Time after time: *Wilson Barca LLP v Shirin* UKEAT/0276/19/BA

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(Judgment handed down on 11 June 2020)
References in brackets refer to the EAT judgment paragraph numbers

The Facts

1. The Claimant ("**C**") was employed by the First Respondent ("**R1**"), Wilson Barca LLP, as a Paralegal/Office Assistant from 2 November 2015 to her resignation on notice on 1 June 2016, her EDT being 30 June 2016. The Second Respondent ("**R2**") was a Senior Partner at Wilson Barca and the Third Respondent ("**R3**") was a secretary and employee of the firm. The Respondents are referred to collectively at times within this article as the "**Rs**".

2. C alleged she had suffered a mental breakdown due to the bullying and harassment of R2 and R3 culminating in allegations of race, age and sex discrimination. She claimed that during the seven months of her employment, she was subjected to bullying every day taking the form of verbal abuse such as "f**king stupid", "f**king stupid c**t" and "f**king stupid cow". She alleged that R3 had said that C was "too old for the job". It was alleged that R2 would shout at her frequently; R2 accepted he shouted at her when she failed to meet expected targets [13]. He denied the frequency and number alleged by C and said he shouted and swore at all staff.

The Employment Tribunal (Liability)

3. The ET upheld six allegations of harassment. In relation to age-related harassment, four were established against R1 and R3 in November 2015, one in January 2016 and one in March 2016 [17]. In relation to sex-related harassment, two allegations were established against R1 and R2 in January 2016 and April 2016 [18].

4. The ET rejected the remainder of C's claims of discriminatory harassment and concluded that, although C had effectively been constructively dismissed (but did not have the requisite service to pursue such a claim), her dismissal was not discriminatory.

5. Importantly for the purposes of this article, no party raised any issue before the ET whether before or at the Liability hearing or in response to the Liability Judgment about claims having been brought outside the statutory time limit. No issue was taken before the Remedy Hearing that the issue of time had failed to be addressed. The issue arose at the Remedy Hearing.

The Employment Tribunal (Remedy)

6. At the Liability Hearing, C sought compensation in respect of career-long loss of £850,000 (net before grossing up), injury to feelings of £40,000, aggravated damages and a claim for personal injury for £88,000. The ET concluded, having heard evidence from expert psychiatrists from both parties that the six acts of harassment established had not caused C's subsequent illness.

7. C's claims for future loss were rejected. In terms of injury to feelings, C was awarded £32,636.42 (£10,000 for the allegations of sex related harassment and £10,000 for the allegations of age-related harassment, adjusted for inflation and a further 10% in respect of the *Simmons v Castle* uplift). An additional £5,000 was awarded for aggravated damages in respect of R2.

8. The first time that issues of time limits were raised was on the first day of the Remedy Hearing [29]; it had not been raised within the ET3/Grounds of Resistance nor before the ET during the Liability Hearing.

9. Dealing with the issue of time, the ET noted that:

> *32. …The last act of age harassment was on 1 March 2016 and the last act of sex harassment was on 25 April 2016. The Claimant applied for the ACAS certificate on 12 August 2016 and was already out of time (although she would not have been aware that her dismissal claim under the Equality Act would fail.) She is between about 10 weeks (sex) and four months (age) out of time.*
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> *33. Jurisdiction is a matter for the tribunal. We are in no doubt that in these circumstances it would have been* ***wholly inequitable to deny the Claimant any remedy or judgment on the basis that because her dismissal claims failed as matters of discrimination law, she was out of time****. She had been subject to a*

continuing barrage of abuse and the extension of time to validate the harassment claims have [sic] caused (and could have caused) no prejudice of any sort to the Respondents, who have been able to defend the claims robustly and, in relation to dismissal, have succeeded. ***We have no hesitation in formally extending time, the parties having asked us to deal with this point. Our failure to do so earlier was an oversight*** [emphasis added]

The Law

10. Section 123 of the Equality Act 2010 provides:

"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 which the complaint relates, or

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

The EAT

11. R appealed on 7 separate grounds to the EAT challenging 3 distinct aspects of the ET's decision, namely (1) the extension of time (2) the award for injury to feelings (3) the award for aggravated damages.

12. Dealing with the issue of the extension of time, the EAT made the following observations at [41]:

(a) The Liability Judgment ha[d] never been the subject of any challenge by the Respondents.

(b) It was not the subject of an appeal to this Tribunal when it was promulgated.

(c) It ha[d] not been and [was] not challenged by the present Notice of Appeal.

(d) No application was made to the Employment Tribunal by the Respondents for reconsideration of the Liability Judgment under Rule 70 of the Employment Tribunal Rules of Procedure.

(e) The Liability Judgment is, and remains, a final and conclusive judgment as between all four parties to these proceedings.

(f) It establishes that the three Respondents are liable for the acts of discriminatory harassment that were found by the Employment Tribunal to have occurred.

13. The EAT's approach was that R was proceeding on an "erroneous basis" that it was for the Claimant to make an application to extend time and rather that, the R's "ought to have attempted to overturn the Liability Judgment once this issue had come to their attention" [42].

14. Furthermore, it held that "the continuing existence of the Liability Judgment results in the question of whether liability has been established, as between the four parties to this Appeal, being *res judicata*" [43].

15. The EAT went on to consider that there was no indication that the Rs had been prejudiced in their approach to either the Liability or Remedy Hearings, nor that the quality of the evidence nor the Tribunal's findings of fact had been affected by any delay.

16. Moreover, C had issued proceedings in respect of her claim for discriminatory constructive dismissal (although this had failed, C could not have been expected to foresee that it would fail) and that the ET had concluded there was a course of conduct throughout C's employment which amounted to a fundamental breach of contract entitling her to resign (again, although this was found not to be an act of discrimination).

17. The EAT considered the overwhelming prejudice to C; effectively depriving her of any compensation in respect of six founded acts of discrimination in contrast to the absence of prejudice (save for having a Judgment against them) to the Respondent.

18. In the concluding remarks, the EAT determined that: "the Respondents' position that the Employment Tribunal could legitimately have refused to extend time for the presentation of the claim in these circumstances on the basis that it was not just and equitable to do so, had the issue been properly raised, is wholly unrealistic" [48].

Comment

19. The issue of 'time', and the necessary extension of time often sought, is one which frequently arises in Tribunal litigation and this case serves as a crucial reminder to employers (and those who advise them) to be alive to issues from a very early stage.

20. Furthermore, clearly one of the largest impediments to the Rs on appeal in this case was the failure not to appeal or seek reconsideration of the Liability outcome.

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