



EMPLOYMENT TRIBUNALS

Claimant

Ms A Ayers

v

Respondent

John Lewis Partnership plc

PRELIMINARY HEARING

Heard at: London Central

On: 23 August 2017

Before: Employment Judge Smail

Appearances:

For the Claimant: In person
For the Respondents: Mr B Williams, Counsel

JUDGMENT

1. The claimant withdraws her claims of breach of contract for failure to pay notice and a bonus so that these can be pursued in existing proceedings in the County Court.
2. The claimant's claims under the Equality Act 2010 and for breach of contract in respect of contractual holiday pay are dismissed as having been brought out of time.

REASONS

1. By a claim form presented on 17 March 2017 the claimant claimed unfair dismissal, race and sex discrimination including victimisation and breach of contract. At a preliminary hearing on 4 July 2017 the claimant withdrew her unfair dismissal claim, accepting she did not have the requisite two years' service. Today she has withdrawn breach of contract claims relating to failure to pay notice and failure to pay a bonus preferring to pursue those in a claim already commenced in the County Court. This was to do with the more

favourable time limits position that applies in the County Court for a breach of contract claim. She does pursue before this tribunal a breach of contract claim in respect of contractual holiday pay. It seems that this contractual holiday pay is co-extensive with any holiday pay claim under the Working Time Directive which would exclusively be a claim before the employment tribunals.

2. At that preliminary hearing on 4 July 2017 a further preliminary hearing, today's hearing, was ordered to look at four matters. First, whether all or any of the claims are out of time and whether the tribunal has jurisdiction to consider them. Secondly, whether all or any of the claims should be struck out as claims that have no reasonable prospects of success. Thirdly, whether all or any of the claims should be the subject of a deposit on the grounds that they have little reasonable prospects of success and lastly whether any of the claims are *res judicata* because of other claims brought by the claimant in the County Court. It has been agreed to determine the matters of time limits first.
3. The claimant has told me that she has understood that the time limits issue relates also to time limits issues recorded under s.2 of the case management order to deal with the questions why in relation to the Equality Act claims it is said that it is just and equitable for time to be extended in order for the tribunal to have jurisdiction; and why in respect of any claim brought under the Employment Rights Act 1996 or under the Extension of Jurisdiction rules in respect of breach of contract, it is said that it was not reasonably practicable for the claims to have been presented earlier. In accordance with directions made by Employment Judge Lewsey at that preliminary hearing the claimant has provided both a witness statement and further and better particulars and I am satisfied that I understand the claimant's case in respect of time limit matters such that the claimant is not in any sense prejudiced today.

The law

4. Time limits for a breach of contract claim under the Extension of Jurisdiction England and Wales Order 1994 are set out at Article 7 where it is provided that an employment tribunal shall not entertain any complaint in respect of an employee's contract claim unless it is presented (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim; or (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the 3 months, within such further period as the tribunal considers reasonable.
5. The time limit under the Equality Act 2010 claims is provided for by s.123(1) Proceedings: on a complaint may not be brought after 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. By sub-section (3) for the purposes of this section (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it.

