



EMPLOYMENT TRIBUNALS

Claimant: Miss J Simpson

Respondent: Air Business Limited

Heard at: London South

On: 12 October 2018

Before: Employment Judge Martin

Representation:

Claimant: In person

Respondent: Mr M Humphreys - Counsel

RESERVED JUDGMENT AT PRELIMINARY HEARING

The judgment of the Tribunal is:

1. The Respondent's application to strike out the Claimant's claims in relation to the promotion issue on the grounds that it was out of time and it was not just and equitable to extend time is successful. This part of the Claimant's claim is struck out.
2. The Claimant's application to amend her claim to include further protected acts is dismissed.
3. The Respondent's application for a deposit order in relation to the Claimant's other detriment claims is successful. Reasons are set out in a separate deposit order.

RESERVED REASONS

1. This was a preliminary hearing listed ordered by Employment Judge Baron at a previous preliminary hearing heard on 12 June 2018 and on application by the Respondent to consider the matters set out below. The purpose of the hearing was threefold:
 - i) To consider the Respondent's application to strike out the Claimant's claims in relation to the promotion issue on the grounds that it was out of time and it was not just and equitable to extend time and as a secondary application if time was extended that the claim has no reasonable prospect of success and should be struck out on this basis.
 - ii) To consider the Claimant's application to amend her claim to include further protected acts
 - iii) To consider the Respondent's application for a deposit order in relation to the Claimant's other detriment claims
2. I had before me written submissions on behalf of the Respondent with case law (**Miller v MOJ UKEAT/15** and **Van Rensburg v Royal Borough of Kingston upon Thames UKEAT/0096/07**). I heard oral submissions from both parties which are set out in some detail below.
3. I explained to the Claimant that the basis of the claim before the Tribunal is the claim she set out in her claim form and that other matters contained in other documents do not form part of the claim before the Tribunal which the Tribunal would determine. Accordingly, throughout the hearing and in deliberations I had in mind the actual pleading made by the Claimant in her claim form.
4. The Claimant was employed by the Respondent from July 2007 until she was dismissed with effect from 1 November 2017. The Claimant presented her claim to the Tribunal on 6 March 2018. The Claimant's overarching submission is that the Respondent was intent on forcing her into a position whereby she was insubordinate in order to terminate her employment.

2014 disclosure and 2016 promotion detriment

5. On 18 November 2014 the Claimant says she made a protected act when making an informal complaint to Mr Duncan Taylor concerning an incident when a drink was thrown over her. Her claim is that she suffered a detriment for making this disclosure when she was unsuccessful in an application for promotion the decision being given on 24 March 2016. Time starts to run from the date of the detriment and consequently the three-month time period (subject to any longer period as a result of ACAS conciliation) expired sometime on 23 June 2016. The Claimant's claim is therefore about 1 year and 9 months out of time.

6. **The Respondent submitted** that whilst the Tribunal has the discretion to extend time on the basis that it was just and equitable to do so, the onus is on the Claimant to show this. The Respondent referred the Tribunal to s33(3) Limitation Act 1980 which provides:

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—

- a. **the length of, and the reasons for, the delay on the part of the plaintiff;**
 - b. **the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11 [F4, by section 11A] or (as the case may be) by section 12;**
 - c. **the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;**
 - d. **the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;**
 - e. **the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;**
 - f. **the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.**
7. The Respondent referred to the Miller v MOJ paragraphs 9 -13 which I have considered. In this case the EAT referred to Robertson v Bexley Community Centre [2003] IRLR 434 and noted that the discretion to extend time on the grounds that it is just and equitable to do so is a wide discretion, but that time limits are to be observed strictly in the Employment Tribunal; there is no presumption that time will be extended and that the exercise of the discretion to extend time is the exception rather than the norm.
8. The Miller case discussed the forensic prejudice to a respondent if a claim is made outside the primary limitation period. Mr Humphreys submitted that this was clearly an issue in this case. He submitted that the real test is what was reason was for decision not to promote the Claimant. He points out that this decision was made 2 years prior to ET1 being presented and that in discrimination claims the mental processes are crucially important. This is especially so as it is rare for a single compelling document to be determinative and this is not a case about the construction of a contract or phrase where the wording is unchanged and where the passage of time does not have the same effect. Mr Humphreys pointed to what he says is a particular prejudice to the Respondent as this is not a case where talking about a delay of a few days or weeks. The Claim is at least 18m out of time. The decision was made in March 2016 and to hear witness evidence three years later represents a prejudicial disadvantage for the Respondent.

