EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**

AND

Ms N. Khatun **Birmingham City Council**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Birmingham **ON:** 2 April 2019

EMPLOYMENT JUDGE Algazy QC

Representation

For the Claimant: In person
For the Respondent: Ms. S.Garner- Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claims for breach of conduct and unlawful deductions are dismissed upon withdrawal.

2. The claimant is not entitled to bring a claim for race discrimination as she was not in "employment" as defined in section 83(2) of the Equality Act 2010 after 14 December 2015.

3. In the alternative, the Tribunal does not have jurisdiction to hear the claims for race discrimination and it is not just and equitable to extend time for bringing the Claims in accordance with section 123 Equality Act 2010.

R E A S O N S

1. By a claim form issued on 6 September 2018, the claimant bought claims for race discrimination, unlawful deductions and breach of contract against her former employer, Birmingham City council.

2. At the Hearing, the claimant withdrew her breach of contract and the unlawful deductions claims and these stand dismissed upon withdrawal by the claimant. There was also some reference to part-time worker discrimination in the ET1 but this was not pursued.

3. At the outset of the hearing, the claimant confirmed that she was only advancing two claims of race discrimination, namely:

   3.1 the respondent's refusal to allow her to return on an acceptable part time basis; and

   3.2 The respondent's refusal to allow her to extend her career break.

4. Today's preliminary hearing was to determine whether the tribunal had jurisdiction to hear the claims and/or whether it would be just and equitable to extend time under section 123 of the Equality Act 2010.

5. The claimant gave evidence on her own behalf and the respondent called no evidence. The claimant represented himself and the respondent was represented by Ms. Garner of counsel. The Tribunal was presented with a bundle from the respondent and a supplementary bundle from the claimant. Ms Garner provided a skeleton argument. References in square brackets are the bundle unless otherwise indicated.

The Facts

6. The key facts were largely not in dispute and I can take most of the relevant dates from the claimant's witness statement.

7. The claimant commenced employment with the respondent as an associate solicitor on 2 July 2007. Her field of expertise did not include employment law.

8. In September 2014 the claimant took a period of maternity leave. This ended on 14 September 2015. Not long after, the claimant commenced a career break for a period of two years from 14 December 2015 to 13 December 2017.

9. Formal approval for the claimants' career break was given in the respondent's letter dated 24 November 2015 [52/3]. The claimant was required to sign and return a copy of the career break agreement which she duly did.

10. The documentation in relation to the career break policy is set out in the bundle at pages [44 to 48]. The scheme explicitly sets out the terms upon which career breaks are implemented and approved by the respondent.

11. In particular, the scheme provides for a break in employment on the basis that the employee resigns:

    "The scheme requires the employee to resign from their post for the duration of the career break and the individual must give three months notice of their intended return to work date. During the career break the individual is not an employee of BCC and continuity of employment is not preserved. However, for the purposes of calculating annual leave, sick pay and maternity leave, BCC will allow the employee to count their period of continuous service prior to the career break, their service post the career break, and to add a period equivalent to the time spent on career break"

    This extract is on page [44], however the point is confirmed in a number of places in the scheme documentation. It was also made plain in the respondent's letter to the claimant dated 11 November 2015:

    "Following commencement of your career break you will no longer be employed by Birmingham City Council and your continuity of service will not be preserved."

12. Notwithstanding this break in the employment relationship, employees have to comply with certain conditions while on career break, breach of which can be considered a breach of the scheme – See page [48]:

    "

    - **Taking any permanent employment, as this is not allowed under scheme**
    - **Taking other employment which constitutes a conflict-of-interest**
    - **Unreasonably refusing to take part in paid training and development days**
    - **Not giving the required notice that they would like to return to work by the agreed date, if there is a job available"**

13. It is further made clear to an employee seeking to go on a career break that **"… whilst every effort will be made to find an appropriate post for the individual when they wish to return to work, this may not always be possible"** [46].

