EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Umpleby	**v**	Chief Constable Thames Valley Police (1) Chief Constable West Yorkshire Police (2)

PRELIMINARY HEARING

Heard at: **Bristol** **On: 25 September 2018**

Before: **Employment Judge O'Rourke**

Appearances
For the Claimant: In person
For the First Respondent: Not in attendance or represented
For the Second Respondent: Mr O Thorne - Counsel

JUDGMENT

1. Both Respondents' titles are amended, as above.

2. The Claimant's claims against the First Respondent are dismissed, by way of withdrawal.

3. The Claimant's claims of sexual orientation discrimination and protected disclosure detriment against the Second Respondent are struck out, for want of jurisdiction, as being out of time and by way of issue estoppel.

REASONS

Background and Issues

1. The Claimant is a serving police officer (albeit currently on a career break) in Thames Valley Police, the First Respondent (R1), but, at relevant times, was seconded to the National Police Air Service (NPAS). The base at which he was seconded is at Filton, Bristol, but NPAS is under the control (nationally) of the West Yorkshire Police, the Second Respondent (R2).

2. By email of 20 September 2018 (not copied to R2), the Claimant withdrew his claims against R1, which are accordingly dismissed.

3. There have been several case management hearings in this matter, most recently on 18 May 2018, in front of (now) Regional Employment Judge Pirani. The clarification of claims from that Hearing (now only against R2), can be summarised as follows:

    3.1. The Claimant brings two claims, one of direct discrimination because of perceived sexual orientation and a second of detriment on grounds of making qualifying disclosures.

    3.2. The sexual orientation claim relates to the removal by another officer of a poster the Claimant displayed of a 'Banksy'-style picture of two uniformed male officers kissing. This claim, he accepted, could relate only to the period 7 August to 28 September 2017.

    3.3. The less favourable treatment complained of is R2's failure to take part in a grievance he had brought against R1, related to the termination, by R1, on 26 April 2016, of his secondment with the NPAS.

    3.4. The protected disclosure detriment complained of is the termination of his secondment and the subsequent outcome of his grievance on 28 September 2017.

4. The preliminary issues for determination at this Hearing were identified as follows (again allowing for the withdrawal of claims against R1):

    4.1. Whether or not, pursuant to s.43KA of the Employment Rights Act 1996 (ERA), the Claimant is able to bring a claim of protected disclosure detriment against R2, that Respondent contending that as R2 was not the Claimant's '*relevant officer'*, due to the secondment, but that R1 was and is therefore the appropriate respondent for such a claim. There is also a related issue as to whether or not the Claimant's secondment is covered by s.97 of the Police Act 1996.

    4.2. That the claims against R2 are out of time.

    4.3. That the Claimant is estopped from bringing these claims, as, having first brought them in August 2017 [1], he withdrew them at a preliminary case management hearing on 5 December 2017 [24A] and they were dismissed by judgment of Employment Judge (EJ) Livesey on 2 January 2018 [30]. He presented a second claim, making identical allegations, on 27 December 2017. No application has been made for reconsideration of EJ Livesey's judgment and nor has it been appealed against.

    4.4. Whether or not the claims have either no, or little reasonable prospect of success and therefore should either be struck out, or have a deposit order made.

5. Following REJ Pirani's Order, both parties presented skeleton arguments and the Claimant provided a witness statement on the time limit issue.

The Law

6. Mr Thorne referred me to the following cases:

6.1. **Lennon v Birmingham City Council [2001] EWCA Civ 435** (as to issue estoppel in an employment tribunal case), in which the Court stated:

29. In the skeleton argument it was urged that Barber was in fact wrongly decided, because in that case there had been no adjudication on the merits. Perhaps understandably, Mr Hunjan did not seek to maintain that argument before us. Barber, of course, binds us, as it bound the judge below, unless it can be shown to have been decided per incuriam, a contention that has not been made before us. It is true, to mention one point that Mr Hunjan mentioned to us, that in his exposition of the doctrine well-known as the doctrine in Henderson v Henderson Vice Chancellor Wigram referred to the doctrine well-known as the doctrine of issue estoppel as depending on "adjudication" by a court. But it seems to me that that adjudication is not, in any event, limited to a trial on the merits, as Neill LJ said in Barber. What matters is that there has been an actual decision of a competent court dismissing the process, which is what the Employment Tribunal plainly did in the ruling which I have already mentioned.

