



## EMPLOYMENT TRIBUNALS

**Claimant**

**Ms N Williams (formerly Whyte)**

v

**Respondent**

**Ministry of Defence**

## PRELIMINARY HEARING

**Heard at: Bury St Edmunds**

**On: 17 October 2017**

**Before: Employment Judge Postle**

**Appearances:**

**For the Claimant: In person.**

**For the Respondent: Miss C Palmer, Counsel.**

## JUDGMENT

1. The tribunal has no jurisdiction to hear the claimant's complaints of the following:-
  - 1.1 Between the periods October 2013 and June 2014 the respondent's failed to consult regarding redundancy process or inform the claimant of voluntary redundancy brought under s.18 of the Equality Act 2010.
  - 1.2 For the period October 2013 to June 2014 the complaints failure to consult re transfer from Buller Barracks to St Omers Barracks under s.18 of the Equality Act 2010.
  - 1.3 31 January 2014 the failure to arrange completion of SJAR prior to the 31 January 2013 under s.18 of the Equality Act 2010.

The tribunal has no jurisdiction to hear any of the above complaints as a service complaint not lodged pursuant to s.121 of the Equality Act 2010.

2. In relation to the claimant's complaints against Major Ballard in September 2014, November 2014 and December 2014 involving direct discrimination, harassment and pregnancy and maternity discrimination all of those claims are out of time and the tribunal determined it was not just and equitable to extend time.

3. The complaints against Warrant Officer Kelly on 24 August 2015 involving complaints of direct discrimination, harassment and pregnancy and maternity discrimination are all the subject of a deposit order.
4. The claimant's claims under s.19 of the Equality Act 2010 (direct discrimination) have no reasonable prospect of success and are dismissed.

## **REASONS**

1. This is a preliminary hearing which was listed to consider the respondent's application for a strike out and/or a deposit order in respect of the claimant's claims.
2. The claimant has brought claims of direct sex discrimination, pregnancy discrimination, harassment and indirect discrimination. The respondent contends there is no valid service complaint in respect of some of the claimant's allegations and that some are out of time, such as the tribunal has no jurisdiction to hear the claims and that otherwise the claims have either no prospect of success or little reasonable prospects of success.
3. In this tribunal there is a bundle of documents consisting of 541 pages, and there are two witness statements, one from the claimant who gave evidence on the issue of the timing of her claims to the employment tribunal and one from Warrant Officer Kelly who did not give live evidence.
4. There are key document in this case to have regard to and they are the claim form (page 2), further and better particulars of the claim dated 31 March 2017 (page 39), the amended response (page 51) and previous case management orders (pages 35 and 66).
5. The tribunal also has the benefit of a skeleton argument from the respondent who amplified the same before the tribunal. The claimant though in person today was previously represented and does have a skeleton argument from her previous advisors, I think that was prepared by her previous Counsel which the claimant was also able to amplify before the tribunal.

### **Background**

6. The claimant was serving in the British army with the Royal Signals until 27 August 2016. She took a period of maternity leave from 1 October 2013 to around about July 2014. She had raised an informal complaint, a service complaint in May 2014 which was referred to the respondent. This related to allegations during her maternity leave. The respondent offered to resolve the complaints informally and ultimately she withdrew her informal service complaint in June 2014 (page 72). The claimant then submitted a further service complaint on 20 October 2015 which was determined on 23 September 2016, and the appeal body determination on 22 August 2017.

