



EMPLOYMENT TRIBUNALS

Claimant: Miss Shai Francis

Respondents: 1) MLCG Limited (In Administration)
2) The Southern Co-operative Limited

PRELIMINARY HEARING

Held at: London South **On:** Friday, 21 July 2017

Before: Regional Employment Judge Hildebrand

Representation

Claimant: In Person
Respondent: Mr Garry Morrison, Solicitor

RESERVED JUDGMENT

1. The Claimant's claim of unlawful deduction of wages is dismissed on withdrawal.
2. The Claimant's claim of sex discrimination is presented outside the time limit provided by section 123 of the Equality Act 2010 and would not be just and equitable to grant an extension of time. That claim is therefore struck out.
3. The Claimant's claim under section 80(h) of the Employment Rights Act 1996 is presented outside the three month period prescribed. The Claimant has not demonstrated that it was not reasonably practicable for it to be presented within that period and it is therefore struck out.

REASONS

Procedural History

1. The Claimant brought proceedings against MLCG Limited (In Administration) on 6 October 2016. She was represented by solicitors.
2. She made claims that she was discriminated against on the grounds of her sex, that she was owed payments and that the Respondent failed to consider her request for flexible working. She stated at box 8.2 that she had been subjected to comments amounting to sexual harassment and sex discrimination from her line manager and her line manager had failed to consider her request for flexible working when the Claimant returned from maternity leave. She had submitted grievances for sex discrimination, sexual harassment, failure to consider her flexible working request and unpaid wages. The Respondent had upheld the grievances but failed to provide a remedy to the complaints.
3. On 13 December 2016 the Joint Administrators indicated to the Tribunal that the Respondent had been placed into administration on 29 June 2016 and that time would be taken by the Administrators to investigate. Time was extended for presentation of the Response. The Administrators responded on 12 January 2017 recording the administration of the Respondent on 29 June 2016 and that the Claimant transferred to the Second Respondent on 29 July 2016.
4. The Claimant attended a preliminary hearing for case management on 23 February 2017. The Claimant was ordered to supply a table in columns showing each act of alleged sex discrimination together with a brief description, the identity of the perpetrator and any witnesses and the type of discrimination. The first order made was that Southern Co-op Dairies Limited should be joined as a respondent to this action as the Second Respondent. In the reasons it was stated at paragraph 2:- "Accordingly Southern Co-op Dairies Limited has been joined as a Second Respondent to this action. Further case management orders will be made once a Response has been received..."
5. Grounds of Resistance were provided by the Second Respondent on 22 May 2017 and accepted. The Second Respondent applied for the case to be listed for a preliminary hearing to determine whether the Claimant's claims had been presented out of time and whether they could proceed. The Second Respondent indicated that the employment began on 24 January 2014 and ended on 27 September 2016. In the grounds of resistance it was recorded that while the claim form provided no details of acts or omission the Claimant had attended a grievance hearing with the First Respondent on 3 December 2015 at which she had raised allegations of discrimination against her line manager. The Respondent submitted that as the claim form was received on 6 October 2016 acts or

omissions which occurred on or before 6 July 2016 would be out of time. Early conciliation was said to begun on 15 August 2016 and ended on 15 September 2016. Since the events complained of had occurred prior to 3 December 2015 it was submitted that the early conciliation regime had no impact. ACAS had been notified at the time and the time limit had already expired.