30. Secondly, it was argued that Barber is distinguishable from the present case because in that case the court knew the reasons for the withdrawal of the original claim. In this case, we do not know the reasons. That is, in my judgement, an incorrect argument. The doctrine turns not on the reason why the court's decision to dismiss the claim was consented to by the party making the claim, nor on the reason why a court made the order, but on the simple fact that the order was in fact made (my emphasis). *It is for that reason that, in the case of issue estoppel, the court will not re-enter the merits or justice of allowing the proceedings to continue, whereas in the wider jurisdiction under Henderson v Henderson, which turns on abuse of process and not simply on a comparison of one order or another, the court may do that.*

6.2. Any extension of time in respect of discrimination can only be under the 'just and equitable' principle of s.123 of the Equality Act 2010 (EqA). In respect of the protected disclosure claim, the 'reasonably practicable' test (s.48(3) ERA) applies.

7. Section 43KA ERA states (in relation to the ability of police officers to bring claims of protected disclosure):

Application of this Part and related provisions to police
(1)For the purposes of—

(a)this Part,

(b)section 47B and sections 48 and 49 so far as relating to that section, and

(c)section 103A and the other provisions of Part 10 so far as relating to the right not to be unfairly dismissed in a case where the dismissal is unfair by virtue of section 103A,

a person who holds, otherwise than under a contract of employment, the office of constable or an appointment as a police cadet shall be treated as an employee employed by the relevant officer under a contract of employment; and any reference to a worker being " employed " and to his " employer " shall be construed accordingly.

(2) In this section " the relevant officer " means—

(a)in relation to a member of a police force or a special constable appointed for a police area, the chief officer of police;

(b)in relation to a member of a police force seconded to the National Crime Agency to serve as a National Crime Agency officer, that Agency; and

(d)in relation to any other person holding the office of constable or an appointment as police cadet, the person who has the direction and control of the body of constables or cadets in question.

8. Section 97 of the Police Act 1996 (as to 'relevant service' of a police officer outside their force) is not quoted here (although set out in full in Mr Thorne's Further Skeleton Argument of 22 June 2018), because it was agreed by both parties that, although setting out a wide range of such 'relevant service' possibilities, it did not apply to the Claimant's secondment to NPAS.

The Facts

9. I heard evidence from the Claimant, in respect of time limitation issues. This evidence was very limited and essentially the Claimant stated the following:

   9.1. That his mental health deteriorated following the termination of his secondment and prevented him from expediting his claims. He accepted that he had provided no medical evidence as to any related diagnosis or description of any effect on his ability to deal with these matters. He said that he had such evidence, but had not realised that he needed to provide it in advance of this Hearing.

   9.2. That the legal advice he had received was sporadic and inconsistent.

   9.3. He believed that his second claim (presented on 27 December 2017) was still within time, as his grievance was not finalized until 28 September 2017 and that was the final act of detriment.

10. I set out the following chronology:

    December 2013 – The Claimant commenced a first secondment with NPAS. He was returned to R1 in February 2015, pending an investigation into alleged misconduct, which allegation was dismissed in June 2015.

    September 2015 – The Claimant returned for a second secondment, intended to be of three years' duration.

    April 2016 – following further allegations against him, his secondment was again terminated and he returned to R1. It was alleged that he had mislead R2 as to

complaints of harassment he had made to the police against a colleague (and which would adversely affect his ability to work safely with her in aircraft) and that he had incorrectly claimed time off for his activities as an Army reservist and that therefore there were concerns about his honesty and integrity. The Claimant stated that his protected disclosure related to alerting R2 to the potential dangers of him working with this colleague.

December 2016 – the Claimant submitted a grievance to R1, stating that the reasons for the termination were unsubstantiated and against which he'd had no opportunity to defend himself.

January 2017 – the Claimant went on a two-year career break.

April 2017 – in correspondence with R1's HR department, the Claimant refers to the possibility of an employment tribunal claim, raising a potential claim of protected disclosure.

July 2017 – R1 informs the Claimant that they are having difficulty getting information from NPAS.

7 August 2017 – Claimant brings first claim [1-15] against R2 only, of unfair dismissal, discrimination related to sexual orientation and protected disclosure.

28 September 2017 – the Claimant is sent the grievance outcome by R1 [174-175], which essentially rejects his grievance, but raises concerns as to poor communication and procedural delay on both Respondents' part.

