JB1

EMPLOYMENT TRIBUNALS

Claimants: Ms P Mashumba

Respondent: Transport for London

Heard at: London Central **On:** 21 June 2017

Before: Employment Judge Goodman

Representation

Claimant: in person
Respondent: Ms T Thomas, counsel

JUDGMENT having been sent to the parties on 21 June 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This preliminary hearing was listed to hear an application on the part of the Claimant (1) to amend the claim by adding acts of detriment to her existing claim of detriment and unfair dismissal, and (2) to consider whether an act of detriment alleged in the original claim was out of time.

2. The Claimant presented the claim to the Employment Tribunal on 8 September 2016. As has been identified in an earlier preliminary hearing, she cannot also bring a claim of ordinary unfair dismissal because she lacks the necessary 2 years qualifying service.

3. The effective date of termination of employment is given as 13 May 2016. The Claimant went to ACAS to commence the early conciliation procedure on 2 June. Reckoning by that date, the clock stopped then for the presentation of a claim which occurred on or after 3 March. Any event which occurred before 3 March 2016 is on the face of it out of time.

4. The claim having been presented, and a response filed disputing the claim, there was a case management hearing before Employment Judge Baty in February. Questioning the Claimant, he identified the detriments alleged, and those which were not in the claim form. Referring to his order, he identified as detriment 8.6.1, that in October 2015 the Claimant was taken off her project and moved to the learning and development department. This is not an amendment, as it is in the original claim, but it is necessary to consider whether it is brought out of time.

5. Judge Baty also clarified with the Claimant that there were three other matters of which she complained, which have been listed as detriment: 8.6.2, that colleagues told her they had been told not to communicate with her effectively ostracism, and, while it is not stated in the case management order, the Claimant says she learned this around about December 2015; 8.6.3, which is that she was disinvited from the Christmas party on 15 December, and 8.6.4, that she was unfairly marked down in an appraisal in October 2015, though a new boss later said it was unfair and changed the mark back to 3, a good mark. These are the subject of the amendment application.

6. The claimant had moved to a new department in October 2015. In March 2016 the Respondent commenced a redundancy procedure, which led to the Claimant being dismissed by reason of redundancy. She appealed on the basis that she was in fact being selected for redundancy because of whistleblowing.

7. The alleged public interest disclosure is in an email of 26 September 2015, in which, among other things, she complained of the procurement process in the awarding of contracts to outside providers. That led to a fraud investigation. In the meantime, at the beginning of October 2015 the

Claimant was moved to the new role in another department doing administrative data input, but with the promise of a more substantial role to come, but that new challenge did not materialise. That, she says, is how she came to be made redundant.

Application to amend to add detriments

8. I refer to the three detriments, described above, as the ostracism (8.6.2), the Christmas party (8.6.3) and the unfair appraisal (8.6.4).

9. The relevant principles when well known case of ***Selkent Bus Co Ltd v Moore.*** The Tribunal must consider relevant factors: whether the proposed amendments are substantial, whether by allowing them the Respondent would be deprived of a time defence if they would otherwise be out of time, and thirdly whether they are simple relabelling of matters which were already before the Tribunal, or whether they are new claims altogether. The Tribunal must look at each of those factors and assess where the balance of hardship lies in deciding whether to allow the amendment or not.

10. The Respondent says that introducing these matters to extra witnesses required to give evidence about them. They also say that this is new material, not even hinted at in the existing claim form, and that they are at a disadvantage in investigating, because by the time of the hearing in the latter half of 2017, they will be around 2 years old.

11. The Claimant says that they were not included in the claim form because when drafting her claim form, as a litigant in person, she did not know the level of detail that would be required. They were elicited by direct questioning by Employment Judge Baty at the case management hearing to identify the issues. She says she took up these matters with her line manager at the time and expected solutions without having to take it to a Tribunal. On the ostracism, she says that she refers in her claim form to ostracism in the email of September 2015, but of course the ostracism now alleged post dates that. I take into account that the Claimant is intelligent and articulate, but not learned in the law.

12. I turn now to examine the various factors to assess the balance of hardship. The time factor is significant because these events occurred in either October or December 2015; the time limit of 3 months from these acts means the claims ought to have been presented in or around January to March 2016. Nor do they seem to have been raised as grievances internally, with the practical result that the Respondent was not able to investigate the detail at the time. If they were allowed now, out of time, the Claimant would gain an advantage, to be contrasted with 8.6.1, which was pleaded at the time, where time issue is to be decided today. As for labelling, this is not relabelling because they are not mentioned at all in the grounds of the claim. As for the substance, the Claimant was invited to say what the effect of these detriments was. The ostracism I assume was as upsetting as it would always be, though I note that the Claimant only knew about it because her colleagues disobeyed the instruction not to communicate with her, so it was the intention rather than the effect that was hurtful. Being excluded from the party will not have been pleasant either (and from the picture in the bundle it was evidently a good do). These were unpleasant things to happen, to be reflected in a lower band injury to feelings award if proved.

13. The appraisal is potentially the most damaging, because of its effect on pay, but as the Claimant agrees, when she complained about it, it was put right by her line manager and she suffered no lasting disadvantage, so the award for detriment proved is limited to injury to feelings in being treated unfairly, which is always painful.