14. That point is explained to the employee at a meeting prior to the career break being approved and repeated in the letter sent to the employee setting out the terms of the career break. In this case the respondent's letter of 11 November 2015. [49].

15. Also in the letter of 11 November 2015, the claimant is reminded of how the scheme will operate when she indicates that she desires to return to work:

    "You have also been advised that there is no guarantee your substantive post will be available for you to return to completion of your career break. In the event your post is filled in the interim, you'll be registered on priority movers, unpaid, for a period of 12 weeks to allow you the opportunity to apply for suitable alternative employment within the council at your substantive grade, or below."

16. The key elements of the career break were also repeated in the respondent's letter dated 24 November 2015 confirming agreement with the application for a career break and enclosing a copy of the career break agreement [52/3]

17. These arrangements allow an employee to cease working for the respondent and to be treated in a favourable manner as regards returning to either the employee's previous post or finding suitable alternative employment at the end of the career break. However certain limitations and conditions as described above are imposed on the employee. I have not set out an exhaustive list of obligations that the scheme imposes on both parties.

18. Returning to the narrative, the claimant gave notice of her intention to return to work on 21 September 2017. In the course of discussions with Suzanne Waters, senior lawyer at the respondent, the claimant indicated that she wished to return to work, part-time, three days a week.

19. The claimant attended a meeting with Ms Waters on 20 October 2017. The claimant was informed that such an arrangement was not possible having regard to the respondent's' business need. Claimant was offered a return to work on a full-time basis of 36.5 hours per week.

20. The respondent's position was confirmed in its letter to the claimant dated 30 October 2017 [62/3].

21. Following a chasing email dated 8 November 2017 from Miss Waters to the claimant, the claimant wrote back requesting an extension to her career break for a further year.

22. On 21 November 2017, the claimant wrote to Ms Waters in relation to her request to extend her career break (supplementary bundle p.2). The email response dated 29 November 2017 indicated that the further request was not being supported internally [72].

23. Further enquiry was made by the claimant as to why she was unable to return part time in an email dated 4 December 2017 chased by email on 20 December 2017 (supplementary bundle p3/4)

24. Miss Waters replied on 21 December 2017 apologising for the delay and indicated that a detailed response would be provided. This was duly sent by letter dated 18 January 2018 by email and recorded delivery to the claimants' home address. This was subsequently returned to the respondent on 8 February 2018 as uncollected.

25. Unfortunately, the claimant was unable to open the various attachments to the respondent's email and was away from home at the time of the delivery of the recorded post. In those circumstances and the claimant requested further copies of the respondent's letter dated 18 January 2018 by email dated 20 February 2018. Following further attempts to chase a response by the claimant, the respondent sent the letter of 18 January 2018 and the enclosures to the claimant by recorded delivery on 13 March 2018. This was received by the claimant around 15 March 2018.

26. The claimant returned completed forms to the respondent on 23 March 2018. The priority movers registration form indicated that the start date of the notice period was 19 January 2018 and the end date was 19 April 2018. In her witness statement, the claimant advances the 19 April 2018 as the date on which time should start to run against her in bringing her claims.

27. Following correspondence between the parties in May 2018 in which the claimant indicated and that she intended to bring an employment tribunal claim, confirmation was received from ACAS that the claimant had commenced early conciliation on 11 July 2018.

28. The respondent replied to ACAS on 25 July 2018 and sent further information on 9 August 2018. The ACAS certificate was issued on 11 August 2018 [20].

29. The claimant gave oral testimony before the tribunal regarding her personal circumstances. That evidence was eloquent, dignified and moving. Suffice it to say that she has been the victim of domestic violence and has had to cope with difficult circumstances in the 2 years during her career break. This impacted on her ability to seek and obtain legal advice. She has also had limited access to computers and the Internet.