5 December 2017 – at an attended preliminary case management hearing before EJ Mulvaney [24a], the Claimant's claims of unfair dismissal and sexual orientation discrimination are dismissed upon withdrawal, the former because as a police officer, he could not bring such a claim (and in any event had not been dismissed) and the latter because of time issues. Concerns were also raised as to limitation issues in respect of the protected disclosure claim. The Claimant indicated that he wished to either amend his claim, or submit a new one, to include a complaint against R1 relating to the grievance outcome. It was suggested to him by the Judge that he should seek advice on the legal basis of such a claim, '*the identity of the respondent and the best way of pursuing the new complaint alongside the current claim. Directions were given for the claimant to take the necessary steps to formally apply to amend his claim or to issue a fresh claim … the further preliminary hearing will alternatively consider the application to amend or the combination of the two claims'* and he was given until 10 January 2018 to do so.

27 December 2017 – the Claimant wrote to the Tribunal [27] stating that he had sought legal advice and had issued a fresh claim on that same date and '*would therefore like to abandon the above claim* (the first claim) *in respect of the new one'* and went on to ask whether he needed to attend the preliminary hearing listed for 31 January to '*withdraw it officially'*. He presented his second claim [33] the same day, bringing claims against both Respondents. He ticked the box in section 8.1 for 'sexual orientation' discrimination and indicated at box 10 that he was also bringing a claim of protected disclosure. The particulars of claim were

in identical terms to those set out in the first claim, less that the third page [15] was not included. They reiterated that he was bringing claims against NPAS/R2 for protected disclosure and discrimination.

2 January 2018 – EJ Livesey gave judgment dismissing the proceedings against R2 (the first claim), following the Claimant's withdrawal of that claim.

31 January – Both Respondents file responses to the second claim. R1 pointed out that they could not be answerable for the claims arising from the Claimant's service with R2. R2 argued that he had not brought a claim of protected disclosure. The Claimant emailed the Tribunal the same day (not copied to either Respondent) stating he had intended to include a specific mention of 'whistle-blowing' in his claim form (stating that he had done so in the particulars of claim (against R2)) and requesting that it now be included. The Tribunal had in fact already treated the claim, on receipt, as including a claim of protected disclosure. However, the only such claim was against R2 and no mention whatsoever was made of the grievance outcome, as forming part of that claim.

18 May – a preliminary case management hearing was listed. That was relisted as an open preliminary hearing and heard, as set out above, by REJ Pirani.

Submissions

11. Mr Thorne relied on his two skeleton arguments. His additional submissions were, in summary that:

    11.1. Any detriment caused to the Claimant, by R2, in the delay in progressing his grievance, ended on 5 May 2017, when R2's HR officer sent R1 the documents requested of them [169].

    11.2. The Claimant is estopped from bringing the second claim, by EJ Livesey's dismissal of an identical claim, which he has not sought to have reconsidered, or appealed against.

    11.3. In his second claim the Claimant did not seek to rely on the grievance process or outcome as a detriment and despite having the benefit of seeing both Respondents' detailed responses to that claim, which, for obvious reasons make no reference to this issue (as he hadn't raised it), he failed to subsequently seek to clarify this point. Therefore, time can only run, as far as R2 is concerned, from the date of termination of the secondment (April 2016), thus rendering the claim well out of time.

    11.4. He failed to follow the judicial guidance he was given by EJ Mulvaney as to amending the first claim, or bringing a fresh claim and combining it with the first and did neither, withdrawing the first and bringing a fresh, but identical claim.

    11.5. There are, in any event, serious evidential weaknesses with his claims, which would render them either as having little, or no reasonable prospect of success. His disclosure was not aimed at preventing risks to air safety, but was intended to have the colleague removed from the workplace, due to

animosity between them. In any event, his apparent concerns as to air safety were met by R2 immediately agreeing that he and the colleague would not fly in the same aircraft. As his concerns had been addressed perfectly adequately, R2 had no reason to terminate his secondment, unless for other valid reasons. Not being formally disciplined (and therefore allegedly being unable to 'clear his name') cannot be a detriment. If, as he asserts, there was a vendetta against him, then it would have been more actively pursued.

