



EMPLOYMENT TRIBUNALS

Claimant: Layla Branton

Respondents: Marvel Heating and Renewable Energy Limited (First Respondent)
Dwain Byrne (Second Respondent)
Shareena Byrne (Third Respondent)

Heard: in public by CVP **On:** 29 August 2024

Before: Employment Judge Ayre, sitting alone

Representation

Claimant: In person
Respondent: Ms E Afriyie, consultant

Observer: Employment Judge Bridge

JUDGMENT AT PRELIMINARY HEARING

The claims were presented out of time and the Tribunal does not have jurisdiction to hear them.

REASONS

Background

1. The claimant was employed by the First Respondent for a brief period in October 2022. She says that her employment started on 4 October 2022 and ended on 20 October 2022.

First claim (1804134/2024)

2. On 24 January 2024 the claimant issued a claim in the Employment Tribunal against the First Respondent following a period of early conciliation that started on 22 January 2024 and ended on 23 January 2024. The claim form appears to include complaints of unfair dismissal, sex discrimination, sexual harassment, notice pay, holiday pay and arrears of pay.

Second claim 91804136/2024)

3. On 24 January 2024 the claimant also issued a claim against the Second and Third Respondents following a period of early conciliation that started on 22 January 2024 and ended on 23 January 2024. The claim form appears to include complaints of unfair dismissal, sex discrimination, sexual harassment, notice pay, holiday pay and arrears of pay.

Other claims

4. The claimant has also issued claims against William Duncan Drew (case number 1804135/2024) and Michael Christopher Buckley (case number 1804137/2024).
5. On 28 May 2024 Employment Judge Bright ordered that all four claims (1804134/2024, 1804135/2024, 1804136/2024 and 1804137/2024) should be considered together.
6. By letter dated 31 July 2024 Regional Employment Judge Robertson directed that the First and Second claims should be considered separately from case numbers 1804135/2024 and 1804137/2024 . The case was listed for a Preliminary Hearing today to consider whether the claim was presented out of time.

Today's hearing

7. The issue to be considered at today's hearing was whether the Tribunal has jurisdiction to hear the claims as they have been presented out of time.
8. There was a bundle of documents running to 88 pages. I heard evidence from the claimant and submissions from both parties.
9. At the start of the hearing we spent some time clarifying what claims the claimant is bringing and against which respondent. The claimant confirmed that she is bringing

the following complaints:

1. First Respondent : (1) Sex discrimination (2) Sexual harassment (3) Unlawful deduction from wages / breach of contract in relation to commission payments, and (4) notice pay / wrongful dismissal.
2. Second Respondent : sex discrimination and sexual harassment.
3. Third Respondent : sex discrimination and sexual harassment.

Findings of fact

10. The claimant was employed by the First Respondent as a Sales Executive between 4 October 2022 and 20 October 2022.
11. On 22 January 2024 the claimant began early conciliation through ACAS, and the early conciliation certificate was issued on 23 January 2024. Both claim forms were issued on 24 January 2024.
12. Prior to working for the First Respondent, the claimant was for several years a trade union representative. She began as a shop steward in 1998, and was subsequently appointed as Regional Equality Officer, a position she held for several years. She then became a national trade union negotiator on equality and health and safety issues.
13. The claimant has studied law. After doing an undergraduate degree in English, she did a law conversion course, followed by the Legal Practice Course, which she passed in 2008.
14. The claimant is familiar with the discrimination legislation. She knows of the right to go to Tribunal and of the existence of time limits. She knows what the time limits for presenting claims to an Employment Tribunal are.
15. At the time of the incidents about which she now complains (i.e. in October 2022) the claimant made a complaint to the police about the behaviour of her manager. She also obtained alternative employment.
16. She chose not to issue proceedings in the employment tribunal until January 2024. She said that this was because she was frightened and did not have confidence to issue proceedings until then. She gave evidence, which I accept, that she had not been threatened by any of the respondents, or by her manager. She described the second and third respondents as nice people.

The Law

17. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination (including complaints of harassment) may not be brought after the end of:

“(a) the period of 3 months starting with the date of the act to which the complaint relates, or...

(a) Such other period as the employment tribunal thinks just and equitable.

18. Section 123 (3) states that:

“(a) conduct extending over a period is to be treated as done at the end of the period;

(a) Failure to do something is to be treated as occurring when the person in question decided on it.”

19. Tribunals have a wide discretion as to whether to extend time but there is no principle or assumption that a Tribunal should exercise that discretion: **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434.**

20. Factors that are relevant when considering whether to extend time can include:

1. The length of and reasons for the delay in presenting the claim;
2. The extent to which the cogency of the evidence is likely to be affected by the delay;
3. The extent to which the respondent cooperated with any requests for information;
4. How quickly the claimant acted when she knew of the facts giving rise to the claim; and
5. The steps taken by the claimant to obtain professional advice once she knew of the possibility of taking action.

21. Complaints of unlawful deductions from wages must, by virtue of section 23 of the Employment Rights Act 1996, be presented to the Tribunal:

“(2).... Before the end of the period of three months beginning with –

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made....

(3) Where a complaint is brought under this section in respect of –

(a) a series of deductions or payments....

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series....

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)

(4) Where the employment Tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.”

22. Section 207B of the Employment Rights Act provides for the extension of time limits to enable early conciliation to take place before proceedings are commenced:

“(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (“a relevant provision”).

(2) In this section –

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.”