The facts relating to the preliminary issue

6. The claimant was employed by the respondent as a data business analyst between 8 June 2015 and 25 January 2016 when she resigned without notice, claiming a constructive dismissal. The three months' time limit for presenting a claim in respect then of the end of employment expired on 24 April 2016. This claim was not issued until 17 March 2017, some one year and almost two months after the resignation. The matters complained of in the claim form were put generally. Subsequently the further and better particulars have attempted to put more meat on the bones, as it were, but the general headings will do for the time being. The claimant alleged: first a failure by the respondent to follow its grievance procedure; secondly humiliating, undermining and bullying her; for example by giving her menial tasks such that she was entitled to resign claiming constructive dismissal; thirdly, segregation and assigning mundane tasks amounting to discrimination when compared with a white colleague; fourthly, refusing reasonable time changes in the context of a flexible working application, the claimant having a young son; fifthly, victimisation in the form of bringing a claim against the claimant for alleged over-payments during the course of her employment; and lastly, a set of further detriments said to amount to race discrimination.
7. The bringing of the claim for over-payments refers to proceedings issued in the County Court by the respondent dated 12 December 2016. In other words an act of post-termination discrimination which post-dates the resignation by nearly 11 months. The claimant submits that it is this act of discrimination which brings the matter in time. The ACAS process took between 29 January 2017 and 24 February 2017. The primary limitation period in respect of the decision to issue proceedings would be three months from 12 December 2016 extending to 11 March 2017 adding the 26 days or so for the ACAS process that would allow presentation of the ET1 on 17 March 2017. In effect the claimant is saying that the respondent's bringing of the claims in the County Court represents the last step in conduct extending over a period and so the entire claim is in time.
8. The claimant accepts that before she resigned from the respondent she had been told by Unite, the union, that she could bring a claim to the employment tribunal if she was 'forced out of employment', as she puts it, and the time limit would be three months from the time forced out. She says she did not put in a claim, although she had been told of her rights by the union, within that three month period because first she was unwell through stress, and secondly she was awaiting the outcome of an internal grievance. The stress point does not in my judgment get the claimant very far. More or less immediately after resigning she started a new job as a data administrator. Admittedly it was a short-term contract; admittedly the duties may have been less demanding and the job, I accept from her, was on less pay, but the fact that she could work suggests she could have put in a claim.
9. There has been no medical evidence produced to show that she was not able to put in a claim. Once this was pointed out in argument today, the claimant made an application for a postponement allowing her to seek evidence from her GP. I refused that application for two reasons. First, there had been every opportunity

for the claimant to seek such evidence and to adduce it in evidence today since the July preliminary hearing before Employment Judge Lewsey; secondly, and perhaps more importantly, given that she accepts that she could work it is difficult to imagine that any medical evidence could advance matters much in her favour in that respect.

10. The second explanation she gives is that she was awaiting a grievance outcome. There is some force in this point. The claimant's grievance was dated 24 November 2015. There was a grievance hearing, I understand, held in December 2015. No outcome was ever provided to her following her resignation. She was not told either that she would not get an outcome. It was her evidence, however, that she knew she was not getting a grievance outcome some four or five months after she had resigned so taking the matter to May or June 2016 - but she still did not put in a claim then. So whilst the grievance point is an important one, it does not explain the full one year and two months.
11. The claimant is quite clear with me that it was really being sued for the over-payment which prompted her finally to put in a claim. There was a documentary lead-up to the respondent's claim in the County Court. On 4 March 2016 the claimant was written to by the over-payments team stating that she had left the partnership on 25 January 2016 and was paid until 31 January 2016, so accordingly there had been a week's over-payment. Secondly, she had benefitted from a season ticket loan and that matter also needed to be recovered. The claimant replied to this letter in the following way. She stated that she had left in circumstances of an effective constructive dismissal. That matter had been raised through the internal grievance process and had not been resolved prior to her leaving, giving her no option other than to leave. She stated that as she was forced out of the partnership through a series of victimisation, harassment and discrimination, all of which culminated in the constructive dismissal leading to her departure, she was not in any position to pay the said amount. Had she not been subjected to the treatments that led to her departure, she would have been able to honour the payment as agreed. However, owing to the circumstances she was in a difficult situation and had been unable to repay the amount.
12. She went on that should, however, the respondent wish to pursue the over-payment she would consider that as a further act of harassment and victimisation and was reserving the right to bring a claim to the employment tribunal to seek damages for the treatment she had received during her time at John Lewis. So she wrote this on 13 March 2016, a year before she ultimately did bring a claim and her position seems to have been "if you sue me for the over-payment I will then bring a claim in the employment tribunal". This position did not prompt her to issue at that stage a claim in the employment tribunal for all that had happened to her as she alleges leading up to her resignation. Then a series of correspondence follows dated 17 March 2016, 30 March 2016 and 18 April 2016 when there is a solicitor's letter intimating a claim for £1,789.94. It seems that there is an eight month or so delay before proceedings are ultimately issued by the respondent on 12 December 2016 when they do issue the claim. The claimant sought to put in a County Court defence and counter-claim alleging discrimination at work. That counter-claim was struck out by District Judge Chesterfield on 24 May 2017 as being misconceived because it is the employment tribunal which has exclusive jurisdiction on matters of discrimination

at work. The claimant has in fact issued a fresh breach of contract claim in the County Court on 23 June 2017 and she had issued the present claim in the employment tribunal on 17 March 2017 as we know.

