Case No: 2601315/17

EMPLOYMENT TRIBUNALS

Between:

Mrs S Tolley-Debruyne **Claimant**	**and**	Derby Teaching Hospitals NHS Foundation Trust **Respondent**

RECORD OF AN ATTENDED CLOSED PRELIMINARY HEARING

Heard at: Nottingham **On:** Friday 26 January 2018

Before: Employment Judge P Britton (sitting alone)

Representation
For the Claimant: In person, assisted by her husband
For the Respondent: Mr A Race, Deputy Director of workforce

JUDGMENT

The claim is dismissed it being out of time and it not being just and equitable to extend time.

REASONS

Introduction

1. The claim (ET1) was presented to the Tribunal on 7 September 2017. As directed by my colleague Employment Judge Hutchinson, who held a telephone preliminary hearing on 22 November 2017, the first item on the agenda before me is to determine as to whether or not it is just and equitable to permit the remaining elements of this case to proceed them otherwise being out of time.

2. Before I come to that, let me simply say that the claim (and I will come back to time limits in due course) was as I read it, first and foremost a complaint of constructive unfair dismissal. In that respect, my learned colleague dismissed that head of claim because the Claimant did not have the

necessary 2 years' qualifying service as she had only joined the Respondent's employ on 5 October 2015. The employment ended on 27 February 2017.

3. Let me make plain that there was no claim before the tribunal which would have meant that the 2 years' qualifying service did not apply and for the avoidance of doubt, that means no claim based upon whistleblowing pursuant to the provisions at Sections 43, 47 and 103A of the Employment Rights Act 1996.

4. The claims that EJ Hutchinson identified as prima facie remaining subject to the out of time issue, he listed as:

- age discrimination
- race discrimination
- sex discrimination
- victimisation.

5. These would all be pursuant to the relevant provisions of the Equality Act 2010 (the EqA).But it is clear to me from the paperwork before me, and having had a discussion with the Claimant, that there is not a claim for race discrimination, indeed there could not be because the perpetrators of the alleged scenario in relation to treatment of the Claimant are all white Caucasian, as indeed is the Claimant.

6. Secondly, it perhaps logically follows (and again the Claimant agrees with me) that it could not be a claim of sex discrimination because the perpetrators were all female. Thus, left would be, which is where the Claimant effectively would wish to proceed, that this is a claim based upon age discrimination. Her date of birth is 16 January 1973 and thus she was aged 44 when the employment ended. The pleaded scenario focuses on events post the Claimant's return to work circa August 2016 but which was preceded by a period of some months of absence from work due to stress issues and which is covered in the occupational health reports which I was able to see today.

7. Prior thereto on 12 January 2016 she raised a grievance about her then line manager (Heather) along the lines of bullying and harassment. It was investigated and by and large upheld as a result of which Heather was transferred away from the Claimant.

8. What this case is really all about is what happened following the Claimant's return to work circa the August. In that respect the villain of the peace, so to speak, would be her by then line manager Michelle Graham. Suffice it to say that my analysis of the case from the bundle that has been put before me by the Respondent and which has the core documentation, would be that this is primarily a complaint of bullying and harassment and subsequent inappropriate dealing with the Claimant's renewed sickness absence from December 2016, again by reason of stress, including breaches of confidentiality and inappropriate discussions in the absence of the Claimant with the workforce in the small team in which the Claimant worked at the time as a data entry officer. The age issue relates inter alia in the context to the recruitment of two younger colleagues.

9. Against that background, the Claimant resigned the employment on 20 February 2017 giving appropriate notice so that the employment ended on 20 March 2017. All that needs to be said in that respect is that subsequent thereto the Claimant raised another grievance, primarily against Michelle Graham. The grievance investigation started to take place around about the end of April: the Claimant was interviewed on two occasions, first on 24 April and then on 10 May 2017.

10. The outcome of that grievance was communicated to the Claimant circa 8 August 2017. Some shortcomings were found in relation to Michelle. I gather this led to a disciplinary process. Of course by then the Claimant had long since been gone from the employment. She was not informed of the outcome of the disciplinary process viz Michelle as this which would remain confidential.

