



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4107801/2019**

**Held in Dundee on 12 December 2019**

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**Employment Judge M Sangster**

**Mr C Tosh**

**Claimant  
In person**

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**The Chief Constable of the Police  
Service of Scotland**

**Respondent  
Represented by  
Ms D Fellows  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that the Tribunal does not have jurisdiction to  
30 consider the claim under section 123 of the Equality Act 2010. The claim is therefore  
dismissed.

### **REASONS**

#### **Introduction**

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1. The claimant submitted a claim to the Tribunal on 22 July 2019, having undertaken early conciliation from 16-18 July 2019. He raised claims that he had been unlawfully discriminated against on the grounds of sex and disability.

E.T. Z4 (WR)

Following a case management preliminary hearing, a preliminary hearing was fixed to determine whether the Tribunal has jurisdiction to hear the claims, or whether they were submitted out of time.

- 5 2. The claimant gave evidence on his own behalf. The respondent did not lead any evidence. A joint set of productions was lodged, extending to 386 pages.

### **Issues to be determined**

3. Whether the claims were brought within the time limit set out in section 123(1)(a) of the Equality Act 2010 (**EqA**)?
4. If not, whether the claims were brought within such other period as the Tribunal  
10 thinks just and equitable (s123(1)(b) EqA)?

### **Findings in fact**

5. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
6. The claimant was a police constable. He was summarily dismissed on  
15 20 November 2017.
7. On 10 February 2016, the claimant was arrested on charges relating to domestic abuse. He was subsequently found not guilty of these charges.
8. On 30 September 2016 the claimant submitted a complaint to the Police Investigations & Review Commissioner (**PIRC**). This included a claim of gender  
20 bias in relation to his arrest on 10 February 2016.
9. The claimant was arrested again on 18 December 2016. He was suspended following his arrest and remained on suspension until he was dismissed. He subsequently pled guilty to the charges.
10. On 13 May 2017 the claimant made a 999 call, as he was concerned about his  
25 partner, who was also a police officer, removing their child from the family home. Police officers attended the claimant's home and agreed that the claimant's partner and child could leave the family home. The claimant required

to be restrained and became abusive towards the police officers in attendance. He was arrested as a result. At the time of his arrest, his response to being cautioned included a statement that he believed he was victimised due to his gender and status.

- 5 11. Action was not subsequently taken by the Procurator Fiscal, but misconduct proceedings were commenced internally.
12. In advance of the misconduct hearing, the claimant was provided with notes of the 999 calls from his property. In the related notes it was stated *'the resident of this address is a high risk victim of domestic abuse and she has a 7 week*  
10 *old child within'*.
13. The misconduct hearing took place on 20 November 2017. The claimant was represented at the hearing by his Police Federation representative. At the conclusion of the hearing the claimant was informed that he was summarily dismissed, on the basis that his behaviour was not compatible with the Office  
15 of Police Constable.
14. In December 2017 the claimant appealed against his dismissal. He was not represented by the Police Federation at this point, or thereafter. His grounds for appeal included a statement that *'Throughout the process and determination there has been no recognition of, or consideration given to my*  
20 *disability in terms of the Equality Act 2010.'* He also stated *'I can only surmise that some gender bias has played a part here and that the circumstances may have been different had I been a female phoning the Police with similar concerns.'* The appeal hearing took place on 19 March 2018. The claimant's appeal was unsuccessful. He was informed of this at the conclusion of the  
25 hearing.
15. On 18 April 2018, the claimant appealed to the Police Appeals Tribunal (**PAT**). The PAT hearing took place on 26 November 2018. At the PAT hearing the claimant also alleged gender bias was apparent in the actions of the officers attending his home on 13 May 2017. He was informed at the conclusion of the  
30 hearing that his appeal was unsuccessful.

16. On 12 June 2019, he received a written response from PIRC (dated 10 June 2019) in relation to a number of complaints he lodged with them. Within that letter it was stated that '*given recorded incidents of a domestic nature...Police Scotland still considered [the claimant] to be a domestic perpetrator*', as such notes on his record '*remained entirely relevant*'.
17. The claimant participated in early conciliation from 16-18 July 2019.
18. He raised his claim with the Tribunal on 22 July 2019. His claims are that he was discriminated against, on the grounds of sex and/or disability, in the period from 2 February 2015 to 20 November 2017. He claims are that he was subjected to numerous instances of discrimination in that period, by significant number of individuals.

