EMPLOYMENT TRIBUNALS

Claimant:	**Miss N Fraser**
Respondent:	**West Yorkshire Combined Authority**
Heard at:	**Leeds On: 11-18 June 2018**
Deliberations:	**27 June 2018**
Before:	**Employment Judge Rogerson**
Members:	**Mr Q Shah**
	Mr J Rathbone

Representation

Claimant:	In person
Respondent:	Mr Newman (solicitor)

RESERVED JUDGMENT

1. The complaints of direct race discrimination, harassment related to race, victimisation and sex discrimination were presented out of time, in circumstances where it was not just and equitable to extend time, and those complaints are accordingly dismissed.
2. The complaint of detriment on the ground of making a protected disclosure was also presented out of time, in circumstances where it was reasonably practicable to have presented that complaint in time, accordingly that complaint is dismissed.
3. Allegations 1 and 8 (direct race discrimination) and 14 (harassment related to race) are withdrawn and are dismissed.

REASONS

Issues

1. Prior to and at this hearing, the complaints were clarified and the issues to be determined were clearly identified and agreed.
2. By a judgment dated 12 January 2018, the complaints of breach of contract, unlawful deduction of wages (relating to the university fees) and disability discrimination were dismissed upon withdrawal by the claimant.

3. For the remaining complaints of race discrimination victimisation and public interest disclosure detriment the claimant had prepared a schedule of allegations (pages 409 to 419) setting out 29 allegations the claimant relied up on as either an alleged detriment (race/sex/victimisation or public interest disclosure) or unwanted conduct (harassment related to race) with the date of each alleged act.

4. Of those 29, 3 allegations were withdrawn at this hearing which were allegations 1: '*non-payment of the minimum wage'*, allegation 8: 'a white colleague was not asked to provide ID on his first day of work which is a breach of the Immigration and Asylum and Nationality Act 2006' and allegation 14: '*SB constantly mocking the claimant with the name Laura or Mora*'

5. The case management summary of 12 January 2018 (pages 354 to 356) identifies the issues. The first issue is jurisdiction. This was because the claim form presented was on 15 November 2017. ACAS conciliation (Day A) was 28 October 2017, (Day B) was 15 November 2017. Any complaint about acts relied upon before **29 July 2017,** was potentially out of time. The list of issues identifies the questions for the Tribunal to decide on jurisdiction which are as follows:

    5.1. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of that period? Is such conduct accordingly in time?

    5.2. For the 'Equality Act 2010' complaints, was any complaint presented within such other period as the Employment Tribunals considers just and equitable?

    5.3. For the 'Employment Rights Act 1996' complaint (protected disclosure detriment) was it reasonably practicable to have brought the complaint within three months?

6. At the beginning of this hearing we emphasised the importance of the time issue to the claimant because if the claim was presented out of time and time was not extended the tribunal had no jurisdiction, the claim would be dismissed.

7. The claimant was a HR officer for the respondent until she resigned (with notice) effective on 23 July 2017. There is no complaint about her resignation. She does complain that her treatment by colleagues prior to her resignation including the requirement that she re-pay university fees was discriminatory. She identifies herself as a black woman and relies upon her 'colour' for the protected characteristic of 'race'.

8. The date of the last alleged act of race discrimination is allegation 2 "unlawful deductions of wages relating to the repayment of university fees, by RM on the 14 July 2018". The claimant alleges this was less favourable treatment because of her race because the claimant was required to repay university fees when two white comparators (CP and HM) were not required to repay their university/course fees. This alleged act is prior to 29 July 2017 and is out of time.

9. During the hearing and in the claimant's closing submissions (paragraph 18 and 19) she suggests that the cause of action had not "crystallised" until the payment of her last instalment of fees on 30 October 2017, which would make her complaint in time.

10. For the sex discrimination claim she relies on allegation 29 (incorrectly numbered 30 on the schedule) that the claimant was 'denied reduced hours due to childcare' by RM in about June/ July 2017.

11. To address the out of time point, the claimant says that new information only came to light about her comparator, on 31st July 2017, when she discovered, that her replacement (a woman with children) had started working for the respondent for 30 hours per week. The claimant says the knowledge that she gained was "reasonable and fundamental" in causing her to change her mind about bringing a complaint and "the acquisition of that knowledge was crucial" to her decision to bring a claim.

12. The claimant describes herself as a 'HR professional' with knowledge of employment law, in theory and in practice. The written documentation she has presented in these proceedings demonstrates that. She has made interlocutory applications during these proceedings, she prepared a skeleton argument with reference to case law and provided written closing submissions. She was not a litigant in person unfamiliar with employment law. Despite this purported knowledge of employment law, it was clear to us that the claimant has fundamentally misunderstood how to apply her knowledge of the law to the facts she relies upon to support her case.