6. The Second Respondent also made clear that the Claimant had brought a grievance against the Store Manager, Mr Keeth Shiva. There had been a hearing on 3 December 2015 and the grievance outcome was produced on 14 June 2016. On 22 July 2016 the First Respondent had confirmed it would make a payment to the Claimant relating to outstanding sick pay and outstanding holiday pay. The employment transferred to the Second Respondent on 29 July 2016 and this was confirmed in a letter to the Claimant dated 30 July 2016 requesting evidence of the Claimant's eligibility to work in the UK. The Claimant had not supplied the documentation requested. A meeting took place between a representative of the Second Respondent and the Claimant on 1 August 2016. The Second Respondent dealt with the Claimant's flexible working request and agreed that the Claimant could and would be accommodated and be allowed to work flexibly as requested. Consideration also took place of the Claimant's wish to return to the university. The Claimant indicated that due to child care responsibility she was unable to work immediately and it was agreed she would take her holiday entitlement before returning. The Second Respondent indicated that the content of that meeting was confirmed in a letter of 2 August. The Claimant was still away from work on 31 August 2016 and the Second Respondent indicated her absence would be unpaid after 26 August. The Second Respondent requested the Claimant to indicate when she could return and that if nothing was heard by 5 September 2016 it would be assumed that the Claimant no longer wished her employment to continue. On 7 September 2016 the Claimant sent an e-mail indicated that she was unable to return due to childcare arrangements. The Claimant was asked on 20 September 2016 to provide proof of eligibility to work in the UK. In the absence of a response the Respondent wrote to the Claimant on 27 September indicating that her employment was terminated as a consequence of failure to provide evidence of eligibility to work in the UK. The Claimant was paid in lieu of notice and did not appeal that decision.
7. The Claimant by e-mail of 10 May 2017 provided further particulars of her claim. She identified an incident when she was refused her request for flexible working on her return from maternity leave. She said she had been told to get out of this store and take of her headscarf which she was wearing to mask her alopecia. She further contended that the Manager, Mr Shiva, deliberately processed her sick certificate weeks after they had been handed in.
8. Employment Judge Freer caused a letter to be written to the Claimant on 2 June 2017 to indicate that her e-mail of 10 May 2017 did not contain the

detail required by paragraph 2 – 4 of the order of 23 February 2017. He asked the Claimant to comply by 9 June 2017 failing which consideration would be given to striking out the claim.

9. I should say that the Claimant's representative e-mailed on 21 March 2017 to confirm that he was no longer instructed to act for the Claimant.
10. On 9 June 2017 the Claimant supplied further particulars of her claim. She indicated in those particulars that she requested flexible working on 7 October 2015. She was concerned that this was indirect sex discrimination and had been a failure to consider her flexible working request. She also recorded that on 16 October 2015 Mr Shiva had told her to take her headscarf off and the Claimant had left the store hysterically in tears. She considered this was harassment under the Equality Act 2010. She also said that Mr Shiva had failed to process her sick certificates while she had been off work.
11. These particulars were copied to the Second Respondent who applied for an open preliminary hearing, on the date of the case management hearing listed for 21 July 2017, to determine jurisdiction. Employment Judge Freer directed on 28 June that the preliminary hearing on 21 July 2017 would be converted to an open preliminary hearing to consider the Tribunal's jurisdiction to hear the Claimant's claims having regard to the applicable statutory time limits.
12. After establishing that the Claimant had the necessary documentation and understood the issues to be determined the Claimant gave evidence and dealt with cross-examination by the Respondent's representative. I made the following findings of fact.

The Findings of Fact

13. No evidence was called by the Respondent. From the evidence of the Claimant it is clear that her employment transferred to the Second Respondent on 29 July 2016. She had a meeting with a representative of HR in August 2016 and the Second Respondent agreed to the hours sought by the Claimant. The Claimant stated she could not return to work until after the school holidays had finished for childcare reasons. In September 2016 she was not able to return because she did not have her birth certificate within the 24 hours which she said the Respondent allowed to her to produce it. She said that she had been allocated a solicitor in 2015 by ACAS. This assertion was not supported by documentation and it is difficult to accept. She said that ACAS had not indicated that she needed to claim within 3 months. She had received an e-mail from ACAS to say the claim was out of time as this issue had been raised by the Respondent. She looked up the e-mail on her phone. She said her claim was not about the end of her employment but about the events of 2015. She had undertaken research on the Internet. Since the events of 2015 she said there had been constant interaction with her solicitor. The

grievance outcome was in July or August 2016. She was given holiday pay and sick pay but nothing was given to her regarding discrimination which was ignored. The Claimant was unable to explain why she considered her store managers comment on her appearance and her response in relation to her medical condition of alopecia amounted to sex discrimination. She considered it was harassment. She said that no further comments were made after 16 October 2015 to which the Claimant objected. The Claimant had been signed off work sick with stress and alopecia during most of this period. She was cross-examined in relation to her deduction of wages claim. The Respondent was informed that this claim had already been withdrawn by the Claimant's solicitors. The Claimant accepted that she had contacted ACAS at some point before November 2015 when her solicitor was instructed. She was aware that she had a claim in 2015. She did not contend that as a result of her absence from work she was prevented from instructing a solicitor. She said she had discussed putting in a claim with the solicitor but the solicitor had tried to sort the case out without going to court. She accepted there was a reference at page 53 of the bundle in a letter of 2 August 2016 to a pre-action letter in March and that she was aware of a potential claim then.