### **Claimant's Submissions**

19. The claimant stated he was unaware of his ability to bring a claim or the timescales for doing so. It was only when he received the letter dated 10 June 2019 that he began to research his further options. He felt that letter contained new information, namely that he was classed as a 'domestic perpetrator'. While he had suspected this was the case before, the letter confirmed this. He raised his claim as soon as possible following receipt of that letter.

### **Respondent's Submissions**

20. The respondent lodged a written submission. They referred to the statutory tests. They stated that the onus is on the claimant to demonstrate that it is just and equitable to extend time. He has not done so. There is a considerable delay (over 20 months) in this case. It is not just and equitable to extend time.
21. The respondent referred the Tribunal to a number of cases, with particular emphasis being placed on cases of:

- (i) ***British Coal Corporation v Keeble*** [1997] IRLR 336 – in relation to which each of the relevant factors were addressed in turn; and

(ii) ***Barnes v The Commissioner of the Metropolis & Independent Police Complaints Commission*** UKEAT/0474/05/CK, in relation

to which parallels were drawn the claimant's case. Emphasis was also placed on paragraph 19 of the Judgment, which outlines that, in relation to the issue of prior knowledge, Tribunals are entitled to ask the following questions:

(i). When did the claimant know or suspect that he had a claim for discrimination?

(ii). Was it reasonable for him to know or suspect that he had a claim earlier?

(iii). If he did know or suspect that he had a claim, why did he not present his claim earlier and was he acting reasonably in delaying?

22. It was submitted that the claimant believed he had been discriminated against in 2016 & 2017. He was advised by the Police Federation at the time of his misconduct hearing and ought to have been aware of the relevant time limits for raising a claim. He has not acted promptly at any stage. Even after receipt of the letter dated 10 June 2019, which he states prompted him to raise his claim, he delayed a further 7 weeks before doing so. The significant delay will affect the cogency of the evidence.

**Relevant Law**

23. S123(1) EqA, provides:

*'[Subject to section 140A and 140B] proceedings on a complaint within section 120 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*

(b) *such other period as the employment tribunal thinks just and equitable.'*

24. What is just and equitable depends on all the circumstances. The burden of proof is on the claimant as explained in **Robertson v Bexley Community Centre** [2003] IRLR 434, in which the Court of Appeal also said, at para 25:

5                   *“It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”*

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25. In **British Coal Corporation v Keeble** [1997] IRLR 336 the EAT held that the Tribunal’s discretion is as wide as that in the civil courts under s.33 of the Limitation Act 1980. That section requires the courts to consider factors relevant to the prejudice which each party would suffer as the result of the decision to be made, including:
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- (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 cooperated with any requests for information;
  - (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
  - (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.
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- 25 26. In **Southwark London Borough Council v Afolabi** [2003] ICR 800 the Court of Appeal confirmed that, whilst that checklist provides a useful guide for Tribunals, it does not require to be followed slavishly. It added however that there are normally two factors which are almost always relevant – (i) the length of and reasons for the delay and (ii) whether the delay has prejudiced the respondents, such as by preventing or inhibiting it from fully investigating a claim while matters are fresh.
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27. In ***Rathakrishnan v Pizza Express (Restaurants) Ltd*** [2016] IRLR 278, the EAT confirmed that the exercise of the Tribunal's wide discretion involves a multi-factoral approach, with no single factor being determinative.

### Decision

- 5 28. The Tribunal firstly considered s123(1) EqA and concluded that the claims of discrimination on the grounds of sex and disability were not brought within the period of three months from the acts complained of.

29. The Tribunal then considered whether the claims were brought within such other period as was just and equitable, noting that the onus was on the claimant to demonstrate this. The Tribunal considered the factors set out in ***British Coal Corporation v Keeble*** and reached the following conclusions in relation to each:
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- (i) **The length of and reasons for the delay.** The acts complained of occurred in the period from 2 February 2015 to 20 November 2017. The claimant's Employment Tribunal claim was not raised until 15 22 June 2019, over 19 months after the last act complained of and well over 4 years after the first act complained of.