13. Dealing with our findings of fact which are based on the evidence that we heard for the claimant, from the claimant. She also provided two witness statements, one from Mr Andrew Coley (union representative who attended a grievance hearing prior to her resignation) and one from a Mr D Simpson (former employee who had left the respondent's employment before the claimant commenced her employment).

14. For the respondent we heard evidence from Rachel Murphy(RM), Lisa Secker(LS), Sue Cooke (SC) and Corinne Gough (CG). The respondent also relied on the witness statements of two witnesses who did not attend the hearing to give evidence – Louise Abrahams and Anne Barraclough.

15. We explained to both parties that the weight attached to the witness evidence of those witnesses who did not attend and whose evidence was not subject to cross-examination would be less than the evidence of witnesses who did attend.

16. We also saw documents from an agreed bundle of documents.

17. We found the claimant's evidence was unreliable. She has exaggerated her evidence and 'replayed' events for the purposes of these proceedings in a way that does not reflect the reality. She has also used highly emotive and inflammatory language, accusing the respondent's witnesses of "slavery, colonial mentality and apartheid" in the context of allegations which she ought to have known were unsustainable on the evidence presented. For example, in relation to the repayment allegation which we deal with below in our findings she alleges a stereotypical assumption was made about black people not repaying loans when on the facts she relies upon there was no evidence to support such an assertion. These were serious accusations to make and the claimant knew or ought to have known the effect her words would have on those witnesses. Despite this she never retracted those words or reconsidered her position when it was clear they were unsubstantiated.

18. We propose in our findings of fact to deal with our findings in relation to the 'last' acts relied upon for the sex, race, victimisation complaints ('Equality Act 2010') and the protected disclosure detriment complaint, ('Employment Right Act 1996') complaint, to decide whether the claim was presented in time.

Sex Discrimination - Allegation 29- 'claimant denied reduced hours due to childcare

19. The claimant complains that she was treated less favourably on the grounds of her sex. To decide whether the claimant was treated less favourably, a comparison must be made with how the respondent would/has treated a hypothetical or actual comparator, in similar circumstances, to establish whether the claimant's sex was the reason for the treatment.

20. Section 23(1) of the Equality Act 2010 provides that in comparing people for the purposes of a direct discrimination complaint there must be no material difference between the circumstances of the comparator and the claimant. What matters is that the circumstances which are **relevant to the treatment** of the claimant complained about are the same, or is nearly the same for the claimant and the comparator.

21. On 1 September 2016, the claimant had temporarily agreed to vary her hours of to work full time. An "employee status amendment form" completed on 19 August 2016 recorded the agreed variation in hours from 30 hours to 37 hours a week to run from 1 September 2016 until 28 August 2017.

22. On 23 May 2017, the claimant emailed a request to reduce her hours from 37 hours a week to 22.5 hours a week from 1 July 2017 to care for her son. The claimant and CG discussed the request on 24 May 2017.

23. The claimant says that CG told her that RM had refused her request because "RM stated we need the hours for two to three months". The claimant does not say she had any further discussion with either RM or CG about this request.

24. In the pleadings the claimant refers to her "flexible working request being refused on 25 May 2017". However, she accepted in cross-examination that she had not made a formal flexible working request she had only discussed it 'informally'.

25. CG referred to the flexible working policy which provides a first stage of informal discussion with the line manager and provides that "once an employee is certain they wish to apply they can make an application under the flexible working policy" which is a formal process. CG recalls the discussion with the claimant and some concern expressed about the financial implications. She left it with the claimant to consider further because the temporary variation was due to come to an end shortly. The claimant said that she would consider it further before making her decision. CG heard nothing further from the claimant and assumed she had decided against it. We accepted CG's account.

26. The claimant knew how to and could have made a formal flexible working application if she had wanted to after her informal discussion with CG. She did not do so and had decided not to pursue it further.

27. If she felt that RM had 'refused' her request it is odd she did nothing about it. She knew how to challenge a refusal but did not do so.

28. The claimant refers to a male comparator SB who had previously made a formal flexible working application. Unlike the claimant he had made a formal request for flexible working in the same way that others (male and female) in the HR team had done which had been approved. Out of 13 individuals in the department only five worked full time. Both CG and RM understood the need to be supportive when these requests are made. If the claimant had made a formal request it is likely the respondent would have agreed to it.

29. A hypothetical male comparator in those circumstances, would have been treated in the same way as the claimant was.

30. The claimant was not denied reduced hours due to child care and was not treated less favourably because of her sex. Furthermore, the fact that the claimant's female replacement was engaged to work 30 hours from 31 July 2017 does not support the claimant in bringing this complaint out of time. Based on her case the asserts she had knowledge of a 'refusal' on 25 May 2017 and her complaint in relation to that refusal was presented out of time.