7. The claimant approached ACAS on 6 February 2016 and an early conciliation certificate was submitted on 25 February 2016. The claimant issued her claim to the tribunal on 24 March 2016 and the ET3 response was submitted by the respondent on 25 April 2016. The claim was stayed pending a consideration of the claimant's service complaint.
8. Pursuant to s.121 of the Equality Act 2010 members of the armed forces can only bring a discrimination claim before a tribunal if they have brought a service complaint and that complaint has not been withdrawn. The time limit for bringing such a claim is six months from the act complained of, or such other period as the tribunal considers just and equitable pursuant to s.123 of the Equality Act 2010. This is also subject to the extension pursuant to the ACAS conciliation process set out at s.140B.
9. The claimant's claims save for the indirect discrimination which I will deal with subsequently, the claimant originally relied upon 8 separate acts of discrimination which are summarised in the respondent's skeleton argument at page 3. The nature of each claim is set out after as either; direct discrimination (D), harassment (H), pregnancy discrimination (P) and whether there is a valid service complaint without which the claimant's claims cannot proceed through to an employment tribunal.
10. The claimant during the course of today's hearing has helpfully conceded that the first three allegations which we see at page 3 of the respondent's skeleton argument the tribunal has no jurisdiction to hear as there was no valid service complaint ever issued by the claimant.
11. Miss Palmer for the respondent has also helpfully conceded that although there is no mention of allegation 4 (the Lucozade comment) referred to in the actual service complaint it was nevertheless raised by the claimant when interviewed for these service complaints and was dealt with by the appeal body dealing with the service complaints. Therefore the respondent accepts that the fourth allegation is covered in the first instance as were the remaining four allegations that we see again at page 3. These complaints are three against Major Ballard who is a female officer, and two complaints against Warrant Officer Kelly. They are particularly, an allegation said to have been made by Major Ballard about the claimant drinking Lucozade in September 2014, a further comment said to be made by Major Ballard on November 2014, "I don't nip home when my dog is sick" – that is D, H and P. The further one said to be made by Major Ballard in December 2014 requiring the claimant to attend a meeting when her son was ill – that is an H.
12. The complaints against Warrant Officer Kelly are 24 August 2015 the claimant could not answer question because had taken the senior command leadership management course. The further comments said to have been made by Warrant Officer Kelly also on 23 August 2015 that he knew of women who had passed their AFT within three weeks of return from maternity leave – reference to a fitness course.

13. Then we have the indirect discrimination claim which relies upon two PCPs and they are; 1) that Corporal/Acting Sergeant must complete the SCLM course within 12 months of notification of promotion, a key part of which is the annual fitness test and 2) that once the date was set for completion of the SCLM this could not be postponed.
14. Just dealing with the law on strike out and deposits, rule 37 of the Employment Tribunal Rules of Procedure 2013 states that a tribunal does have power to strike out all or any part of a claim if:-
  - a) It has no reasonable prospect of success.
  - b) That the manner in which the proceedings have been conducted has been unreasonable.
  - c) For non compliance with an order of tribunal.
15. Rule 39 provides that a tribunal may order a party to pay a deposit not exceeding one thousand pounds if the tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success, or 39(2) outlines that the tribunal shall make reasonable enquiries into a paying parties ability to pay the deposit and have regard to any such information when deciding the amount of any such deposit. It is also the case that the importance of not striking out discrimination cases in particular other than in the clearest cases has been cited in a number of cases including the House of Lords case Anyanwu v South Bank Students' Union [2001] UKHL 14. However it is also perfectly proper to strike out a claim where the way it is pleaded is legally misconceived.
16. Now if I can deal with time limits first, I accept that a tribunal should not generally determine whether there is an act extending over a period of time on the basis of legal argument alone without hearing evidence and making findings of fact. However, I also agree with the respondent's Counsel it is not enough for a claimant simply to assert that there is a continuing act or that there is an ongoing state of affairs, rather the claimant must have an arguable basis for that contention that the complaints are in some way intrinsically linked as to be a continuing act or ongoing state of affairs. A continuing state of affairs is distinct from "a succession of unconnected or isolated specific acts". The Court of Appeal in Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96 said that:-

"The burden is [on the claimant] to prove either by direct evidence or by inference from primary facts that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a discriminatory state of affairs."

It will be relevant but not conclusive whether the same or different individuals are involved in the alleged incidents of discrimination over the period and where there is a break in the period of several months a tribunal may be entitled to conclude that continuity is not preserved.

