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EMPLOYMENT TRIBUNALS

Claimants: Mr S Omah
Mr F Samuel

Respondents: (1) London Borough of Newham
(2) Paul Higgs

Heard at: East London Hearing Centre

On: 5 March 2018

Before: Employment Judge Foxwell

Representation

Claimant: Mr J Nkafu (Counsel)
First Respondent: Ms S Clare (Solicitor)
Second Respondent: Mr D Vardon (Colleague)

JUDGMENT

The judgment of the Tribunal is that:-

1. The claims against the Second Respondent, Paul Higgs, in claim numbers 3201728/2017 and 3201730/ 2017 (“the new claims”) have been presented outside the time limit in section 123 of the Equality Act 2010.
2. It is not just and equitable to extend time for bringing the new claims.
3. Accordingly, the Tribunal does not have jurisdiction to hear the new claims and they are dismissed.

REASONS

1 The Claimants, Mr Saleh Omah and Mr Fazi Samuel, are employed by the London Borough of Newham (“the Council”). They work as refuse loaders. They are both Muslim and black.

2 On 13 September 2017 each presented a claim to the Tribunal against the Council arising from an alleged incident on 5 June 2017 said to involve their colleague, Mr Paul Higgs (case numbers 3201148/2017 and 3201149/2017). The background to the claim are the tragic events in London when a terror attack took place on London Bridge. The Claimants alleged that Mr Higgs harassed them racially and on religious grounds by

accusing them of being terrorists in front of colleagues. The claims brought against the Council arise, firstly, from its potential vicarious liability for this alleged comment and, secondly, from the Council's own alleged failure to deal with the Claimants' complaints arising from it.

3 The Respondent filed a Response disputing the claims on their merits in October 2017. The Response was sent to the Claimants' solicitors by the Tribunal by letter dated 19 October 2017. One of the points taken at paragraph 10 of the Response is what is known as "the statutory defence", which is contained in Section 109 of the Equality Act 2010. The statutory defence enables an employer to escape liability for an act of unlawful harassment or discrimination done by one of its employees if it can show that it took reasonable steps to prevent conduct of that type. In this case therefore, even if the underlying allegation against Mr Higgs is established on the evidence, the Council may nevertheless escape liability for this if it establishes this defence.

4 In accordance with its usual practice the Tribunal listed a Preliminary Hearing at an early stage of the proceedings to consider the issues in the claim and to discuss case management. The parties were given notice of this hearing at the time the claim was accepted by the Tribunal.

5 Shortly before midnight on 30 November 2017, that is the Thursday before the Monday on which the preliminary hearing was listed, the Claimant's solicitor emailed the Tribunal applying to amend the claims to join Mr Higgs as a party. The application was in broad terms and did not contain the text of any proposed amendment. The Council had one business day's notice of this application and I suspect that Mr Higgs was wholly unaware of it at the time.

6 The Case Management Preliminary Hearing on 4 December 2017 was before Employment Judge Russell. Unsurprisingly, Judge Russell felt unable to deal with an application to amend presented on this basis without a detailed draft pleading. I am told by Mr Nkafu and Ms Clare, who both appeared on the last occasion, that the Judge nevertheless discussed the application with the parties in some detail. She directed that the Claimants set out in writing the grounds of their application to amend on or before 8 January 2018, dealing in particular with an issue which was identified regarding early conciliation. What was anticipated, therefore, was a more detailed application to amend than the one filed on 30 November.

7 I have been told that Judge Russell gave an indication that an application to amend to include Mr Higgs was likely to succeed. I have set this to one side for two reasons: firstly, Mr Higgs was not present and was unable to make any representations at the last hearing and, secondly, Judge Russell specifically chose not to make a decision on the application; it remains undecided and, therefore, the decision whether to allow either an amendment or, as in this case, to extend time for new claims on just and equitable grounds lies with me.

8 I turn to what then happened. The Claimants' solicitors did not apply to amend the current claims but chose instead to issue fresh proceedings naming Mr Higgs as Respondent, no doubt anticipating that, should those claims be permitted to proceed, they would be consolidated with the claim against the Council. The new claims (case numbers

3201728/2017 and 3201730/2017) were presented on 14 December 2017, the Claimants having gone through early conciliation with Mr Higgs between 6 and 8 December 2017. The new claims were framed as ones of religious discrimination and not race discrimination.

9 On 24 January 2018 Employment Judge Russell dismissed the race discrimination claims against the Council on their withdrawal by the Claimants. What remains, therefore, are claims of discrimination because of religion or belief.