Direct Race Discrimination -Allegation 2 'unlawful deductions of wages'

31. The last act of alleged race discrimination relied upon is the alleged unlawful deduction from wages relating to the repayment of university fees of £1,016.15.

32. In June 2016, the claimant applied to the respondent for funding assistance to support her in obtaining a "Post Graduate Diploma in HR Management" which she subsequently changed to a "MA (Masters) in HR Management".

33. The respondent has a policy, which whilst encouraging employees to pursue further qualifications, quite reasonably seeks to recover those training costs in certain circumstances.

34. On 20 June 2016, the claimant signed an agreement (see pages 93 to 94) stating that she understood that this agreement required her to repay the fees if she left within two years of completion of the course in accordance with the policy. The claimant left her employment on 23 July 2017 before completing her course.

35. However, she agreed that in line with the spirit of the policy and because she had received the benefit of funding to help improve her career she would repay the money obtained. Her only issue at the time was about the method of repayment.

36. In email correspondence exchanged with the respondent on 20 June 2017 she suggests that amendments were made to the policy to improve it in the future suggesting additional words were added to say *"in line with the learning support policy, if you leave other than through compulsory redundancy whether during or within the first year of completion of the course an invoice will be raised or where it is not possible to recover this amount from your final salary as it might cause financial difficulties a repayment plan would need to be discussed with your manager and can exceed no later than 24 months"*.

37. It was clear that the claimant expected to repay the money loaned (£1,016.15) when she left the respondent's employment. She and CG discussed repayment options and RM was inclined to agree a repayment plan but was not the decision maker. The finance department decided that the claimant's final wage would be used to recover some of the sum advanced. RM did expect that a repayment agreement could have been made but the first option for recovery was always from the final wage, as the only means of guaranteed recovery.

38. Instead of asking the finance department to reconsider that decision the claimant raised a grievance. In her grievance the claimant alleged inconsistency of treatment citing three examples where she asserts that in the past different repayment practices had occurred. In her grievance she does not identify any complaint of race or sex discrimination but does suggest that the reason why the money was taken out of her final wages was because she was being punished by the respondent for advancing her career by leaving. That was the reason why

she believed the respondent made the decision, which is not because of her sex but is because she was leaving.

39. To resolve this matter, the claimant suggests the respondent agrees to the repayment plan she has proposed otherwise she would take Employment Tribunal proceedings for unlawful deduction from wages and breach of contract (again making no reference to discrimination).

40. A grievance hearing took place on 3 July 2017 with Mr Giles Nightingale. The claimant confirmed her full intention to repay the fees and acknowledged that she could see why the respondent wanted to take the full amount out of final wages because people in the past had taken advantage. She accepted the respondent had the right to deduct the money. The minutes also record that the reason why the claimant thought she was being treated unfairly was because she was being blamed for leaving the respondent's employment. The 'inconsistency' point was dealt with in relation to the comparators identified and it was explained that the circumstances were different in each case.

41. Mr Nightingale agreed to the repayment plan the claimant proposed which he offered in the outcome letter sent on 7 July 2017 (page 254). That agreement was signed by the claimant on 12 July 2017 (see page 273). The clamant had agreed repayment of the sum of £1,016.15 by the sum of £266.15 deducted from her final salary on 14 July 2017 followed by three further instalments of £250 per month payable on the 30th of each month commencing on 30 August 2017 and ending on 30 October 2017.

42. By 12 July 2017, the claimant knew the terms she agreed for the repayment of the loan. It was only because of that agreement that she voluntarily made payments to the respondent of £250 on 30 August, 30 September and 30 October 2017.

43. At this hearing the claimant complains that this was less favourable treatment in comparison to two white comparators CP and HM. The claimant and her comparators were not in the same circumstances because none of them had made the repayment agreement that the claimant had made with the respondent.

44. CP is white and left the Respondent in 2017, two years after completing his course in 2014. The claimant relies on a Linked In profile of CP's to suggest that he started his course in 2015 and completed it in 2017 and therefore left less than two years after completing the course. We accepted the respondent's evidence that by the time CP left his employment it was two years after completion of the course. The claimant did not leave two years after completion of her course which was another material difference in the circumstances of the claimant and her comparator.

45. HM is white and moved to another local authority organisation. The repayment policy expressly provides that there is no repayment of fees in those circumstances where the new employer as an authority is treated as an associated employer. The claimant did not move to a local authority employer which was another material difference in the circumstances of the claimant and her comparator.