11. So, the claim that would go forward subject to my decision on the just and equitable point, would be one based upon age discrimination. The Claimant has given more detail of what that is about in the run up to today, albeit she had singularly failed up to today to provide the entries to the Scott Schedule which had been asked for by the Respondent at the time of filing its Response and ordered by Employment Judge Hutchinson to be provided, and which was reiterated by my colleague, Employment Judge Heap, of recent time with a deadline of 18 January.

12. From my reading of the bundle and this discussion in which the Claimant has put her case much more clearly, the core allegation is that Michelle from the word go, so to speak, made plain that she was wanting to recruit two younger members into the small team with the clear interference being (says the Claimant) that she was about getting rid of the Claimant and the other two older members of the team. Thus this started off with the departure of a long-standing member of the team (Karen) who is aged about 58.

13. I observe from the documentation that I have got in relation to that second grievance, that I cannot see that the Claimant ever made clear as to this core allegation relating to age. This is doubtless why the conclusions reached in the internal investigations whilst finding shortcomings by Michelle in relation in particular to the handling of the sickness issue and unfortunate comments to colleagues at work about whether or not the Claimant was genuinely sick, do not in themselves conclude whether or not there was an element of age discrimination in it. I only make those observations insofar that if my adjudication on the out of time issue was otherwise finely balanced, then in terms of where the balance of justice lay I could have fallen back on assessing the merits of the claim itself apropos ***Lupetti -v- Wrens Old House Ltd [1984] ICR 348 EAT***. As it is for reasons I shall come to, I have not needed to do that.

Out of time

14. The Claimant's employment ended on 20 March 2017. Engaged is s123 of the EqA:

> " ***Time limits***

> *(1) …proceedings on a complaint within section 120[1] may not be brought after the end of—*
>
> *(a) the period of 3 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.*
>
> *…*
>
> *(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*."

15. The last act complained about (ie the behaviour of Miss Graham) cannot of course be later than the Claimant's resignation as by then the Claimant was off sick again with stress, never to return. And even if I was wrong on that, it cannot of course be later than the end of the employment (ie 20 March 2017). Thus time would end for the presenting the claim on 19 June 2017. The claim was not presented to the tribunal until 7 September 2017. In order to bring a claim such as this, the Claimant needed to enter into ACAS early conciliation. This she only did on 6 September, the certificate ending on the 7th, which is of course why she then brought the claim because she could not bring it without having an ACAS EC certificate so to do.

16. What that means is that Section 140B of the EqA cannot come to the rescue. That provision is one which extends time for the duration of the ACAS EC. But, it only comes to the rescue if the ACAS early conciliation has commenced within the usual limitation period, if I take it short. So, it cannot extend time.

17. Therefore the claim is out of time and so I have to determine whether it is just and equitable to extend time. The principal authority on the topic of just and equitable in the context of out of time is ***Robertson -v- Beckley Community Centre trading as Leisure Link [2003] IRLR 434 CA***. Inter alia there is no presumption that a tribunal should exercise its discretion to extend time. In fact, "*quite the reverse*" – a tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time. The exercise of discretion is the exception rather than the rule. That of course was reiterated by the Court of Appeal in ***Chief Constable of Lincolnshire Police -v- Caston [2010] IRLR 327***. As to the approach in determining what is just and equitable I have followed the guidance and the helpful check list as per ***British Gas Corporation -v- Keeble and others [1997] IRLR 336 EAT*** and which Mr Race has helpfully and accurately set out in his opening written submissions at paragraph 17. I have heard the Claimant under oath.

[1] Which would apply to the claim as it now is

Findings of fact

18. The length and the reasons for the delay. The length of the delay in this case is quite considerable. It is nearly 2 ½ months. Why? The Claimant prays in her aid her state of mind essentially because of the stress of what had occurred. I have no doubt that she was unwell (as to which see the last occupational health report circa 13 January 2017). But was this unwellness exercising such an impediment on her ability to function as to explain why she did not bring the claim until she did?

19. I have noticed the following. The Claimant is an intelligent and articulate person. Thus, she was able to extensively communicate throughout such as the internal processes with the Respondent. In the immediate run up to the effective date of termination, she had raised in particular issues relating to the breach of confidentiality issues and she had made plain to the Respondent that she had already been able to contact the Information Commissioner. That shows to me that even if she had got limitations, they were not so bad that she could not effectively pursue her case.

