time by which the case was delayed in respect of the issuing the pleadings to be particularly significant in this case. I am satisfied that the explanation for the delay that I have been given is satisfactory in the sense that it explains the delay although criticism could be made of the filing system that was adopted, such criticism might be the 2020 vision of hindsight. This was a busy workplace and it is clear that under the circumstances it is quite likely that the post was lost in the way described. I consider that the explanation I have received is an honest one. I have considered the merits of the defence and there is some arguable merit to the case that is put forward by the respondent.

7. I then consider where the balance of prejudice lies on this point. My view is that the nature of the allegations are relatively serious and will affect the reputation of

individuals who should be given the proper opportunity to rebut them, if rebuttal is possible, and I consider that the company will also have a local reputation and that may be affected by a successful claim. I consider that the prejudice to the claimant is that she has had at the very least this claim delayed by this process. However she still can make her claim and it can be adjudicated so that I consider that, on the one hand, the respondent would lose the opportunity of defending itself as a result of a delay where there is in my view reasonably satisfactory explanation. On the other hand the claimant can still pursue her claim so that, having considered those matters, I consider it appropriate to reconsider my earlier judgement and to set that aside on the basis that the respondent should be given permission to have time extended to permit them to defend the case.

### **Time Bar**

8. Having heard argument I have reached a decision on the question of time bar. The claimant's claim was presented outside the time limit under section 123 of the Equality Act 2010 and it is not just and equitable to extend time.

9. The claim was presented on 19th of August 2020, with early conciliation having occurred between 8 July and 5 August. The claimant's complaint relates to acts of discrimination occurring at latest by 11 March 2020 for which, unless there was a putative unlawful act to which they can be linked which so as to constitute conduct extending over a period and which occurs after her 18 April 2020, they are outside the time limit.

10. One possible act upon which reliance might have been placed is that on 14 June 2020 the claimant's employment was terminated. However the claimant, when giving evidence, told me that this was not in her claim an act of discrimination on the basis of sex. She did argue that it was punishment for having raised a complaint or grievance on 16 May 2020. However, on examining that document, there is nothing in it which constitutes a protected act for the purposes of section 27 of the Equality Act 2010 and it is not alleged by her that it constituted an act of harassment within the meaning of that term under section 26 of the Equality Act 2010.

11. I then considered whether it is just and equitable to extend time under section 123. I have had regard to the case of **Bexley Community Centre (trading as leisure link) -v- Robertson** 2003 EWCA Civ 576. This stands for the principle that I should not extend time unless the claimant convinces

me on a balance of probabilities that it is just and equitable to do so. So, in other words, the burden is on the claimant to prove the facts on the balance of probabilities and the exercise of discretion to extend time should be the exception and not the rule. The claimant in this case waited to see whether the respondent would deal with her appeal. However it appears that she knew that the respondent was not dealing with an appeal by mid-June. She then delayed making the application until August as a result of apparently listening to advice from ACAS.

12. I do not accept that the explanation that is provided for the delay is a satisfactory explanation, and looking at that factor (the length and reasons for the delay) the delay appears to have been from around 10 June until 19 August. As I have said, it appears that the delay was due to the claimant waiting for the respondent to deal with that complaint. However, the claimant was then dismissed on 14 June and, although it was a little unclear in the claimant's evidence, it appears to me that it is likely that the claimant's appeal against that was rejected by about 17 June. In relation to the question of whether the cogency of the evidence is likely to be affected by the delay, it strikes me that there could be very little effect on the cogency of the evidence in the circumstances of this case. I also have considered the extent to which the respondent had cooperated with any request that the claimant may have made for information and the only issue here appears to be the extent to which the respondent's behaviour in relation to the appeal accounted for any of the delay. The delays to which I have been referred occur primarily outside the primary limitation period although there is a period of delay from the complaint to the middle of June.

13. I have considered the extent to which the cogency of the evidence is likely to be affected by the delay and I have concluded that there could be very little effect apart from the usual effect of a short lapse of time on witnesses' memories. I was not informed of any other effect. I next looked at the extent to which the respondent had cooperated with any requests for information. It seemed to me here that the only issue is really the extent to which the respondent's behaviour accounted for any of the delay and by the time that most of the substantial delay occurs, the primary limitation period had already passed. There is the complaint of 16 May however it appears to me that that does not relate to any of the relevant matters and it appears to have been expressed in such terms as it would not be obvious to the recipients that there was a complaint that any kind of discrimination was taking place. Next I look at the promptness with which the claimant acted once she knew of the possibility of taking action. In my judgement the claimant did not act promptly once she realised that it was possible to take action. It seems to me that there is a period of time which is effectively unaccounted for in terms of why she did not present the claim any earlier. Essentially there is not an adequate explanation for that delay. Next I look

at the question of the steps that the claimant took to obtain advice once she knew of the possibility of taking action and although I do not regard this as a particularly significant factor it is right to say that there was no evidence that the claimant attempted to obtain any advice, although she told me that she was taking the advice of ACAS which appears to have related to seeking to appeal.

14. The claimant also made clear in her claim for that there was a rejection of the appeal. It was said that she had no right to appeal. Again it was not clear to me what the date of that rejection was. But it is clear that this is not a case where the claimant was simply left wondering whether something was going to happen. She had been told that she had no right to appeal.

15. Now those factors are factors which have been traditionally considered but I do bear in mind the case of **Adedeji -v- University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 where the Court of Appeal of England and Wales cautioned against treating that checklist as anything more than a checklist. I am not going to adopt a mechanistic approach to it. So what I have done is to assess all the factors that I considered to be relevant in this case including in particular the length of the delay and the reasons for the delay. Taking all those matters into account I have to find that it is not just and equitable to extend time and the result of this finding is that the claim for sex discrimination claims are dismissed.

#### **Remaining claims**

16. In addition the claimant has brought a claim for wrongful dismissal. It is accepted by the respondent that the employment ending on 14 June and it is presented within the primary time limit.

Employment Judge: Declan O'Dempsey  
Date of Judgment: 23 April 2021  
Entered in register: 10 June 2021  
and copied to parties