23. The time limit for presenting claims for breach of contract in the Employment Tribunal is contained within Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (“**the Order**”) which states that:

“Subject to article 8B, an employment tribunal shall not entertain a complaint in respect of an employee’s contract claim unless it is presented –

- (a) *Within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or*
- (b) *Where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or*
- (c) *Where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.”*

24. Article 8B contains provisions for the extension of the time limit to enable Early Conciliation to take place before a claim is presented. Similar

25. Time limits for presenting claims are a jurisdictional issue (***Rodgers v Bodfari (Transport) Ltd 1973 325 NIRC***) and if a claim is out of time, the Tribunal must not hear it. The burden of proof lies on the claimant to show both that it was not reasonably practicable to present her claim on time and that she presented it within such further period as was reasonable (***Porter v Bandridge Ltd [1978] ICR 943 CA***)

26. In cases, such as this one, in which a question arises as to whether it was reasonably practicable for the claimant to present her claim on time, there are three general principles that fall to be considered –

1. The question of reasonable practicability should be interpreted liberally in favour of the claimant;
2. It is a question of fact as to whether it was reasonably practicable for the claimant to present her claim on time; and
3. It is for the claimant to prove that it was not reasonably practicable for her to present her claim on time.

27. In ***Palmer and another v Southend-on-Sea Borough Council [1984] ICR 372***, the Court of Appeal concluded that ‘reasonably practicable’ does not mean ‘reasonable’ or ‘physically possible’, but rather ‘reasonably feasible’.

28. In ***ASDA v Kauser UKEAT/0165/07*** the EAT held that the test is not what was possible, but whether, on the facts of the case, it was reasonable to expect what was possible to have been done.

Conclusions

29. I have reached the following conclusions having considered carefully the evidence before me, the submissions of all parties and the relevant legal principles.

30. The claimant accepted in her evidence to the Tribunal that her claim was presented out of time. She gave evidence that she knew of her rights, including the right to bring a claim in the Tribunal, and that she also knew of the time limits for doing so. She worked for years as a trade union representative, focussing on equality issues. She knew her rights far better than many claimants who appear before the Tribunal. In addition, she has studied law and obtained a qualification which would enable her to apply for a training contract as a solicitor. She should therefore be well aware of the importance of time limits in legal proceedings.
31. There was no evidence before the Tribunal to suggest that the claimant was too unwell to issue proceedings earlier. It appears that she was able to make a complaint to the police about her manager, and to obtain alternative employment.
32. The claimant told us that the reason she issued her claim in January 2024 and not before was that she had 'had enough' of what she considered to be a course of conduct by employers in the industry and wanted to take action. She said that she had been through a lot and had by January this year recovered her confidence to stand up for herself.
33. There was no evidence to suggest any contact between the claimant and the respondents after the termination of the claimant's employment in October 2022. This is not a case in which new facts came to light more recently, which caused the claimant to believe she may have a claim. She was aware of the facts giving rise to this claim from October 2022, yet took no steps to issue proceedings until some 15 months later. Nor is this a case in which the claimant asked for information from the respondents, and the respondents refused to cooperate.
34. The claimant acknowledges that her claims were presented out of time. It falls to her to show why she did not submit her claims earlier. I have heard no compelling reasons as to why she did not. She knew of her rights; she was able to complain to the police and she was able to seek alternative employment.
35. The length of the delay is significant. It is not just a few days, weeks or even months. Given the date upon which her employment terminated, the claimant should have started early conciliation by 19 Jan 2023. She waited for more than a year before doing so. The claims are therefore more than a year out of time. There is no extension of time for early conciliation because she did not contact ACAS until approximately a year after the expiry of the three month time limit for presenting claims.
36. It is likely that such a lengthy delay will have an effect on the cogency of the evidence, and that witnesses may struggle to recall what happened many months ago.

37. The legal test that I have to apply in considering whether the Tribunal has jurisdiction to hear the complaints of breach of contract (including for notice pay) and for unlawful deduction from wages, is whether it was reasonably practicable for the claimant to put her claim in on time and, if it was not, whether she presented her claim within a reasonable period following the end of the three months.
38. I have no hesitation in finding that it would have been reasonably practicable for the claimant to submit her claim in time. The claimant worked for years standing up for the rights of individuals in her role as a trade union official and had particular experience in discrimination and equality issues. She knew of her right to present a claim to the Tribunal and of the time limit for doing so. She was able to report matters to the police and provided no explanation as to why she could report matters to the police but not to ACAS. The claimant could in my view have contacted ACAS and issued proceedings. Although she said she was afraid of issuing proceedings, she accepted that she had not been threatened by the respondents.
39. Although, in light of my findings above, it is not strictly speaking necessary for me to consider the issue, I also find that the claimant did not present her claims within a reasonable period following the end of the primary limitation period. There was no compelling reason as to why, in January 2024, she became able to issue proceedings or as to why she could not do so sooner.
40. In relation to the complaints of discrimination, the test is wider, namely would it be just and equitable to extend time and allow the claimant to pursue her claim.
41. The claimant submitted that it would be in the public interest to extend time, and that the time limit for presenting discrimination claims is too short and should be lengthened. It is not within the power of this Tribunal to decide whether the time limits contained within the Equality Act 2010 should be longer. That is a matter for parliament. This Tribunal has to apply the time limits that are set out in the Equality Act.
42. Time limits exist for an important public policy reason – the finality of litigation. The claimant has not persuaded me that it would be just and equitable to extend time in this case, for the reasons set out above.
43. I therefore find that the claims were presented out of time and that the Tribunal does not have jurisdiction to consider them.

Employment Judge Ayre

Date: 29 August 2024

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