30. The claimant told the tribunal that she made an approach to a registered charity about 2 to 3 weeks before the preliminary hearing but that they could not provide assistance in discrimination cases although some help with document preparation was afforded to the claimant. Approaches were made to solicitors, direct access barristers, the CAB in West Bromwich, legal clinics, Birmingham University and to the "usual places", as the claimant described them. All to no avail. The Tribunal was not provided with detail or dates in respect of such approaches. This evidence was not in the claimant's witness statement and was not part of her oral testimony in chief, it emerged in cross-examination.

31. The claimant also accepted that she was aware of time limits in other claims even though she was not an employment lawyer.

The Law

32. Section 83(2) (a) of the Equality Act 2010 ("EqA) defines employment, insofar as is material here as:

"employment under a contract of employment, …. or a contract personally to do work"

33. I pause to note that at §43 of her witness statement sought to argue that "…*the resignation as per career break policy is grossly unfair and the respondents continue beyond the resignation to have an employer and employee relationship restricting the right of the employee to take employment elsewhere without prior approval"*

34. Section 123 EqA provides that the time limit for a discrimination claim to be presented to a tribunal is at 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"**

35. The claimant did not seek to rely on any argument in relation to continuing conduct under section 123(3) EqA, that is **"conduct extended over a period".**

36. For the purposes, of the Preliminary Hearing I took a date more favourable to the claimant than originally advanced by the respondent. Limitation started running against the claimant on 15 March 2018, the date of the receipt of the respondent's letter of 13 March 2018. The respondent had originally argued that the appropriate date for time to start to run should have been 20 October 2017 when the decision not to permit the claimant to work part time was made.

37. I was taken to a number of authorities by the parties on the "just and equitable" extension of the time limit in discrimination cases. From those cases and the general law on the topic, I take the propositions below to be the applicable relevant principles.

38. Firstly, Parliament has chosen to give the employment tribunal the widest possible discretion. Whilst it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 – *British Coal Corporation v Keeble [1997] IRLR 336 §8*, the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account – *Southwark v Afolabi [2003] IRLR* 220 §3.

39. The claimant, in particular, relied upon the proposition that the tribunal is entitled to take into account anything that it deems to be relevant - *Hutchinson v Westward Television Ltd [1977] IRLR 69*.

40. Factors which are relevant to consider when exercising the discretion whether to extend time are:

    (a) the length of, and reasons for, the delay;
    (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh);
    (c) the extent to which the cogency of the evidence is likely to be affected by the delay (This is not relied on here by the respondent);
    (d) The extent to which party sued had cooperated with any requests for information;
    (e) The promptness with which the claimant acted once she knew of the facts giving rise to the cause of action;

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

41. The court in *Bexley Community Centre v Robertson [2003] EWCA Civ 576* held that time limits are to be applied strictly in employment cases, and there is no presumption in favour of extending time. A tribunal should not extend time unless the claimant, who has the burden of so proving, convinces them that it is just and equitable to do so. The exercise of discretion to extend time should be the exception, not the rule.

42. In *Rathakrishnan v Pizza Express UKEAT/0013/15,* the EAT suggested that a multi-factorial approach is to be preferred, and that no single factor is determinative.

43. The claimant also referred to the cases of *Churchill v Yeates and sons Ltd* and *Porter v Bandridge Llimited [1978] ICR* to support the proposition that information regarding other employees being given part time roles after coming back from maternity leave was information coming to light after limitation had expired. Of course, the obligations on the employer in respect of an employee coming back from maternity leave are different to the situation that the claimant was in, namely returning after a career break under a specific scheme.

44. Phillips J. in *Hutchison (op cit)* also suggested that some regard might be properly had to the underlying merits of the claim:

    "*In that connection and going back for a moment to the first point, it is for the tribunal to say how far they think it is necessary to look at the circumstances of the matter complained of. No doubt they will want to know what it is all about; they may want to form some fairly rough idea as to whether it is a strong*

complaint or a weak complaint, and so on. Certainly, it is not required at that stage to try the complaint."