20 That finding is supported by the email trail during that period (ie March) in which she is able to articulate the substance of her complaints against Michelle Graham: a good example is 20 March 2017 (Bp 93 – 95[2])

21. The Claimant was able to very clearly articulate the substance of her complaint in the first investigation meeting which she had with the grievance investigator Ms M Faint-Uffen (Bp 105 – 110) on 25 April 2017; also at a follow up investigation interview on 10 May 2017 (Bp 112 – 113; and she was able to add a footnote when approving the minutes on 12 June.

22. Also, she was able to attend a grievance feedback meeting on 27 July (Bp 116 – 121) at which she was able to make repeated articulate representations on the investigation outcome and what she wanted done in relation to Michelle Graham.

23. None of the above is consistent with an inability to intellectually function; quite the reverse; it shows an ability to effectively pursue her case.

24. The Claimant did tell me that very early on she had been able to make contact on the telephone via its helpline with ACAS. Furthermore during the early stage of matters, she had contacted the CAB in Derby and via them she had been given various ports of call that she could go to, one of which was the Derby Law Centre. I am well aware of the latter because in this region it is one of the few law centres still functioning; and from cases that I have undertaken, it is competent and the team there are well able to give employment advice. Of course, there would also be the ability to contact, if the Claimant had been prioritising, such as no win no fee lawyers in the Derby area, of which I am well aware there are several specialising in employment law. As it is she did contact Nelsons, who are a large regional law firm, and was put off at their high fees. Of course that would not have prevented her

[2] Bp = page number in the bundle.

going to one of the other ports of call to which I have now referred; or indeed Derby University's FRU Unit or that at Nottingham Trent University.

25. The Claimant was also aware that she could present a claim to tribunal via a supportive family and friends network. She knew of the time limits. But she maintains that she could not do that because her state of mind was such that she could not get on with presenting it. She has not pleaded that she did not do it because she wanted to wait the outcome of the Michelle Graham disciplinary.

26. But from all of the above the following is clear: the Claimant knew she could bring a claim to tribunal; had been intellectually able to make contact with the CAB; Nelsons and ACAS, and was able to so articulate her case. It follows that I am not persuaded. Not only are there the above actions and knowledge, but there are various references in the documentation before me which clearly show that she was aware of what she could do. Thus, first her ability to source the ICO website and know what their powers were, as to which see 15 March 2017 Bp 104. Thence there is the reference to ACAS and a clear cut indication that she is planning if she does not get satisfaction to go down the tribunal route made plain by her at the investigation meeting on 25 April 2017 (Bp 105). The same applies at Bp 112 and thence most of important of all on 22 July (Bp 120): "*She highlighted she would be going to employment tribunal and needs to go back to the ICO".* So why not do it then?

27. I appreciate that the Claimant then had the summer holidays with her small son at home and that she was trying to cope with part-time work (having given up a job she got after she left the Trust); but she says such was her stress level that it was too much for her to be able to cope and think about putting in a claim. But at the responsibility is on the Claimant to bring her case to tribunal within the time limit and it has to be an exceptional and convincing reason for not so doing. But from my findings of fact so far I am simply not persuaded: the Claimant could most certainly have brought her claim earlier than she did and in particular before the onset of the summer school holidays.

28. The extent to which the cogency of the evidence is likely to be affected. This does not apply. The Respondent does not say that due to the passage of time it cannot defend the claim..

29. Obstruction by the Respondent in the path of the Claimant thus preventing her having the information to realise she had a potential claim. This does not apply. It is quite obvious that the Claimant knew she could bring a claim and had in mind so to do.

30. Promptness with which the Claimant acted once she knew of the facts giving rise to the cause of action. I have dealt with that under the reasons for the delay. I have dealt with the steps taken by the Claimant to obtain appropriate professional advice once she knew of the possibility of taking action.

31. I then remind myself that it is always a balancing issue and that I should not lightly strike out the Claimant from the justice seat. However, it cuts both ways. If I let the case proceed, there is of course the prejudice to the Respondent of having to go to the expense of defending it and in a case where

I have no doubt whatsoever that this Claimant could have presented the claim much sooner than she did.

Conclusion

32. It follows that I have decided that it is not just and equitable to extend time and therefore I shall dismiss the case.

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Employment Judge P Britton

Date: 26 March 2018
JUDGMENT SENT TO THE PARTIES ON

27 March 2018

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FOR THE TRIBUNAL OFFICE