9. The Respondent submitted that the Claimant may submit that there is a continuing set of acts between the promotion detriment and the other detriments flowing from the 2016 protected acts which will be considered later in these reasons.
10. The Respondent rejects the Claimant's potential argument that there were continuing acts on the basis that the individual who decided not to promote the Claimant is a different person to person cited in the Claimant's further detriments. One individual is responsible for the promotion issue and the further detriments relate to the 2016 protected disclosure so is not part of a continuing series of acts.
11. The Respondent highlighted a point which was in the Claimant's favour namely that part of the grievance of June 2016 related to the issue of the Claimant not being promoted and that this was investigated. The outcome of that investigation is that the Claimant's allegation was dismissed. It was submitted that it was open for the Claimant to say that this is a point against the Respondent as it means that there was an investigation and the Tribunal would need to consider this when looking at totality of forensic prejudice.
12. The Respondent submitted in the alternative that the Claimant's claim in relation to the promotion issue had no reasonable prospect of succeeding and should be struck out on that basis. The grounds for this are that the person to whom alleged protected act said to have been made to is a different person from the person who made decision regarding the promotion. The Claimant has not pleaded or set out how causation would properly work between those two events.
13. It was submitted that the period of time between the informal complaint in November 14 and the decision not to promote the Claimant in March 2016 was about 15-16 months. Even on papers before the Tribunal there is no reasonable prospect of this part of the Claimant's claim succeeding but in the alternative the Respondent submitted there was little reasonable prospect of this part of the Claimant's claim succeeding and invited the Tribunal to make a deposit order on this basis.
14. **The Claimant submitted** that the informal meeting with the IT director, Mr Taylor, on 18 November 2014 she told him that she was being bullied due to sexist attitudes, and things had got so bad in 2013 that she was close to taking legal action in addition to bringing to his attention the drink throwing incident. She told the Tribunal that she put to the Respondent that members of the team ganged up on her and that the drink throwing matter was not a single incident and that there had been multiple episodes over long period of time. She submitted that this situation continued afterwards, put it to him that had the two managers Mr Stewart and Mr Searle managed situation in the first place the situation would not have risen and she attributed this to their sexist attitude. Also said things were so bad in 2013 believed close to legal action. She said that Mr Taylor was also the dismissing officer.