The claimant's position was that he was prompted into action by the letter from PIRC dated 10 June 2019, which contained new information.

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In considering the reasons for the delay, the Tribunal considered the questions posed in the ***Barnes*** case about the claimant's prior knowledge. It is clear to the Tribunal that the claimant suspected that he had a claim for sex discrimination well before receipt of the letter of 10 June 2019. He asserted this on several occasions from 25 September 2016 onwards. He was aware, from the information provided to him in advance of his misconduct hearing on 20 November 2017, that his wife was considered '*a high risk victim of domestic abuse*'. The claimant was the only other adult who lived at that property, so it was obvious that he was considered the

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5 perpetrator of that. The letter dated 10 June 2019 may have expressly stated this but, given the information provided to him in advance of his misconduct hearing, it was reasonable for the claimant to know, or at very least suspect, that this was the case at a much earlier stage. He accepted that he did indeed suspect this was the case.

10 The letter of 10 June 2019 provided the claimant with no further information in relation to any claim for disability discrimination. It is clear from the terms of his appeal in December 2017 that he knew or suspected that he had a claim of disability discrimination at that stage.

15 In the period up to 12 June 2019, the claimant was aware of the facts giving rise to his claims and the legal basis for his claims. The claimant accepted that there was no obvious impediment to him raising his claims with the Tribunal prior 12 June 2019. The reason he did not do so was that he simply did not know that Tribunals had jurisdiction to consider such a claim, or the applicable timescales. He accepted that he could have researched the position earlier or sought advice, given that he at least suspected that he had a claim, but did not do so. No explanation was provided as to why it took the claimant 7 weeks from receipt of the letter on 12 June 2019 to lodge his claim with the Tribunal.

25 **(ii) The extent to which the cogency of the evidence is likely to be affected by the delay.** The claims relate to the period from 2 February 2015 to 20 November 2017. There is no doubt that the cogency of evidence will be significantly and adversely affected by the delay. The Tribunal accepted, as submitted by the respondent, that witness evidence is critical in discrimination cases.

30 **(iii) The extent to which the party sued had cooperated with any requests for information.** There was no assertion that the respondent had failed to do so.



**(iv) The promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.**

5 The claimant knew of facts giving rise to causes of action as early as September 2016, when he submitted a complaint to PIRC, which included a claim of gender bias. He raised this issue on numerous occasions thereafter. In addition, in his appeal against his dismissal in December 2017, when he was representing himself, he made reference to the fact that he felt there had been no recognition of, or consideration given to, his disability in terms of the Equality Act 10 2010. He was accordingly aware, at that stage, of the facts giving rise to the causes of action he now seeks to assert. He confirmed that, whilst he could have sought advice or undertaken research at an earlier point, he did not do so until June 2019. The Tribunal found, as a result, that the claimant did not act promptly once he 15 knew of the facts giving rise to the cause of action.

**(v) The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.**

20 Whilst the claimant was, at the misconduct hearing in November 2017, represented by the Police Federation, there was no evidence of him requesting appropriate advice from them about the possibility of further action. Similarly, there was no evidence that the claimant had sought to obtain appropriate professional advice from any other source at any stage.

30. The Tribunal took these factors into account in considering the balance of 25 prejudice between the parties. The Tribunal concluded that no satisfactory explanation was advanced for why the claims were not brought sooner, particularly where it was clear that the claimant suspected he had claims for discrimination at an early stage. There was no obvious impediment to the claimant raising his claims sooner. Had he undertaken research at an earlier 30 stage he would have readily identified that he could potentially raise his claim with the Tribunal and the time limits for doing so, as he did following receipt of the letter dated 10 June 2019. The respondent would be prejudiced if the

claims were allowed to proceed at this stage, as the cogency of evidence in relation to these claims would be significantly and adversely affected by the delay.

31. For these reasons the Tribunal did not determine that the claims were brought  
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does not have jurisdiction to hear any of the claimant's claims.

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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**Mel Sangster**  
**24 December 2019**  
**27 December 2019**

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