10 It is common ground that the second set of proceedings have been presented outside the time limit contained in Section 123 of the Equality Act 2010. The allegation against Mr Higgs arises from an alleged incident on 5 June 2017. The time limit is three months from the act complained of and this would have expired on 4 September 2017. The early conciliation provisions allow time spent in conciliation to be added to that period; by my calculation 31 days were spent in early conciliation. Conciliation concluded before the end of the ordinary limitation period. In those circumstances I can add 31 days to the limitation period, which takes us to the 4 October 2017. That is the latest date by which an in-time claim could have been presented against Mr Higgs (I could be out by a day or a two one way or the other but that distinction does not really matter in this case in my judgment).

11 The question for me is whether it is just and equitable to allow this claim to proceed against Mr Higgs despite it having been presented late. The parties chose to deal with this issue on submissions so I accepted the underlying evidential basis of each submission at its highest. The Council took a neutral stance on the outcome of the Claimants' application.

12 The following arguments advanced by Mr Nkafu favour extending time for the Claimants' claims. Firstly, the issues in the case involve Mr Higgs directly; the original allegation is against him and nothing in the new claims is different in this respect to the older ones. Secondly, the Claimants maintain that there is no practical difference between what they have done, bringing fresh claims against Mr Higgs, and what was proposed by Judge Russell, making an application to amend. I agree that there is no practical difference between these two routes. Thirdly, it is possible that the Council will establish the statutory defence leaving the Claimants without a remedy if they are not allowed to pursue this claim against Mr Higgs (although this also illustrates the value of the limitation defence to Mr Higgs). So those are matters which, as it were, are on the plus side for their application.

13 Factors which weigh against the application for an extension of time are these. Firstly, the Claimants knew at all times the identity of the alleged perpetrator in this case so they could have brought the new claims when the original ones were presented to the Tribunal back in September 2017. Secondly, they have been aware through their solicitors of the statutory defence that is being run by the Council (as it is entitled to do) since October 2017 when the Response was served on them. Thirdly, an application to amend was not made until one working day before the hearing on 4 December 2017. There is no real explanation for delaying until then (although I accept that these new claims were issued promptly after the hearing before Judge Russell). So, Mr Higgs faces a claim which is out of time as against him in circumstances where there is no cogent explanation for the delay in presenting the claim (I gave Mr Nkafu an opportunity to take

instructions on this point during the hearing).

14 I am conscious that the test I am applying to the application to bring late claims is one of justice and equity, not the stricter test of what is reasonably practicable, but the circumstances and timing of the presentation of a late claim are factors relevant to the exercise of my discretion. I must have regard too to the guidance of the Court of Appeal that the extension of time in discrimination cases is not simply a rubber-stamp exercise; there is no presumption that time will be extended, indeed it has been suggested that an extension of time will be the exception rather than the norm (see *Robertson v Bexley Community Centre* [2003] IRLR 434 and *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327).

15 In this case the Tribunal is faced with new claims between individuals. The consequence to the Claimants if they are not permitted to proceed against Mr Higgs is that, if the statutory defence is established, they will not succeed in the Tribunal to the full extent of their claims irrespective of the underlying merits. On the other hand, the consequence to Mr Higgs if I permit a late claim to proceed is that he will be deprived of a jurisdictional defence which Parliament has conferred and will now have to face the weight of this claim, possibly alone. In the circumstances of this case it seems to me that the prejudice to Mr Higgs outweighs that to the Claimants. The Claimants still have a claim against the Council and they may have a claim against their solicitors if the claim against the Council fails on the statutory defence, so they are not left without a remedy. I find that the balancing exercise inherent in the test of justice and equity falls in favour of refusing to extend time on just and equitable grounds.

16 It follows that the new claims against Mr Higgs personally have been presented out of time, the Tribunal does not have jurisdiction to decide them and they must be dismissed.

17 I emphasise that that is a finding based on jurisdiction; it does not decide the underlying factual issues which are the subject matter of the Claimants' remaining claims against the Council.

Case management

18 Having announced that decision, I confirmed that the Claimants' claims against the Council remains listed for hearing in May 2018 and that the Case Management Orders already sent to the parties continue to apply. I made one additional Order for the Council to provide particulars of its claimed statutory defence as the burden of proving this lies on it.

Employment Judge Foxwell

15 March 2018

**Case Numbers: 3201148/2017 & 3201149/2017
3201728/2017 & 3201730/2017**