11.6. It would not be just and equitable to extend time. Due to the Claimant's procedural errors and confusions, the final hearing has already been delayed nine months and due to forthcoming fundamental changes in NPAS, it is likely that R2 would have real difficulties in presenting coherent evidence at any eventual hearing.

11.7. The Claimant cannot rely on paragraph 43KA ERA.

12. The Claimant (following a half hour break to allow him to gather his thoughts) said the following:

12.1. He relied on his skeleton argument.

12.2. He accepted that the 'procedural problems' were his fault, but that he was new to such matters.

12.3. EJ Mulvaney gave him the option of issuing a fresh claim, in respect of which he'd taken advice from the CAB.

12.4. Any delays in progressing his claim were due to his poor mental health.

12.5. If the grievance outcome was the final detriment then his second claim is in time. That grievance was hugely delayed by R2's failure to provide documents to R1 and which was not simply a 'mistake' on their part, but gross misconduct, seeking to 'subvert' the outcome.

12.6. He argued that he had sought to rely on the grievance outcome as a detriment. (However, on questioning, he accepted that he had made no mention of it in his second claim, instead only raising it at the 18 May 2018 preliminary hearing and in his statement for this hearing, undated, but filed on 8 June 2018.

12.7. He considered that s.43KA ERA does apply in his case. He does not seek to rely on the Police Act.

12.8. His disclosure was genuinely made with air safety in mind.

12.9. He has now twice had secondments with NPAS terminated, indicating a desire on their part to 'get rid of him', due to him raising complaints about colleagues. He was reinstated after the first termination, but given no opportunity to defend himself against the second termination.

Findings

13. Limitation Period. If the grievance outcome is set to one side, then the second claim is clearly well out of time (by well over a year). To rely, therefore, on the grievance outcome (as a final act of detriment), to bring the claim within time, such detriment needed to be pleaded, but it was not, until raised verbally at the preliminary hearing of 8 May 2018. The second claim was in almost identical terms to the first and made no mention whatsoever of the grievance, or its outcome. By way of explanation for this failure, the Claimant referred to his mental health issues, but there is no medical evidence to elaborate on these matters, or indicate why he may have been unable to properly present his claim. Further, at the point of the second claim, the grievance outcome was only three months old and therefore, if what he says is true about it being a detriment, should have been foremost in his mind, but unaccountably is not mentioned. Why thereafter did it take a further four months for him to raise the complaint and why was it not instead brought sooner? I again note the reference to mental health, but conclude again that there is no supporting evidence on this point. It should have been apparent to the Claimant, on receipt of the Responses at the end of January 2018 that he had made no mention of the grievance (as neither Response, in turn, did so), particularly so as he clearly took account of what was said in those pleadings, as he immediately wrote to stress, or clarify that he wished to bring protected disclosure proceedings, as well as discrimination (as this point had been disputed in the Responses). That was his opportunity to rectify the pleadings, but he did not and I am not satisfied that he has provided a valid reason for failing to do so. Therefore, the claims being out of time, I consider first, subject to s.123(1)(b) EqA, whether it would be 'just and equitable' to extend time in respect of the discrimination claim. I find that it would not, for the following reasons:

13.1. Applying **Robertson v Bexley Community Centre [2003] IRLR 434 EWCA**, the onus of convincing the Tribunal that it should exercise its discretion (for which '*there is no presumption that they should do so'* and is '*the exception rather than the rule'*) is on the Claimant and I don't consider, in this case that the Claimant has provided a convincing reason to do so. He has known of the alleged circumstances arising from the removal of his 'Banksy' poster since at least April 2016 and the alleged link to the termination of his second secondment, but only brought his first claim approximately fifteen months later and his second claim approximately a year and a half later. As stated, he made no attempt in either claim to link the alleged discrimination to any less favourable treatment stemming from the conduct or outcome of his grievance and therefore that claim can relate only to the termination of his secondment, in April 2016.

13.2. **British Coal Corporation v Keeble [1997] IRLR 336 UKEAT**, suggested the use of a 'checklist' from s.33 of the Limitation Act 1980, the items of which are as follows:

13.2.1. The length of and reason for the delay: as set out above, the delay is prolonged and I am not satisfied that there is good reason for it. The Claimant has also referred to being given inaccurate advice by the CAB as to how to progress his claim, following EJ Mulvaney's

preliminary hearing, but her direction in that case management summary was clear, either apply to amend the existing claim, or bring a new claim and combine it with the existing one, neither of which the Claimant did. I don't know the content of the advice he received from the CAB in this respect, but note that he is clearly an intelligent man and as a police officer can be expected to have more grasp than most of the importance of legal procedure. I don't consider therefore this factor to be a decisive one.