14. The Claimant is studying for a degree at Croydon College on a full time course. The Claimant accepted that the manager, about whom she complained, Keeth Shiva, was dismissed prior to the transfer of the business to the Second Respondent. In the course of the submissions it also became apparent that the Claimant had an early conciliation certificate dated 24 November 2015 and a further certificate dated 5 February 2016. The Claimant supplied the numbers of these certificates.

The Submission of the Respondent

15. The Respondent submitted that the Claimant was employed by the First Respondent and her difficulties arose with her Line Manager, Mr Keeth Shiva who had been dismissed prior to the transfer. The Second Respondent was an innocent party brought into the case through the provisions of TUPE. The Claimant claims that she was denied flexible working requested on 5 October 2015 in the rejection on 7 October 2015. She claims this is a breach of s.80 of the Employment Rights Act and indirect sex discrimination. The Claimant also claimed on 15 October Mr Shiva made comments related to her appearance and required the removal of her headscarf which she was wearing to mask her medical condition. The Claimant was outside the statutory time limit of 3 months in respect of s.80H running from the refusal or such further period as the tribunal considered reasonable if it was established that it was not reasonably practicable to present in time. In relation to the Equality Act, s.123 provided for claims to be brought within 3 months or such further period as the Tribunal considered just and equitable. Subsection 3 referred to conduct over period being treated as done at the end. A failure to do something is treated as done when the party fail to do so. 7 October was the date of the rejection of the flexible working application. Her hours

were changed on 8 October and time therefore runs from that date. The representative referred to the Court of Appeal case of **Matuszowicz v Kingston upon Hull City Council**. Time runs from the date of the employer's act. The Claimant should have presented her claim on or before the 6 or 7 January.

16. In respect of the second incident the claim should have been presented on or before 14 January 2016. The case of **Walls v Khan** clarified that the meaning of reasonably practicable required an impediment preventing performance. The Claimant had instructed and had been capable of instructing legal professionals. The Claimant had knowledge that she could make a claim in November. Even if it had not been practicable for the Claimant to claim within the time required the Claimant had a representative and no contact was made until October. With regard to s.123 of the Equality Act and the just and equitable test **British Coal v Keeble** required consideration on the length of delay and reasons. The events in question were in October 2015. The contact which led to the certificate before presentation was a year later. Her perpetrator was no longer employed. The Claimant had not acted promptly when she knew of the cause of action. The internal appeal did not have the effect of extending time. The case of Robertson makes clear that there is no presumption for an extension of time. There was no evidence here of a mistake of law. Professionals had been instructed. The claim had not been made until 12 months later. By that time the perpetrator was no longer employed and the business had been transferred. The claim should be dismissed.

The Claimant's Submission

17. The Claimant's submitted that she was not prepared. She had no solicitor. She said she had done everything she had been asked to do. She should not be out of time now. She was not a solicitor. Going through ACAS she understood the best thing to do was not to go to court and drop everyone in it. Her first conciliation was in November 2015. She had e-mails in January as things did not go to plan. There had always been efforts to resolve it. Letters were passing between the parties. She said she had a conciliation certificate in November 2015 and a further one on January or February 2016.
18. At this point the Claimant's son, a toddler, begun to disrupt the proceedings. The Claimant had concluded her submissions. The Respondent made a short response. The Tribunal referred to the recently decided case of **Mist v Derby Community Health Services NHS Trust**, in the event that it was necessary to consider it, although the principles engaged appeared clear.
19. The Claimant made clear that her complaint was not about the conduct of her grievance or the outcome or the termination of her employment. It related to the events of October 2015 alone.

20. The decision was reserved at that point.

The Law

21. Section 80(H) of the Employment Rights Act requires a complaint under the flexible working provisions shall not be considered unless it is presented before the end of the period of three months beginning with the relevant date or within such further period as the Tribunal considers reasonable in the case where it is satisfied that it was not reasonable practicable for the complaint to be presented before the end of that period of three months. The relevant date is the first date on which the employee may make a complaint. A complaint may not be made until the employer notifies the employee of the decision on the application or, if the decision period comes to an end without the employer notifying the employee of the employer's decision on the application, the end of the decision period.
22. In the present case the decision was given and so the time runs from the date of communication of the decision to the Claimant.
23. In relation to the Equality Act 2010 s.123 provides that proceedings may not be brought after the end of the period of 3 months starting with the dates of the act which the complaint relates or such other period as the Employment Tribunal thinks just and equitable. The Court of Appeal case of **Robertson v Bexley Community Centre trading as Leisure Link 2003 IRLR 434** the Court made clear that the granting of an extension was the exception rather than the rule and that the tribunal must be convinced by the claimant that it is just and equitable to extend time.