15. The Claimant said that no action was taken following that meeting. In July 2015 she says she was told to go to HR if she wanted resolution of her bullying allegations and also that a new senior web developer position was under discussion and her manager said he would speak to Mr Taylor about it and come back her but when she tried to follow this up he became very evasive. The Claimant said she understood that her line manager was proposing that position to her and that she believed that Mr Taylor blocked it immediately as he did not come back to her and her line manager became evasive.
16. The Claimant submitted that by November 2015 the new position and who should get it was being openly discussed by the two senior web developers and the QA person. The new position was advertised internally on 29 February 2016 and the Claimant was interviewed on 17 March 2016. She received the outcome with feedback on 24 March 2016. The Claimant said she was told she was being marked down by the interviewers one of whom was a personal friend of Mr Taylor and the Claimant's position is that it was implausible that that person, Ms Fisher, would not have discussed the interviews as she reported to Mr Taylor.
17. The Claimant submitted that she was told that the reason for her not getting promotion was that it was felt she did not understand an IT administration tool. She said it was not her job to understand this tool which was being introduced to Respondent and was being used to manage work. Her position is that the successful candidate was doing the new role in all but job title which is why he got the job.
18. The Claimant says she raised this as one of her 2016 grievance points and said that it was the Respondent's repeated failure to deal with bullying and gender harassment creating a working environment and they blocked her promotion. The grievance was asking the Respondent to remedy that situation. The Claimant says that the Respondent said that the promotion issue had been looked at, but she alleges that the successful candidate was told in advance he was being considered for promotion and was deliberately given work aligned to the job for several months before interview and that the interview process was a sham. She alleges that the external HR consultant who was part of the interview process was aware of this and failed to report it.
19. The Claimant submitted that this shows there was a chain of events tying all it together and that there was a relationship between interview and Mr Taylor who blocked line managers suggestion that she should have the role. Four people were interviewed for the role and the Claimant said it was general practice on her team that people were given work as a process of pre-selection.
20. The Claimant said she was aware she could bring a sex discrimination in 2013 but that she did not know the process. She said she had been taking advice from her union. She did not bring a claim about the promotion as she wanted to keep her job. She raised her 2016 grievance on the recommendation of her union.

21. The Claimant submitted that had she been promoted to same level as Mr Taylor, it would then be difficult for the Respondent to allege insubordination subsequently.
22. **In reply** the Respondent referred to the grievance of June 2016 and submitted that what the Claimant has told the Tribunal is not in the pleadings.
23. It was submitted that the account the Claimant has now given involves a number of different steps in communicating what Claimant says is the protected act from the person said to be made to the decision maker. Even if the Tribunal allowed this, it accentuates the Respondent's point about forensic prejudice as it is now not just an allegation where there is a clear central communication, it appears to be alleged by the Claimant a culture or communication via a convoluted route. The more people one has to add to make the causation argument the greater level of forensic prejudice. Both require evidence which is now very stale.
24. The Respondent submitted that the other point in the Claimant's account was in the discussion about why the Claimant did not bring the claim in time. This was a claim which could have been brought in April – June 2016 and in time. This is when the Claimant, on union advice, raised a grievance. This period is within jurisdiction of the Tribunal of the detriment she says suffered. When considering totality this is relevant and should err in favour of the Tribunal not to extend time.
25. **The Tribunal's decision:** I have considered carefully the submissions made by both parties and have directed myself to the case law referred to by the Respondent. I am mindful that the Claimant is a litigant in person and during the hearing ensured that the Claimant had the opportunity to put her points across as set out above. Mr Humphreys also gave assistance in making submissions which could be in the Claimant's favour rather than the Respondent's in accordance with the overriding objective.
26. This part of the Claimant's claim is clearly out of time if taken as a single act. Therefore, my first consideration is whether it could be said that the promotion issue is a continuing act with the 2016 grievance issue which would then bring it in time. There is a distinction between a continuing act and an individual act that has continuing consequences. I find that the promotion issue is an individual act. There was a decision not to promote the Claimant. I accept that not being promoted had ongoing ramifications such as pay and seniority however this does not in my judgment constitute a continuing state of affairs.
27. I considered whether the fact that the grievance made in June 2016 included complaints about the promotion issue could mean there was a continuing act with the promotion issue. Of key significance here is that Mr Taylor was not involved in the grievance process. This was conducted by the Head of HR Ms Satterthwaite who had not until that time known the Claimant. In considering this point I have focussed on

the substance of the complaints and how these complaints are raised in the Claimant's claim form.

28. In her claim form the Claimant says:

The Claimant believes she was penalised for raising a grievance in 2016 which alleged that she was the victim of gender-based harassment. The Claimant has alleged in November 2014 that she was being bullied because of sexist attitudes and the Claimant believes this impacted upon the application for promotion. The Claimant believes that a factor in her dismissal was that she was being punished for pursuing complaints and grievances and she has been victimised for doing so.