17. On the face of it clearly the tribunal does not have jurisdiction to consider the allegations 4, 5 and 6 as set out in the respondent's skeleton argument at page 3 on the grounds they are clearly out of time. They are September 2014, November 2014 and December 2014. It is clear that the claimant did not approach ACAS until February 2016 some 15 months outside the prescribed time limits. She then submitted her claim on 24 March 2016, some 16 months later or thereabouts. It is true the claimant was plainly aware of time limits as she referred to the time limits in her service complaint in October 2015 and it should be noted that Major Ballard left in June 2015.
18. The later allegations against WO Kelly are clearly in time, but are in respect of entirely different and unconnected matters, ie the senior command leadership management course and those of matters complained of against Major Ballard. They are clearly separated in time by a period of over 6 months and relate to a different period, they are separate phases clearly defined periods. It is not sufficient simply to advance the argument that they are acts extending over a period of time without explaining why. The claimant's witness statement it is true adds nothing in this respect. Again the claimant's claims it would be just and equitable to extend time sets out little or no basis in her ET1 as to why the tribunal should exercise that discretion. Further in her witness statement she relies upon an illness in May 2015 and increased workload in July to December 2015 and that she was fearful of Major Ballard's response.
19. The tribunal must consider the whole of the period in deciding whether or not to exercise it's discretion to extend time on the just and equitable principle. There is a period in excess of 12 months. There are clearly periods when the claim could have been issued particularly December 2014 to May 2015. Furthermore Major Ballard had left in June 2015 so that argument is not available. Taking all these factors into account the tribunal is not prepared to exercise it's discretion to extend time on the just and equitable principle. Therefore, the tribunal has no jurisdiction to hear those claims.
20. Dealing with the claims against WO Kelly, allegations 7 and 8 as set out in the respondent's skeleton argument at page 3. They are clearly in time, and they are clearly covered by a service complaint. Taken at their highest which I must do, I cannot say that they have no real prospect of success. The claimant suggests that WO Kelly was aware the claimant had been on maternity leave, there appears to be a factual dispute, having said that the tribunal has concerns, but is prepared to say that they have little reasonable prospect of success and will order a deposit order for each of those allegations.
21. Finally, dealing with indirect discrimination claim these are part of the fitness test for the SCLM, in my view they are legally misconceived as the way they are advanced. As PCPs they simply do not make sense. The claimant was permitted a 12 month period to pass the SCLM and on being passed as physically fit for duty on 1 August 2014. The claimant was in fact arguably treated more favourably as the respondent's policy normally only allows one attempt at the course save in exceptional circumstances. The claimant was given a second opportunity, that opportunity appears to have been requested by Major Ballard (pages 76 and 77), and in any event the claimant would not have been prevented from promotion entirely as at 26 October 2015 the

claimant was taken off promotion for that year and put back for 1 November and the 12 months started again. There is also an ability to postpone the course, the respondent's policy confirms that if necessary that can be done through the chain of command. Furthermore, comparison is not between women who have just given birth and others but relates to a time period once an individual is returned to work some considerable time after the birth once they undertake their duties. The claimant had already passed her annual fitness test which involves the same exercise required on the SCLM. Those claims clearly have no reasonable prospect of success and are struck out.

22. At the conclusion of the proceedings I ascertained from the claimant that she is now in full time work, in IT with an annual income of £44,000 per year. The claimant confirmed that if I made a deposit of £300 for each of the two claims against WO Kelly (total of £600), such a sum could be discharged within 21 days.
23. Furthermore at the conclusion of the hearing a discussion ensued as to how long the case needed to be listed. At present it had been previously listed for 5 days at Reading Employment Tribunal commencing on Monday 8 January through to Friday 12 January 2018. Given the issues have now been narrowed subject to the claimant paying the deposit a realistic time estimate is now 2 days and therefore with the agreement of parties the case is listed only for Monday 8 and Tuesday 9 January 2018.

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**Employment Judge Postle**

Date: 6 November 2017

Sent to the parties on:

.....6 November 2017 ....

For the Tribunal:

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