Conclusion

24. In the present case the Claimant entered early conciliation on 15 August 2016 some 10 months after the last of the two events of which she complained in October 2015. Her final contact with ACAS was therefore significantly outside the period within which a claim could be brought, the primarily limitation period of three months. The Claimant had already obtained two certificates from ACAS on her own account. The second and third certificates are therefore invalid since only one certificate may be obtained in relation to a matter. The claim was presented on 6 October 2016 almost exactly a year after the event about which she wished to complain.
25. The Claimant has had the benefit of professional advice and has been in contact with ACAS in November 2015 well inside the limitation period of three months running from the date of the acts complained of. The delay in this case is therefore significant. In relation to the flexible working claim the Claimant did not establish any material to suggest that it was not reasonably practicable for that claim to be presented in time. Adopting the paraphrase of reasonably feasible it was clearly reasonably feasible for

the Claimant to present this claim within the three month period from the date of refusal of her flexible working request. The Claimant has not cited any physical impediment. At its highest she indicates her desire for matters to be resolved internally.

26. The finding must therefore be that it was reasonably practicable for her flexible working claim to be presented in time. There were therefore no grounds for extension and that claim is therefore dismissed for want of jurisdiction.
27. Even if I am incorrect on that and it was not reasonably practicable for the claim to be presented within three months it is impossible to identify on the material provided any ground for saying that it was reasonable for the Claimant to wait until October 2016 before presenting the claim. Even taking into account an ACAS certificate which itself is out of time and therefore invalid three weeks appear to have passed following the closure of conciliation before the presentation of the complaint. Solicitors who were aware of the fact that the complaint was out of time would have to act with alacrity to demonstrate that an extension of time should be granted. The Claimant did not act within a further reasonable period.
28. Turning to the Claimant's discrimination claims the Respondent's representative has referred to the leading authorities in the field. In particular reference is made to ***British Coal v Keeble***.
29. Applying the factors identified there to this case it is clear that the delay is significant. No satisfactory explanation has been provided for the delay. It cannot be suggested that the Second Respondent has in any way contributed to that delay nor is it asserted by the Claimant that the First Respondent contributed to the delay. The relative prejudice is as always difficult to analyse. The Claimant has not made clear a case of sex discrimination other than in the context of her flexible working application which may or may not have additionally given rise to a claim of indirect sex discrimination. The issue regarding the Claimant's headscarf may come within harassment on grounds of sex. I accept that the First Respondent upheld her grievance. I therefore proceed on the basis that the Claimant has a claim but no particular weight can be attached to the strength of the claim from the material provided. If the claim is out of time the Claimant would have lost the benefit of that claim. On the Respondents' side, the First Respondent is in administration. The Second Respondent appears to have proceeded with diligence on taking over the business. A meeting was promptly arranged with the Claimant. She was offered the hours which she had sought in her flexible working request by the Second Respondent shortly after they took over the business. Allowances were made for her to return to work after she had dealt with childcare commitments and the employment came to an end on other grounds about which the Claimant does not complain. It appears that the Second Respondent will be in some difficulty in defending claim if it is allowed to proceed. The Second Respondent's management was not in place at the

time of the events about which the Claimant complains, and the alleged perpetrator left the employment of the First Respondent before the transfer. I therefore perceive considerable prejudice to the Second Respondent in the event that time is extended.

30. The Claimant has not given any clarity why with professional representation and awareness of the potential existence of a claim it was not presented within a reasonable period of time. Applying the authority of **Robertson** I have sought in vain for the exceptional circumstances which are required to allow an extension of time on the grounds of justice and equity particularly the long extension required in this case.
31. I therefore find that this case is presented out of time insofar as it is a claim under the Equality Act and it has not been presented within such other period as is just and equitable.

Regional Employment Judge Hildebrand

Date 23 August 2017 London South