29. There has been no application to amend the Claimant's claim, so her claim is limited to what is in the claim form. I find that the 2016 grievance is something separate from the issue of the Claimant not being promoted. In her claim form the Claimant refers to the 2016 grievance being a complaint about harassment. The fact that she was not promoted is not an instance of harassment on her claim but an isolated act of victimisation and is consequently out of time.

30. I then considered whether it would be just and equitable to extend time in relation to the promotion issue. I have considered the law as set out above. I find that the Claimant was able to have brought her claim in 2016 when she was told she was unsuccessful in her application for promotion. Of note is that the Claimant was receiving advice from her union who she said suggested she brought a grievance. I am satisfied that the Claimant knew in 2013 that she could bring a claim against the Respondent as she referred to nearly making a claim then. There was no evidence that the Claimant had any impairment precluding her from bringing a claim.

31. I also considered the Respondent's submission that it would be forensically prejudiced if the Claimant's claim was allowed to proceed. The Claimant's protected act of November 2014 is in dispute and the first task of the Tribunal is to ascertain whether that complaint falls within the definition of a protected act. The unsuccessful interview was in March 2016 some time later. There is no causal link in the pleadings to the conversation with Mr Taylor in November 2014 and the interview panel in 2016 this is something raised at this hearing for the first time.

32. I have taken into account that the grievance process included matters relating to the promotion issue and therefore there is a more recent recollection of events. The Respondent accepts that there was a thorough investigation of the promotion issue concluding that a fair process had been undertaken.

33. I have had the benefit of having the 2016 grievance before me and I have read it carefully. There is no mention in the grievance of a link between the 2014 alleged protected act to Mr Taylor and what the Claimant now says is the link, namely that Ms Fisher who was on the interview panel was a personal friend of and report to Mr Taylor and it was implausible that Mr Taylor did not effectively warn her off appointing

the Claimant. This would therefore not have been part of the investigation and this aspect would now cause the Respondent prejudice in defending the allegation as matters were now stale. It is a situation whereby there is unlikely to be any supporting evidence. Indeed, the Claimant's case in this respect is based on supposition only.

34. Taking all these matters into account and weighing up the prejudice to both parties I do not find that the Claimant has demonstrated to my satisfaction that it would be just and equitable to extend time. The Claimant's claim regarding the 2016 promotion process is therefore struck out.

The Claimant's application to amend her claim to include further protected acts

35. At the preliminary hearing before Judge Baron in June 2018, the Claimant confirmed that the two protected acts she relies on are the November 2014 informal grievance with Mr Taylor and the June 2016 grievance. This is recorded in the Tribunal's order. The Claimant was ordered to provide further details of her detriment claims flowing from those two alleged protected acts. The Claimant provided what she called a list of issues which prompted the Respondent to object. In this document the Claimant listed 11 protected acts she said she relied on. Confusingly the November 2014 act was not one of them although the June 2016 act was.
36. The Claimant confirmed that she wanted to make an application to amend her claim to include all these protected acts. The Respondent submitted that it was not open to the Claimant to add further protected acts. This was outside the orders made by Judge Baron when the protected acts were identified and recorded. The Claimant told the Tribunal that she prepared the list of issues on legal advice.
37. I spent some time discussing the additional proposed protected acts with the Claimant and concluded that the further acts were in fact part and parcel of the grievance process, including a chronology she compiled in 2016, statements for the grievance, her grievance appeal letter and so on.
38. The order of Judge Baron was very clear in identifying the protected acts relied on by the Claimant. There was no correspondence from the Claimant indicating she disagreed with what was in that order. I have also considered the Claimant's claim form and do not find that the further acts are pleaded as protected acts or indeed that they appear at all in her pleading.
39. I got the sense from the Claimant that the only reason this document was produced was because a solicitor or other legal advisor told her it was required. This document is clearly not well thought out as it omits the already agreed protected act of 2014. I concluded that the only two protected acts going forward to a full hearing were those set out in the order of Judge Baron of 19 June 2018.

Employment Judge Martin

16 October 2018