14. The ostracism, exclusion from the party and the unfair appraisal, on the face of it seem unlikely to have been part of any chain of causation contributing the dismissal, the matter for the Tribunal to decide at the hearing which is in time. The significance of these matters may not be so much the detriment they caused at the time, as the fact that they are evidence of malice towards her, evidence the Tribunal must assess when deciding what part the whistleblowing played in the eventual decision to make her redundant in the new department.

15. Weighing these factors, it seems to me that the balance of the prejudice is with the Respondent who suffers greater hardship by the addition of detriment claims which they have to defend at a late stage and with late evidence, and by being deprived of the time limit defence they could otherwise have raised, compared with the harm done to the Claimant by each individual act of detriment which even if not allowed as amendments can still feature as evidence supporting her dismissal claim. Accordingly the application to amend by adding 8.6.2, 8.6.3 & 8.6.4 is refused.

Jurisdiction to consider 8.6.1

16. I turn now to whether 8.6.1 , the decision as of the start of October 2015 to take the Claimant off the future project and move her to learning and development, is out of time. The significance of this being pleaded as detriment, as against dismissal, is that if this matter were only part of a chain of causation leading from the whistleblowing to the dismissal, it may matter if it is out of time as it still has value as evidence, but the Claimant may not be able to show that the redundancy selection itself was influenced or was caused by the whistleblowing, and the whistleblowing was the reason for it; she may be looking at a "but for" test of causation, saying had she not been moved in October for whistleblowing she would not have been made redundant for business reasons in March. The Claimant says that many of the projects on which she was working before October 2015 were still going on, so had she not been moved she would still have a job.

17. The test for a time limit for bringing a claim of detriment under the Employment Rights Act is set out in section 48 (3): an Employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of 3 months, beginning with the date of the act or failure to act, to which the complaint relates, or where that act or failure is part of a series of similar acts or failures is the last of them, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was *not reasonably practicable* for the complaint to be presented before the end of that period of 3 months.

18. The act complained of, at the beginning of October, is clearly a single act, rather than a series of similar acts or failures; although the Claimant will argue that its consequences eventually were her dismissal, it is a single event, from which that consequence flowed. It is out of time, and it falls to consider whether it was not reasonably practicable for the complaint to be presented before the end of the period of 3 months.

19. The case law on this is mostly about unfair dismissal, which has the same test, indicates that "practicability" is about whether there was a practicable possibility of bringing the claim in time. It is not the wider, and probably more generous, test of what is just and equitable as in the Equality Act. Practicality can mean physical factors which might prevent the Claimant from bringing a claim, but it can also mean the mental factors such as the Claimant's state of mind. Important cases on this are *Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119* and *Marks & Spencer v Williams Ryan [2005] IRLR 562,* both decisions of the Court of Appeal.

20. Analysing the facts as to what was preventing the Claimant from bringing a claim in time, the Claimant says that she was aware of the existence of Employment Tribunals, if not of the time limit for detriment claims. In any event, she hoped that the move from one section to another was a temporary problem of limited effect: she was told by her new manager that they were looking for a more demanding and challenging role appropriate to her talents, though that did not materialise. She also hoped that it would be dealt with as the appraisal was, by being reversed when she complained, and told that it had been unfair. She had reason to think that this was only a temporary problem, of limited harm. She adds that the stress and expense of bringing a claim before the Employment Tribunal is significant, something she had to weigh in the balance when looking at her work situation, and that the move to the new section did not seem as significant at the time when she hoped to be granted a more challenging role, though it became significant in retrospect when she lost her job.

21. Having regard to the factors known to the Claimant at the time, it seems to me right to say that it was not reasonably practicable to present it within a

three month time limit. Not until she knew that she was dismissed (and that her appeal against dismissal had been rejected) did she understand she should make a claim in a tribunal for the decision to move her from one team to another, because, she says, of whistleblowing. It was of course *practicable*, as there was nothing to prevent her from accessing an ET1 Form and completing it, but it was not in my finding *reasonably practicable*. A reasonable person at the time would not think it right to bring an Employment Tribunal claim for something that seemed like a temporary upset and whose significance only became apparent much later.

22. There is the subsidiary question of whether it was presented within a reasonable time thereafter. The Respondent has rightly pointed out that the Claimant did not present a claim until September 2016, which is right at the outside limit of the time limit when calculated by reference to the dismissal date and the early conciliation period.

23. There is no doubt that the Claimant could have presented her claim much sooner, and seems to have timed her presentation of claim with regard to the unfair dismissal date. However, again, because it was possible to present it sooner does not render it unreasonable not to do so. Presenting it by reference to the unfair dismissal date is not unreasonable when she saw the move of department in October 2015 as the start of the chain of events leading to dismissal.

24. I am influenced in the exercise of jurisdiction on both points by the public interest in protecting whistleblowers at work, and that they should not lose protection because they did not foresee the consequences of apparently harmless changes at the time. If the decision to move her did have to do with whistleblowing that should be tested on the evidence.

25. In my finding the complaint of detriment identified as April at 6.1 in the case management order is one which the Tribunal has jurisdiction to consider.

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Employment Judge Goodman