13.2.2. Effect of delay on cogency of evidence: it is now well over two years since the bulk of the events in this matter took place and the delay in progressing it to hearing, which could probably not now take place until approximately three years after the events will inevitably affect the cogency of the evidence.

13.2.3. Promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action: even if he had pleaded the grievance outcome as a detriment, the second claim was brought at the very end of the three-month time limit, running from that event and three weeks after he'd been informed of the limitation difficulties by EJ Mulvaney. It is clear therefore that he did not act promptly in this matter and in any event, when he did, did not rely on the grievance outcome as a detriment.

13.2.4. There are clearly, in my view, very real evidential difficulties in the Claimant being able to establish that he was less favourably treated by R2, either by having his secondment terminated, or by their alleged delay in assisting the progress of his grievance, because of any perceived sexual orientation of his, when compared to a person who was not so perceived. R2 provided alternative rationale for their decision and that was not overturned by the grievance. The Claimant had advanced no evidence that might shift the *prima facie* burden to R2 to show a non-discriminatory motivation (nor seemed likely to be able to) and he seemed reliant solely on his assertions to that effect.

14. In respect of the Claimant's protected disclosure claim, the test is as set out in s.48(3) ERA, namely whether the claim was presented within such further period as the Tribunal considers reasonable, where it is satisfied that it was not reasonably practicable to do so within the initial three-month time limit. The first claim was clearly well out of time as, at that point, the final detriment relied upon was the termination of the secondment, in April 2016. The second claim, if based on the grievance outcome, was within time, but as set out above, no such link was made and therefore it was also, dependent as it was on the secondment termination date, even further out of time. Being aware of the grievance outcome and clearly considering that to be linked to his alleged protected disclosure, it was entirely practicable for him to bring a claim stating so, in clear terms, but he did not, merely 'cutting and pasting' his original claim. He has advanced no convincing reasons as to why he did not do so. He has never applied to amend the second claim, but applying **Selkent Bus Co Ltd v Moore [1996] ICR 836**

UKEAT, I don't consider that any such application would succeed, for the following reasons:

14.1. The likely amendment would be a major one, amending the range of the claim and adding new factual allegations which change the basis of the existing claim.

14.2. As stated, no application has been made and even if it had been, at this Hearing, that would have been at a point nine months postdating the claim and there is no good explanation why it could not have been made earlier.

14.3. In balancing the interests of justice and the relative hardship to be caused to the parties by refusing any such application, I consider that the balance falls in R2's favour, because I don't consider that any such amended claim would have reasonable prospects of success and therefore R2 would be obliged to defend itself against an unmeritorious claim. R2 did not decide the outcome of the Claimant's grievance, R1 did. R2 will say that they had no involvement whatsoever in that procedure, beyond providing responses to whatever queries R1 may have had and to provide copies of requested documentation. It seems common likely evidence that R2 was dilatory in providing such requested information, but it is somewhat of a stretch for the Claimant to successfully assert (no doubt in the face of outright denials by R2) that such delay was deliberate and designed to (somehow) skew the grievance outcome, undertaken by another entirely independent police force. Such a level of conspiracy would require compelling evidence, of which it seems entirely unlikely the Claimant would be able to provide.

15. Issue Estoppel. Even if, however, limitation was not the bar I find it to be, the Claimant also faces, to my mind, the insuperable obstacle of issue estoppel. EJ Livesey dismissed the Claimant's first (identical) claim and that judgment must, unless reconsidered, or successfully appealed, stand. The issues in the second claim therefore have already been adjudicated upon. Applying **Lennon**, it is clear that regardless of EJ Livesey's judgment being one made without consideration of the issues, upon the Claimant's withdrawal of his claim, it is an 'adjudication' to which the principle of issue estoppel applies.

16. Other Issues. While other issues were relied upon in submissions as to whether this claim should be struck out, or not, I do not feel it necessary to consider them, in view of my findings above.

Conclusion

17. For these reasons, therefore, the Claimant's claims of sexual orientation discrimination and protected disclosure against R2 are struck out.

Employment Judge O'Rourke
Dated 26 September 2018