

NeTWork

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Time Limits for bringing discrimination claims

(Munchkins Restaurant and Mr H Moss v Miss J Karmazyn and Others)

The Employment Appeals Tribunal (EAT) recently considered whether an Employment Tribunal was correct to hold that claims of sex discrimination and harassment were brought within the requisite time limit notwithstanding that the acts of discrimination and harassment took place over a five year period.

The Claimants were waitresses in a restaurant in London and were subjected to persistent, unwanted sexual harassment by the boss and owner of the restaurant for the duration of their employment at the restaurant, which varied from five years to just over one year. They resigned and claimed unfair constructive dismissal, sex discrimination and harassment.

The Tribunal found the Respondents liable for unfair constructive dismissal, sex discrimination and harassment despite the arguments that the claims were brought outside the time limit of three months from the last act of harassment or discrimination and that the waitresses had themselves initiated conversations of a sexual nature. The Tribunal concluded that this was a coping strategy for the waitresses, rather than an indication that the conduct was not unwanted.

The EAT also held that the Tribunal was allowed to decide the issue of whether the claims for harassment were out of time at the remedies hearing, rather than at the time of deciding whether the Respondents were liable for the acts complained of. This was a case management decision that the Tribunal would make.

In addition, the EAT held that where two or more Respondents have been found liable on a joint and several basis, it is not necessary for the Tribunal to set out the reasons why they had awarded joint and several liability. Any one of the Respondents was liable to the Claimants for the full amount of compensation awarded. A Respondent may have the right to seek contribution from a Co-Respondent, but this does not detract from the right of the Claimants to obtain the full award from any of the Respondents as they may choose.

Comparators in Equal Pay Claims

(City of Edinburgh Council v Ms C Wilkinson and Others)

Following the explosion of equal pay cases we have seen in recent months, the EAT in Edinburgh considered an appeal and cross-appeal on behalf of the Council and the Claimants respectively in relation to an equal pay claim brought against the Council by some 52 employees.

The women, who were employed in various Administrative, Professional, Technical and Clerical (APT&C) posts in schools, libraries and social work sought to compare themselves with a group of men who had previously carried out manual work such as refuse collectors and gardeners. The Claimants maintained that they were employed in work of equal value to their male comparators. At first instance, the Employment Tribunal held that the Claimants were in the same employment as their male comparators for the purposes of the Equal Pay Act 1970 as although they were not employed at the same establishment, they were employed on the same terms and conditions (namely those found in the Red Book, a collective agreement between the Council and the Union in 1999). The Tribunal held that the Claimants and their comparators were in the same service and/or there was a single source of pay applicable to the Claimants and the comparators.

On appeal and cross appeal by the Council and Claimants, the EAT held that the Claimants and their comparators were employed at the same establishment, notwithstanding that they were employed in different departments. The EAT held that the Council was a single undertaking, a presumption which would only be rebutted if it could clearly be shown that there were parts of its operation which ought properly be regarded as separate establishments.

The EAT also had regard to the Claimants' and their comparators' contracts of employment. The contracts all stated an initial location for work, but the mobility clauses allowed the employees to work all over the City. This was a common factor as between the Claimants and their comparators.

The EAT further considered that common terms and conditions of employment were enjoyed by the Claimants and their comparators, all being derived from the Red Book. Any terms and conditions that were derived from the previously in place Green or Blue Books were merely temporary.

When looking at whether the difference in pay between the female Claimants and the male comparators performing equal work, the European legislation governing this requires the difference to be attributable to a single source. The EAT held that as the Council alone were responsible for setting the terms on which both the Claimants and their comparators were paid, the Council were plainly a single source within the terms of the legislation.

Disability Discrimination – Was the Claimant 'disabled'?

(London Borough of Redbridge v Baynes)

The EAT has held that a Judge erred in deciding that a Claimant was disabled when she herself asserted that she was not.

The Claimant had worked for the Respondent since 1994. During this time, she lost the sight in her right eye as a result of an operation. Her manager subsequently changed her duties to accommodate this, and openly referred to her as "disabled". She resigned, claiming constructive dismissal and disability discrimination. She stated that when her manager changed her duties, he subjected her to a detriment as she had been certified by the hospital as 100% fit to carry out her duties. The Claimant had never referred to herself as "disabled".

At the pre-hearing review, the Judge concluded that the Claimant has a physical impairment which had a substantial and long term adverse effect on her ability to carry out normal day to day activities. This fulfilled the definition of a disability under the Disability Discrimination Act 1995 and so the Judge found the Claimant to be disabled, despite her own opinion that she was not.

The Respondent appealed to the EAT. The EAT held that it was "impossible" to see how the Judge could have found that the loss of one eye has a substantial and long-term adverse effect on her ability to carry out normal day to day activities in light of her assertions to the contrary and without considering medical evidence, that had not been requested by the Judge. It was the Claimant's own case that she was not disabled and that it was the perception of her disability by her line manager that was the cause of the discrimination. The EAT concluded that it was not permissible for the Tribunal to go behind the Claimant's own case.

If you would like to discuss any of these topics further please contact **Heather Cowley** (Partner & Head of Employment Law) on 01582 731161. Alternatively she can be contacted via email at heather.cowley@taylorwalton.co.uk