45. The proper limits of such an approach were considered by the EAT in *Lupetti v Wrens Old House Ltd. [1984] I.C.R. 348.* In this case I was addressed by both parties on the merits and in particular on the distinction between the circumstances of the claimant and the two employees who were returning from maternity leave. The claimant sought to address this apparent obstacle by pointing to the fact that she was told that the decision in her case was based on business need.

Conclusions

46. I deal firstly with the status issue. The Claimant maintained that there was a subsisting employment relationship post resignation. The respondent's position was that the career break agreement which took effect after 14 December 2015 was not a contract of employment within the meaning of section 230(2) of the Employment Rights Act 1996 and further that the claimant was not a worker within the meaning of section 230(3) of the Employment Rights Act 1996. Nor could the claimant properly assert that she was working under a contract of employment or a contract personally to do work under section 83(2) of the Equality Act 2010.

47. I find that the respondent's submission Is well founded. The arrangements in place, as described above, constituted a separate contract to have effect during the career break. That agreement regulated the obligations between the parties during the currency of the career break as well as the circumstances in which a former employee might return to work for the respondent. There being no guarantee that such eventuality would definitely take place.

48. The claimant also made reference in her witness statement to section 212(3)(c) of the Employment Rights act 1996 (§43). I do not see on the face of that section any connection with the circumstances of the claimant in this case. Far from there being any arrangements in place, or like custom, the terms of the career break scheme and the career break agreement specifically provide that continuity of employment is not preserved.

49. The claimant regards the career break policy as grossly unfair (see above). However, that is the agreement she entered into in the full knowledge that her employment relationship with the respondent was to terminate.

50. In those circumstances the tribunal does not have jurisdiction to consider the claimants allegations of race discrimination and the claim is dismissed accordingly.

51. However, should I be wrong in the legal analysis of the contractual relationship between the parties I go on to consider whether the claimant should have time extended on a just and equitable basis in any event.

52. As outlined above, I take15 March 2018 as the latest date on which I find that the claimant can legitimately claim that time started to run against her. Even if I did accept, which I do not, that 19 April 2018 is the appropriate date (see claimants witness statement at paragraph 20), the claims would still be out of time.

53. Whatever the unfortunate circumstances that the claimant endured whilst on her career break, the chronology after 15 March 2018 does not assist her. She was ready to bring her claim, I find, by the time that she had received all the material from the respondent concerning her two requests. She did not go to ACAS until 11 July 2018.

54. Those stark facts, coupled with the facts and matters advanced by the respondent are such that the tribunal finds it is not just and equitable to extend the time for bringing her claims. I so find notwithstanding that I take full account of the details of the troubling personal circumstances relied on by the claimant.

55. The claimant is a solicitor and familiar with the concept of time limits and limitation. She has been able to access at different times different sources of information albeit that that access has been patchy. She did not lead any direct evidence about the specific steps taken by her in the period between 15 March 2018 11 July 2018. I have set out above the broadly described attempts at seeking advice and information in relation to her claim. Regrettably such evidence as was before the tribunal falls far short of discharging the burden on the claimant to show that it would have been just and equitable to disapply the time limits in her case.

56. The respondent has not failed to cooperate with any requests for information.

57. Very fairly, the claimant did not rely on any delays regarding correspondence from the respondents in support of her application. As she put it, her “trigger” was the discovery, towards the end of August 2018, of what she perceived to be differential treatment of employees returning from maternity leave.

58. I bear in mind the extract from *Hutchinson* set out above in respect of that last issue. Whilst the broad merits of the claim are not a matter that I take into consideration in arriving at my decision, it does provide some collateral assistance in this sense. The claimants case appears to rest on a comparison of her treatment with those employees coming back from maternity leave. If that is so, it is not an auspicious basis on which to found her claims of discrimination. The claimant may be able to find some reassurance in the fact that the Tribunal’s ruling has not necessarily deprived her of a valuable claim.

59. In all the circumstances, if the claimant was otherwise entitled to pursue her claims, they are both out of time, the Tribunal has no jurisdiction to hear them and they are dismissed accordingly.

Employment Judge Algazy QC

on 1 May 2019