46. The claimant had agreed to repay £266.15 from her final wage and therefore there was no unlawful deduction made from her final wage or any consequential breach of the National Minimum Wage. The claimant had sensibly withdrawn those complaints because she accepted the payment was properly payable in

accordance with the agreement she made on 12 July 2017. It follows the repayment by way of deduction was not less favourable treatment of the claimant and was not made because of the claimant's race.

47. The claimant has however alleged this deduction was made "*purely as a result of my race*" (paragraph 61 and 62) which demonstrates a 'stereotypical' assumption made by the respondent that she had no intention of paying the money back because she is black. This is one example of the claimant's untruthful evidence where she has deliberately misrepresented the evidence at this hearing when she has always known the allegation made was unfounded. She proposed and agreed repayment by way of a deduction from wages and instalments. That allegation is not proven.

48. We do not accept the claimant's argument that any complaint in relation to the university fees crystallises on payment of the last instalment on 30 October. Section 123(1) Equality Act 2010 provides that time runs with the date of the act to which the complaint relates. For the unlawful deduction of wages allegation, the date she agreed the deduction should be made was 12 July 2017 when the repayment agreement was made. The consequences of that agreement was that she voluntarily paid instalments in August September and October 2017. It was not a continuing act that crystallises on 30 October it was an act on 12 July with the continuing consequence of payment by instalments which ended on 30 October 2017, and the complaint was presented out of time.

49. Neither the last alleged act of sex discrimination on 25 May 2017 or the direct race discrimination on 12 July 2017 are proven or in-time. Those complaints were presented nearly six and four months out of time respectively.

Victimisation -allegation 29- "the handling of the claimant's grievance through the formal process without consideration of mediation through the informal route".

50. For the victimisation complaint the last act the claimant relies upon as a detriment is "*the handling of the claimant's grievance through the formal process without consideration of mediation through the informal route"*.

51. The claimant submitted a grievance on 21 June 2017. She had a grievance hearing on 3 July 2017 and was provided an outcome in writing on 7 July 2017.

52. The claimant chose to pursue a formal grievance and the respondent accordingly responded to that formal grievance as it was required to do under the grievance policy. On those facts the claimant was not subjected to a detriment.

53. In any event the claimant alleges the date was June-July 2017 and the last date in terms of the grievance process was the outcome letter of 7 July 2017. This means the complaint is presented out of time.

Just and Equitable Extension of Time

54. If as we have fond the 'Equality Act 2010' complaints are out of time the claimant seeks an extension of time to the date of presentation of the claim on 15 November 2017 on 'just and equitable grounds'.

55. She says she was too 'unwell' to present the complaint earlier. We had no evidence to support her assertion that she was incapable due to ill health to make her claim in time. In fact, following her resignation she immediately started a new job which she has continued to do throughout this process. She continues with her Masters course and studies. She has actively pursued and participated in

these proceedings prior to and during the hearing. On the evidence before us the claimant was 'capable' of presenting her claim in time.

56. She has clearly misapplied the law to her claim but that is the fault of the claimant and her mistake must be viewed in the context of someone with knowledge of time limits and the Employment Tribunal process. In fact, she told the respondent she would use that process in her grievance in early July 2017(when her claim could have been presented in time).

57. There were no grounds in our view for a just and equitable extension of time. The claimant knew about the time limits. She also knew that if she was going to rely on any medical evidence to support an extension of time that evidence should have been produced at this hearing, because the time point was 'flagged up' to her as early as January 2018.

Public Interest Disclosure Detriment

58. Taking allegation 18 first which is 'threats made to the claimant in a HR meeting about role deletion" the date of this alleged detriment is 29 March 2017 and the primary time limit ended on 28 June 2017.

59. For allegation 22 the claimant alleges that on 29 March 2017 she was advised to share information about her private life, which is a breach of the Human Rights Act 1998". The primary time limit for that complaint is 28 June 2017.

60. We did not find either of these allegations were proven based on the evidence we heard but they were both substantially out of time.

Reasonably Practicable Extension of Time

61. Section 48(3)(b) of the Employment Rights Act 1996 provides that the primary time limit of 3 months can be extended "*within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months*".

62. Before extending time for a further reasonable period we must be satisfied, that it was not reasonably practicable to present the complaint in time. For the same reasons that we have identified above, the claimant's knowledge of the time limits and process and capability, we were satisfied that it was reasonably feasible for the claimant to have presented her complaint in time and therefore it is not reasonable to extend time to the date of presentation.

63. The Tribunal therefore has no jurisdiction in respect of the Equality Act 2010 complaints or the Employment Rights Act 1996 complaints which are all accordingly dismissed.

Employment Judge Rogerson

Date: 14 September2018