



# EMPLOYMENT TRIBUNALS

**Claimant:** Jennifer Ndhlovu

**Respondent:** Hestia Housing and Support

**Heard at:** London South (by cvp) **On:** 11 December 2020

**Before:** Employment Judge Housego

**Representation**

**Claimant:** In person

**Respondent:** Paras Gorasia, instructed by Domonique McRae, solicitor, of Howard Kennedy LLP

## JUDGMENT

1. The name of the Respondent is amended, as above.
2. The claim is struck out.
3. The Claimant is ordered to pay costs to the Respondent of £1,500.

## REASONS

1. The Claimant and her advice agency sought an adjournment, because the advice agency was unable to be present at the virtual hearing. They sent detailed submissions and a witness statement for the Claimant. The Claimant repeated that request at the hearing, additionally as she had her baby, now almost 1 year old, on her lap throughout. It was not necessary to take evidence from the Claimant, as the position was made clear in the documents. Much of the Claimant's witness statement dealt with the ending of her relationship with the Respondent, and little was about why the claim was submitted out of time. The time point alone was fatal to the claim. The history of the matter is set out below.
2. The Claimant was an agency worker for the Respondent, whose correct name is as above. She became pregnant and told the Respondent of this on 24 April 2019.

3. On 27 June 2019 the Respondent told her that, with immediate effect, her role would end.
4. The 3 month time limit for bringing a claim to the Employment Tribunal ended on 26 September 2019.
5. On 29 September 2019 the Claimant contacted Acas to commence the Early Conciliation ("EC") process. This was 3 days outside the time limit for bringing a claim.
6. The Claimant has not given any reason why she could not do this earlier, other than that she did not know what to do, until someone at Church told her. The Claimant said that she was ill with morning sickness, and with anaemia, but provided no medical evidence of inability to bring a claim. She was, plainly, still able to attend Church.
7. On 08 October 2019 the EC Certificate was issued (a period of 9 days).
8. On 31 October 2019 Acas contacted the Respondent on behalf of the Claimant.
9. On 06 December 2019 via Acas the Respondent offered the Claimant one week's pay (£447.30).
10. On 09 December 2019 the Claimant accepted this sum, by email to Acas.
11. On 11 December 2019 the Claimant again emailed Acas stating that she was in hospital at the early stages of labour.
12. On 12 December 2019 the Claimant emailed Acas asking them to arrange the agreement, and said that she was now 3cm dilated and hoping the baby would be born soon. The baby was born later on 12 December 2019. The Claimant left hospital on 13 December 2019.
13. On 13 December 2019 the COT3 was drafted, and on 17 December 2019 was amended.
14. The Claimant COT3 was completed on 19 December 2019 and on that date Acas stated that the agreement was legally binding.
15. On 13 January the Claimant emailed the Respondent stating that she wished to withdraw from the agreement, because:
  - 15.1. It was signed "under duress of circumstances".
  - 15.2. It was not entered into on an equal footing as she did not have legal advice.
  - 15.3. At the time she was under maternity stress and distress.
  - 15.4. The agreement was oppressive as she was not given sufficient time to consult a qualified person to assist her with anxious scrutiny of the terms.
  - 15.5. The money had not been paid and so the Respondent had violated the terms of the agreement.

- 15.6. The agreement was illegal because it was obtained by inducing negotiations “whilst in maternity crisis and heavily pregnant, and that she was subjected to undue pressure to settle.
- 15.7. The discrimination issue was not one that could be fully resolved by the agreement.
16. On 17 January 2020 the Respondent paid the Claimant the £447.30.
17. 26 January 2020 this claim was filed. It brings claims of unfair dismissal, sex, race and pregnancy discrimination, and for notice pay.
18. The Respondents say:
- 18.1. The Claimant was not an employee so cannot claim unfair dismissal, and had she been an employee had not the required 2 years’ service.
- 18.2. The claims are out of time and it would not be just and equitable to extend time.
- 18.3. The claims were settled by a binding COT3.
19. The time limit for bringing the claims expired before the Claimant started the EC process (27 June 2019 – 26 September 2019, EC 29 September 2019).
20. The claim was filed on 26 January 2020, which is exactly 7 months after the date the Claimant was dismissed. While time stops for limitation purposes during the EC process, that was only 9 days. The claim was lodged after more than twice the maximum period for bringing such a claim. While the Claimant said at the hearing and in her documentation that the delay was due to stress caused by lockdown, that did not start until 2 months after the claim was lodged.
21. There being no good reason why the claim was not brought in time, nor even shortly after the period expired, the Claimant cannot bring herself within the just and equitable criterion for allowing a claim brought outside the time limit to proceed, and it must be struck out as out of time.
22. The Claimant entered into a binding COT3 agreement which precludes any subsequent claim. This would also be fatal to the claim, were it in time. The Claimant points out that she was in hospital awaiting the birth of her baby at the time she accepted the offer. She was in hospital 3 days and said that she left on 13 December 2019, so she may be mistaken about that, but that was not the point at which the agreement became binding. That was 19 December 2019, 6 days after the Claimant left hospital. She is not accurate to state that this was all unfair by reason of being about to give birth. The Claimant does not say that there was any misrepresentation by the Respondent. The submission that Acas were acting inappropriately was not particularised. This point too would be fatal to the claim proceeding.
23. After I gave the decision to strike out the claim the Respondent sought an order for costs, and then provided a without prejudice bundle of documents about costs. The Respondent spelled out its position on costs in a without prejudice letter to the Claimant on 26 November 2020. It accurately set out exactly why the claim would be struck out at this hearing. It suggested that she withdraw the claim, and said that if she did the Respondent would not

seek the costs of £1,800 plus vat so far incurred, but would seek costs at the hearing, which were likely to be another £2,500 (plus vat).

24. The Claimant was by now in receipt of advice from a charitable advice agency, CAMC, to whom she showed that letter. They wrote seeking adjournment of this hearing, and setting out lengthy representations about the COT3 agreement, but not about the out of time point, and with a substantial witness statement from the Claimant, which does not address the time point which was spelled out in the ET3 grounds of resistance.
25. The Respondent supplied a detailed breakdown of costs, amounting to £7,007.40, inclusive of vat.
26. The provision of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 relating to costs is paragraph 76 of Schedule 1, which states:

76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.

27. This claim had no reasonable prospect of success. It was unreasonable to have continued with the claim, especially after the clear letter of 26 November 2020. A costs order is inevitable in these circumstances. I made enquiry as to the means of the Claimant. She is a single parent of 3, aged 18, 12 and 1. She works part time and earns £15,000 a year. Her rent is met from housing benefit. She receives £256 a month in universal credit, and child benefit. The Claimant says that she has no savings.
28. I decided that an order of costs in the sum of £1,500 was appropriate and proportionate. This is less than the costs incurred since 26 November 2020. I also bear in mind that the Claimant received £447.30 in a settlement figure for a week's notice pay (although she was out of time to bring a claim and was not, as an agency worker, entitled to any notice pay from the Respondent).

Employment Judge Housego  
Dated: 11 December 2020