Conclusions

13. In my judgment there is no prima facie case, or any case - and there are no reasonable prospects that a Tribunal would conclude - that the respondent's decision to recover the £1,789 over-payment is discriminatory. She acknowledges herself that the sum was due but says she was not in position to pay it because of the financial consequences of the alleged earlier discrimination. She does not in my judgment establish that the decision to issue new proceedings for the over-payment is prima facie or indeed actual victimisation for her having intimated discrimination claim whether in her grievance or in response to the letters before action. There are no reasonable prospects that a tribunal would conclude this. The reason for this is that there is plainly an independent non-discriminatory reason for issuing the claim, namely that the money was owed.
14. She has asserted but is not able to show on the disclosure that has been forthcoming from the respondent, that someone in similar circumstances in terms of indebtedness would not have been sued for recovery of that amount so as to generate an inference that these proceedings were an act of discrimination or victimisation. There are plenty of examples of the respondent having pursued recovery of amounts. There are some examples also it is true where amounts have been waived but there is no material in the disclosure before me to generate an arguable case that the decision to recover the amount of £1,789 in this case is an act of discrimination. That means in my judgment that the decision to issue proceedings does not help the claimant with her time limits problem. She does not explain not suing for the matters leading to her resignation in time by reason of the respondent's decision to issue proceedings. That decision was not the end step in a continuing period of discrimination. It was not the end example of discrimination amounting to the end of discriminatory actions or decisions extending over a period.
15. That means, then, the claimant has to show a good reason or it has to be just and equitable for her not having brought a claim in respect of the matters leading up to her resignation until one year and two months after the resignation. In my judgment, the claimant has failed to establish it is just and equitable, and standing back from the matter I do not see how it is that I could find it would be just and equitable to allow the claim to proceed one year and two months after the resignation. The two primary reasons put forward do not help the claimant, the first being stress. As we know she immediately found a new job. That seems to me to be the answer to the stress position. If she was in position to find a new job, she was in position to fill in a claim online, all the more so because she had been told she had got three months by her union. The grievance point is a stronger argument for the claimant but it does not cover the whole one year two months. It perhaps explains the period until she formed the view that she was not going to get a grievance outcome and that, as I have already found based on what she told me, was May or June 2016.

16. We do have time limits in the employment tribunal. It does have to be just and equitable to extend time. I can find no basis for finding it will be just and equitable to do so because the claimant knew of the time limits position and in effect chose not to bring a claim. I find this notwithstanding that the respondent is not saying it would be unable fairly to defend these claims or that the evidence would be less cogent. Those points the respondent does not have in its favour. I decide the matter on the basis that in the circumstances of the claimant knowing of the time limits and in effect choosing not to bring a claim in time and really using the threat of proceedings only has a means of seeking to stave off being sued for over-payments, I do not see how I could find that it would be just and equitable to extend time. In all those circumstances, it is not just and equitable to extend time.
17. As to the contractual holiday pay claim: it plainly was reasonably practicable to put in a claim within 3 months, She knew of the time limits from the union. She was well enough to find a new job promptly.
18. That means that proceedings in the employment tribunal have come to an end. There is an ongoing breach of contract claim in the County Court. The claimant would be well advised to seek legal advice as to whether it is appropriate to maintain such a claim in the County Court and, if so, to have it phrased properly and perhaps to see if it can be litigated sensibly as a small claim rather than the significant sum she has sued for, being £25,000 when it is not immediately obvious as to how that amount is reached. All of that is a matter for her. As I say the judgment of this tribunal is therefore as follows:
 - 18.1 The claimant withdraws her claims of breach of contract for failure to pay notice and a bonus so that those can be pursued in existing proceedings in the County Court.
 - 18.2 The claimant's claims under the Equality Act 2010 and for breach of contract in respect of holiday pay are dismissed for being out of time.

Employment Judge Smail
26 September 2017